

# ARTICLE

## The National Security Lawyer, In Crisis: When the “Best View” of the Law May Not Be the Best View

ROBERT F. BAUER\*

### ABSTRACT

*The Department of Justice’s Office of Legal Counsel (“OLC”) has committed to certain principles for the conduct of its legal advisory function, one of which is a pledge to provide the executive a “best view” of the law while nonetheless “facilitating” where possible the executive’s policy objectives. The standard is closely related to a conception of the Office’s standing, developed after Watergate in the Carter Administration, as a source of fully independent legal advice insulated to the maximum extent possible from political and policy pressure. This adherence to “best view” has been the source of considerable comment and criticism when the Office has appeared to depart from this standard in supplying the executive with legal positions that may qualify as “reasonable” or “plausible” but fall manifestly short of what scholars and other observers judged to be the best possible reading of the law.*

*This Article questions the “best view” as a standard that should bind the OLC, or any other senior legal advisers, in advising the executive in a national security crisis. It challenges the best view theory both as 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 advisers should be expected to offer. Among the criticisms is the absence*

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\* Professor of Practice and Distinguished Scholar in Residence, New York University School of Law. © 2018, Robert F. Bauer. I am very grateful for the comments and criticisms offered on an early draft of this Article by Gabriella Blum, Daryl Levinson, Jack Goldsmith, Fred Kronz, Sam Issacharoff, Dawn Johnsen, Harold Koh, Rick Pildes, Trevor Morrison, Daphna Renan, Peter Shane, Dana Remus, and Martin Willard. Their perspectives on my central argument varied widely, ranging from the generally sympathetic to the sharply critical, and I benefited in all cases from their engagement with the paper. I also appreciated the opportunity by Judge David Barron to present an early paper on which this more extended treatment is based, at his constitutional law seminar at Harvard Law School.

In preparing this paper, I had the benefit of excellent research assistance from Corey Ciorciari, Sara Bodner, Thad Eagles, Daniel Katz, Allison Nichols, and Pablo Rojas.

This article represents only my views, and not those of any members of the Obama Administration with whom I worked on national security matters in my time as White House Counsel.

*of a fully coherent conception of “best view,” and the risk that best view claims mask what are less legal, and more policy disagreements. This Article sets out an alternative model of lawyering in this context: the development of legal positions grounded in reasonable, good faith readings of the law, subject to thoroughgoing transparency requirements.*

*Apart from an assessment of the literature and expositions of “best view,” this Article draws on historical and contemporary sources that aid in a dispassionate analysis of the response of lawyers to policy and political pressure in crisis. One such source is the historical record of the functioning of the executive’s legal advisory process in two major national security crises: the Cuban Missile Crisis of 1962, and the bases-for-destroyers exchange with Great Britain intended to shore up that country’s defense against the German military onslaught. Primary source materials, including memoirs and documents authored by senior legal advisers and interviews with national security lawyers in recent administrations, supply useful insight into the challenges of crisis lawyering.*

*One consequence of this revised, more empirically grounded view of crisis lawyering is that it is no longer clear that OLC should have the primary, if not decisive, role in determining the lead advice that the executive should receive when confronting a critical national security challenge. An alternative decision-making model would ensure that OLC views are considered but would allow for a crisis management structure with different leadership on legal issues, including but not limited to the Counsel to the President, and closer, more open dialogue between lawyers and policy makers. This Article insists that the key to the executive checking function is a detailed public accounting of the legal advisory structure established to support the President’s decision-making in crisis and of the substance of the Administration’s formal legal position.*

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#### INTRODUCTION

*Remember now, you're working for me.*

Attorney General Robert F. Kennedy, to Associate Attorney General Nicholas Katzenbach, as he left a meeting at which the United States legal authority to act against Soviet placement of missiles in Cuba was discussed.<sup>1</sup>

*I got the shotgun, you got the briefcase. It's all in the game, though, right?*

Omar Little, in an episode of *The Wire*, suggesting on cross-examination that the defense counsel who is pressing him on his involvement in drug trafficking is himself “a parasite” profiting from that deadly racket.<sup>2</sup>

The work of lawyers in the George W. Bush Administration on counterterrorism policy has led to much discussion of whether we truly have a handle on how lawyers in the Executive Branch support, and when they should decline to support, policymakers on highly sensitive or critical national security questions.

It does not appear that we have arrived at a satisfactory view. The Obama Administration took office with the commitment that it would establish a more

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1. Leonard C. Meeker, Recallings 344 (March 2001) (unpublished manuscript) (on file with author). I am grateful to Professor Harold Koh for alerting me to the manuscript and providing me with a copy. The Meeker account of his role is also available in a condensed version, in a speech he delivered in 2014. See *Ambassador Leonard Meeker on the Cuba Missile Crisis*, OCRACOKE OBSERVER (June 26, 2014), <http://ocracokeobserver.com/2014/06/26/ambassador-leonard-meeker-on-the-cuban-missile-crisis/> [https://perma.cc/R2CG-Y9P2].

2. *The Wire: Omar Testifies Against Bird*, YOUTUBE (uploaded Nov. 7, 2008), [https://www.youtube.com/watch?v=oYj7q\\_by\\_2E](https://www.youtube.com/watch?v=oYj7q_by_2E).

secure footing for law and legal process, and achieve a change in direction on certain policies in national security matters. Commentators disagree over the extent of the change, and critics tend to claim that the shift has primarily been one of tone and process, while the basic substance of national security policy has remained much the same. At least one prominent critic believes that the Executive Branch has largely gone rogue, without regard to which party might be in power, and he recommends that the legal advisory function be removed from Presidential control.<sup>3</sup>

The problem remains that the lawyer is “in the game,” especially at senior levels, as a member in awkward standing of the national security policymaking process. The lawyer stands both outside and inside that process, as an independent professional but also a member of the policymaking team. Her responsibilities include supporting the President’s legitimate—and for purposes of this Article, most pressing—policy priorities or challenges. The Department of Justice’s Office of Legal Counsel (“OLC”) has published a Statement of Best Practices that frames the responsibility as one of “facilitating” the Executive’s achievement of preferred policy objectives, provided that lawyers attend carefully and faithfully to honest, accurate legal analysis—giving their “best view” of the law so that lawyers may then aid in facilitating the achievement of an administration’s objectives.<sup>4</sup> This brings us full circle to the question of how good lawyering is to be judged. The policymaker would define good lawyering in part as lawyering that helps the policymaker do what needs to be done, particularly where national security is judged to be at risk.

National security legal questions, like all others, are ones that lawyers can disagree about, and the differences of opinion are, of course, often sharpest on the hardest, most important questions. It is rare that the resourceful lawyer cannot make a credible case out of unlikely or resistant material. Now and then the law

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3. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (proposing a Supreme Executive Tribunal whose members would be subject to Senate confirmation and who would render binding legal opinions on issues of executive authority).

4. 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* (Jul. 16, 2010), <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/9URP-TEPV>] [hereinafter OLC Statement of Best Practices]. The Office of Legal Counsel states its mission generally as the following:

By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The Office also is responsible for providing legal advice to the Executive Branch on all constitutional questions and reviewing pending legislation for constitutionality.

Office of Legal Counsel, *About the Office*, DEP’T OF JUSTICE (last visited Oct. 11, 2017) <https://www.justice.gov/olc> [<https://perma.cc/HDE5-ZSQ5>].

may be absolutely clear, but for purposes of the issues discussed here in conditions of crisis, the law that policymakers confront under intense policy pressure is typically amenable to interpretations consistent with their policy goals, and lawyers can be found or encouraged to supply them. Both lawyers and policymakers must contend, however, with the question of whether, under OLC's published standard, the Administration's legal justification for the policy corresponds with the "best view" of the law.

The "best view" is not a standard with a long pedigree. It is connected to a particular understanding of the role of the OLC that took hold in the period following Watergate, one that emphasizes its independence and insulation from political influence.<sup>5</sup> "Best view" has, however, carried the DOJ's imprimatur for some years now, and it has been staunchly defended as a standard required to guard against corrosion in the quality of legal advice under political and policy pressures. Without a "best view," it is feared, the lawyer as uncharitably described by Omar Little would be too much "in the game," a hired-gun or enabler of the policymaker. The national security legal controversies of recent years have only exacerbated these fears.<sup>6</sup>

In attempting to work out these issues as dispassionately as possible, it can help to go back in time and take advantage of the perspective that more distant events can provide. Two prominent cases involving lawyers under policy pressure in crisis have occasioned extensive discussion, and yet still have much to offer on this topic: the Cuban Missile Crisis in 1962, and the bases-for-destroyers exchange the United States entered into with Great Britain in 1940.

The advantage of pairing these episodes in the discussion that follows is that they are similar in some respects, each a case study in lawyers working their way to a conclusion compatible with the aims of policy makers. In both cases, the conclusions the lawyers reached were controversial, and in both, it is generally recognized that the lawyers were working under intense pressure to clear a path to the policymakers' urgent goals. In the two cases, we also see both criticism of the lawyers' work—at the time and since—and an insistence by the lawyers themselves that their legal analysis was something like the "best view," or within range. Additionally, while holding them accountable for the weaknesses in their work, the critics have in time shown a reluctance to judge their advice too harshly. These forgiving critiques probably have much, if not everything, to do with the stakes: in 1962, a hostile military buildup only ninety miles offshore and the danger of a nuclear exchange between the two global superpowers; and in 1940, Britain's vulnerability to defeat at the hands of Nazi Germany, which

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5. For a comprehensive discussion of this view of OLC, beginning with the Carter Administration, see Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017).

6. The condemnation of the executive branch lawyer performance is found in a voluminous literature, not to speak of press and more popular media accounts. See, e.g., FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 187 (2007) ("Government lawyers have become instruments by which fundamental constitutional principles are eroded.").

would then move the war closer to the U.S. homeland. The evaluation of the rigors or theoretical soundness of either the legal process or their legal advice may have seemed to the lawyers, and later to some critics, as largely beside the point.

In other respects, these examples of lawyers at work in crisis are different, and the difference is also informative about the role of politics and policy, and the transparency with which they enter into the legal deliberative process. The Missile Crisis lawyers did their work in circumstances more familiar to the later twentieth century and early twenty-first century audience, and for that reason, it is reviewed first in the discussion that follows. The client—the President of the United States—developed policy options and the lawyers were summoned to give legal clearance. First came the policy, then the law, and the question was how credibly the lawyers performed as lawyers.

The bases-for-destroyers exchange shows the lawyers in a very different era in a more directly political role from the beginning. They were undoubtedly concerned to put their prodigious legal skills to good use; but they also operated comfortably within policymaking circles, and they did not shrink away from taking a strong position on what the policy should be—or from accepting their place in effectuating it.

Today, the questions these lawyers faced are raised and addressed by their successors in what Professor Gabriella Blum has called our “über legalistic culture,”<sup>7</sup> one in which numerous laws and regulations, subject to various interpretations, confront executives in their exercise of war powers.<sup>8</sup> But as the histories of these past crises show, the struggle of the national security lawyer to protect the rule of law while supporting the executive in protecting the nation has remained largely unchanged. Together, the two cases can put in a clearer light some of the contemporary questions of how we might realistically view this struggle.

We seem today stuck between the two choices: an insistence that the law remains a factor unto itself, as insulated as possible from policy and political currents, or a more flinty-eyed acceptance that the law must yield more ground to high policy in national security. The question is whether there is another choice, declining to give up on the role of lawyers and the law, but more realistic and less dependent on preserving illusions. To put the question another way: are we correct in our understanding of what constitutes sound legal advice and process in such situations, and if not, what does this suggest about what the process should be and who should be providing the advice?

The claim put forth in this Article is that in the particular case of national security crisis, it is self-defeating to insist on a “best view,” or to commit the assignment of finding one to the exclusive control of a specialized corps of lawyers,

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7. Gabriella Blum, *The Role of the Client: The President's Role in Government Lawyering*, 32 B.C. INT'L COMP. L. REV. 275, 278–79 (2009).

8. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGEMENT INSIDE THE BUSH ADMINISTRATION* 65–66 (2007) [hereinafter GOLDSMITH, *THE TERROR PRESIDENCY*].

which at the present time and for this purpose is the OLC. There may sometimes be a “best view,” but not always, and even when 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: Often, what seems to be a disagreement over law may be primarily a difference over policy. Moreover, where the policy challenge is complex and urgent, it is unrealistic and not clearly justified to ask the policy-maker to defer to such a “best view” if there are other reasonable legal positions that can be crafted professionally and in good faith, and that an administration can present as the basis for its preferred action. A revamped legal advisory structure would be subject to a key requirement: thoroughgoing transparency that compels the Administration to disclose the structure of the legal advisory process and the basis for its legal conclusion.

In these cases, where the presidential responsibility is most acute, the White House Counsel—or another designated senior lawyer—may appropriately provide the leadership of the legal team and assume the ultimate responsibility for the advice the President is given. OLC would be included in the deliberative process, its expertise and high-quality lawyering fully utilized, but it would not be charged with a final, presumptively binding pronouncement on the legal options. This process may fit better with exigent circumstances in which the President’s options must be developed and considered, and it allows for lawyers outside the OLC, with more competence in the myriad of policy and other relevant factors, to build those considerations into a process that produces viable options for the executive.

A final, but not insignificant, virtue of process reformed to these specifications is that it enables the process to work formally and openly—to work as it does, in fact—and to obviate the need for clashes over both the “best view” and the degree to which questions of law have merged into conflicts over policy. In looking closely at how, in past national security crises, lawyers have performed and legal processes have been structured, there is still much to be learned about how lawyers and the policymakers worked together—which does not always match the explanations of policymakers or the later and now standard historical accounts of these episodes.

### I. THE CUBAN MISSILE CRISIS, THE LAW AND THE LAWYERS

Of particular interest and significance in the Missile Crisis is the shape the leading narrative has taken, largely influenced by an entire book devoted to the episode by the State Department Legal Adviser, Abram Chayes.<sup>9</sup> Chayes conceded the policy imperative—that the United States was going to act because the President deemed inaction or acquiescence unacceptable—but he argued that law mattered, and that it influenced in various ways, to various degrees, the options

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9. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (1974).



considered and the one selected. Another commentator at the time declared that the Crisis revealed a “real triumph for the lawyer and his role in decision-making.”<sup>10</sup> A contemporary scholar and leader in the field, Professor Harold Koh, has suggested that the course chosen by the President was the superior one, “in no small part because it emerged from an interactive dialogue between the lawyers and the policymakers.”<sup>11</sup>

While the legal theory on which the United States relied has been criticized on its merits, the Kennedy Administration and its lawyers have been praised for their very commitment to giving a plausible legal account of the United States action. The role of law was protected, and the rule of law vindicated, in that respect. This standing narrative merits reconsideration.

#### A. THE SETTING: EVOLUTION OF THE CRISIS AND OF THE LEGAL THEORY

The Cuban Missile Crisis did not steal altogether suddenly on the Administration because the discovery that led to the defensive quarantine had been preceded by a long period of public debate over Soviet intentions in Cuba and, in particular, whether Soviet military activity there was offensive or defensive in nature.<sup>12</sup> The Administration had stuck hard to the position that the detected activity was defensive, though it warranted continued monitoring. Congress—Congressional Republicans in particular—expressed skepticism about whether the Administration’s policy was sufficiently muscular.<sup>13</sup> Various resolutions were introduced to either provide broad authority to the Administration to act to protect the United States from the threat from Cuba, or to express the Congress’s determination that such a threat was intolerable.

In the background, of course, and only a year before, was the Administration’s catastrophic initiative known as the Bay of Pigs, by which it had promoted paramilitary action by Cuban exiles that failed quickly and that, when failure became apparent, the Administration would not support with airstrikes.<sup>14</sup> It was widely

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10. William P. Gerberding, *International Law and the Cuban Missile Crisis*, in INTERNATIONAL LAW AND POLITICAL CRISIS 199 (Lawrence Scheinman & David Wilkinson eds., 1968).

11. *Retrospective on International Law in the First Obama Administration*, 167 AM. SOC’Y INT’L L. PROC. 131, 135 (2013) (remarks of Professor Harold Koh).

12. The account of the international and political setting for the lawyers’ work draws on multiple historical accounts, particularly SHELDON M. STERN, *THE WEEK THE WORLD STOOD STILL: INSIDE THE SECRET CUBAN MISSILE CRISIS* (2005) [hereinafter STERN, *CUBAN MISSILE CRISIS*], SHELDON M. STERN, *AVERTING “THE FINAL FAILURE”*: JOHN F. KENNEDY AND THE SECRET CUBAN MISSILE CRISIS MEETINGS (2003), and WILLIAM M. LEGRANDE & PETER KORNBLOTH, *BACK CHANNEL TO CUBA: THE HIDDEN HISTORY OF NEGOTIATIONS BETWEEN WASHINGTON AND HAVANA* (2014), and first-person accounts, such as THEODORE C. SORENSEN, *KENNEDY: THE CLASSIC BIOGRAPHY* (1965) and ROBERT F. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* (1969). Of course, in the case of the first-person accounts, due note is taken of how the perspectives might be influenced by how the authors would like their Administration’s actions to be viewed.

13. CHAYES, *supra* note 9, at 9, 10–11.

14. There are many histories of this fiasco, too numerous to mention, but Trumbull Higgins provides a detailed account. See TRUMBULL HIGGINS, *THE PERFECT FAILURE: KENNEDY, EISENHOWER, AND THE CIA AT THE BAY OF PIGS* (1989).

understood that the question of Cuba could very well become an issue in the mid-term congressional elections in November 1962.

The Administration was busy with these questions before the Crisis materialized. The President issued two “warnings” to the Soviets in September 1962, on the 4th and the 13th,<sup>15</sup> about the consequences of moving to an offensive rather than defensive posture in Cuba.<sup>16</sup> The United States’ contingent planning included assigning the lawyers to develop legal rationales for the use of force in response to a Soviet offensive buildup in Cuba. The Office of Legal Counsel submitted its analysis, prepared by Assistant Attorney General Norbert Schlei, to the President and senior staff, and it was revised and used to support the President’s September warning.

On October 16, 1962, President Kennedy learned that aerial surveillance instead revealed preparations for offensive military activity not consistent with the Administration’s public reassurances about the Soviet presence in Cuba. The Administration went into emergency deliberations guided by three key decisions made at the outset.

First, regular process would not be followed and a special committee of the National Security Council—known as the EXCOM—would function as the core advisory group. Its membership varied from time to time but included at least one nonmember of the Administration—former Secretary of State Dean Acheson. Second, the Administration would not rely on conventional, full-dress diplomacy, and it would not consult Congress; rather, Congress would only be notified about the course of action eventually chosen. And, finally and critically, there was never a question about whether the Administration would take action. It would clearly do something, and the choices were identified and firmly fixed from the beginning—aggressive military action, to include air strikes and invasion, or a blockade of Soviet ships bringing offensive missile weaponry into Cuba, which, if unsuccessful, would require resorting to more direct military measures.

Over the period of several days that the Administration debated the options, it became evident relatively quickly that the President favored the blockade. It was characterized as a defensive “quarantine,” rather than as a blockade. A legal theory, articulated in the so-called “Meeker Memorandum” by Assistant State Department Legal Adviser Leonard C. Meeker, was then built to support this action.<sup>17</sup> The records of the deliberations, which include tape recordings, show that it was not unanimously agreed among the participants in the decision-making process that any special legal theory was required. The Department of Justice took the position that the doctrine of self-defense would do all the necessary work. Dean Acheson appears to have taken a step even beyond this one, arguing

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15. STERN, CUBAN MISSILE CRISIS, *supra* note 12, at 51.

16. See CHAYES, *supra* note 9, at 17.

17. See Memorandum from the Department of State on the Legal Basis for the Quarantine of Cuba (Oct. 23, 1962), *reprinted in* CHAYES, *supra* note 9, at 141–48 [hereinafter Meeker Memorandum].

that no legal justification was required when a state was confronted with so direct a threat to its sovereignty, international standing, and even survival.

Why, then, did the Administration in these circumstances bother with any legal theory at all? It is clear, and even ardent defender of the legal decision-making process, Abram Chayes, concedes, that the Administration was induced to take legal considerations seriously to a significant degree by advice from a Soviet expert, former United States Ambassador to the U.S.S.R., Llewellyn Thompson, who advised that the Russians took legal questions seriously. He admitted that it was peculiar to say this of a totalitarian regime but somewhere in the Soviet psyche, as he recounted it, there was special sensitivity to at least the form of legal argument. The lawyers who advised on the legal issues during the intense deliberations leading to the quarantine were assembled in the wake of that advice.

#### B. THE "THEORY OF THE CASE": THE MEEKER MEMORANDUM

The Meeker Memorandum, dated October 23, 1962, followed by a day the President's proclamation of the quarantine and his accompanying address to the nation.<sup>18</sup> Meeker had arrived at his conclusion about the legal grounds for a quarantine on October 18th and represented the State Department as Legal Adviser (his superior, Abram Chayes, was out of the country) at the EXCOM October 19th meeting when the legal options were discussed. It was not a post hoc rationalization; instead, it was the approved legal position, or part of it, adopted by the United States government.

The Memorandum concluded that the quarantine could be authorized by the Organization of American States' ("OAS") Organ of Consultation pursuant to the Rio Pact of 1947, and that the quarantine was otherwise consistent with the provisions of the United Nations ("U.N.") Charter to which the Pact was "subordinate."<sup>19</sup> The Soviet introduction into Cuba of offensive missile capability was not an "armed attack,"<sup>20</sup> such that the U.S. could resort to self-defense under the U.N. Charter, but instead a "fact or situation"<sup>21</sup> that would endanger the peace of America under Article 6 of the Pact. In such cases, the Organ of Consultation could by a two-thirds vote authorize a response in the form of some use of force. This is what the OAS did on October 23rd, declaring the Soviet act to be precisely such a "situation" justifying the use of "armed forces."<sup>22</sup>

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18. *Id.*

19. *Id.* at 141-43.

20. *See id.*

21. *Id.*

22. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 8007, RESOLUTION OF THE COUNCIL OF THE ORGANIZATION OF AMERICAN STATES (Oct. 23, 1962), *in* AMERICAN FOREIGN POLICY: CURRENT DOCUMENTS (1962).

On these points, the Meeker Memorandum evinced no doubt. It portrayed the action of the Administration as falling “readily” within treaty procedures,<sup>23</sup> and as “fully authorized.”<sup>24</sup> The next question was consistency with the U.N. Charter, and here, too, the conclusion was that it was “entirely consistent.”<sup>25</sup>

The OAS certainly constituted a “regional agency or arrangement” dealing with a matter “relating to the maintenance of international peace and security.”<sup>26</sup> Such an agency is required to “make every effort to achieve pacific settlement of local disputes . . . before referring them to the Security Council.”<sup>27</sup> The Council, in turn, is obligated to encourage such “pacific settlements.”<sup>28</sup> As the Meeker Memorandum analyzed the OAS action, it was “in complete accordance”<sup>29</sup> with United Nations purposes and principles: It was enacted to “maintain international peace”<sup>30</sup> within the meaning of the U.N. Charter by prevention and removal of the threat to peace posed by the Soviet missile emplacements.

For support, the Memorandum drew on the legislative history of the San Francisco Conference debate on the role that regional agencies or arrangements, and the OAS in particular, would play in the scheme of the international peace-keeping structure then under consideration. Meeker described the OAS as a “prime example” of the effective contribution to the U.N. framework of such agencies.<sup>31</sup> “The political process by which it must operate”—close contact with regional issues and a two-thirds vote requirement—“ensures that action will only be taken after careful analysis.”<sup>32</sup> Because any use-of-force resolution would only be recommended—that is, would not be binding on member states—“safeguards” existed to allow for effective action consistent with “the limitations imposed by the United Nations Charter.”<sup>33</sup>

The remaining issues presented by the U.N. Charter arose under article 53(1), which provides that regional arrangements are agencies that cannot take “enforcement action” without Council authorization.<sup>34</sup> The Meeker Memorandum did not treat this as a close or difficult question. The line of argument it deployed on this point was fairly involved but fell into these parts:

- The Security Council never agreed, because of division among its members, that actions of this kind in the past—e.g., OAS action in the Dominican Republic in 1960—constituted “enforcement action.” In the

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23. Meeker Memorandum, *supra* note 17, at 142.

24. *Id.* at 143.

25. *Id.*

26. *Id.*

27. U.N. CHARTER art. 52, ¶ 2.

28. *Id.*

29. Meeker Memorandum, *supra* note 17, at 144.

30. *Id.*

31. *Id.* at 145.

32. *Id.*

33. *Id.*

34. U.N. CHARTER art. 53, ¶ 1.

Dominican Republic case, the U.S.S.R. brought this claim but could not succeed in winning the unanimous support that Council approval would require. Because it was the “practice of the Security Council” to construe enforcement as applicable only to obligatory actions, it could not apply to only “recommendatory actions” like the one the OAS took in the Cuba case.

- Analogy to other provisions of the Charter supported the distinction between obligatory and recommendatory actions in applying the authorization requirement.
- An advisory opinion of the International Court of Justice issued in 1962 supported the same distinction and affirmed that only actions “solely within the province of the Security Council” are enforcement actions.<sup>35</sup>

On all these points, the Meeker Memorandum concluded that the law was “clear.”<sup>36</sup> An OAS recommendation pursuant to which armed force is used was not an enforcement action, and the Security Council need not have authorized it.

A year later, Meeker returned to the subject in the *American Journal of International Law*. His article, entitled “Defensive Quarantine and the Law,” restates roughly the same argument but with less adverbial zest.<sup>37</sup> The officials he was advising were aware in 1962 of the “novelty and difficulty of the question presented.”<sup>38</sup> Because it was a singular case, the legal analysis followed “the traditions of the common law.”<sup>39</sup> The prevailing legal theory did not put forward “new doctrines of wide application,”<sup>40</sup> but instead addressed “one single situation [that] was considered on its individual facts,”<sup>41</sup> then resolved on the “narrowest and clearest grounds.”<sup>42</sup>

In this emphasis on limited common-law adjudication, Meeker added an acknowledgment of the limits of formal legal logic. A regional agency action like the quarantine might seem to require Security Council authorization, but the Meeker Memorandum’s claim to the contrary faced up to the reality of that body’s politics. He wrote: “the Council has been disabled from performing its functions as originally intended”<sup>43</sup> as a result of “the abuse of the veto” by Council members.<sup>44</sup> Having surrendered its effective authority, “it should not be surprising to find also some contraction” in its “negative authority to preclude

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35. Meeker Memorandum, *supra* note 17, at 147.

36. *See id.* at 148.

37. *See* Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT’L L. 515 (1963).

38. *Id.* at 515.

39. *Id.* at 524.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 519.

44. *Id.* at 522.

action by other bodies.”<sup>45</sup>

Another question Meeker took up was the application to the U.S.S.R. of the Rio Pact action. The Soviet Union was not a member of the OAS, and the quarantine, aimed in theory directly at Cuba, was an action taken against Russian shipping. The “extra hemispheric” effects on Russia, Meeker concluded, were not inconsistent with international law.<sup>46</sup> Some spillover from the quarantine was expected and necessary to its implementation.

These two documents—the contemporaneous Memorandum and the subsequent elaboration in a professional journal—set out Meeker’s formal, public position. The Administration elaborated in other ways on at least this aspect of its position: further discussed below are the other arguments that hovered around and above, and one might say even supplanted, this main one. The State Department dispatched a summary of the Meeker theory to worldwide posts, following the institution of the quarantine, to inform and assure consistency in the United States legal defense of its action.<sup>47</sup> It included many of the more emphatic conclusions, such as the position that the OAS action was “entirely consistent” with the U.N. Charter and “plainly” met its requirements.

Less than a month after the Crisis, at Harvard, Chayes had more to say, including on one issue of significance that did not appear in the Meeker version.<sup>48</sup> Cuba had been expelled from participation in the OAS process, and yet it had not formally withdrawn or repudiated the Pact. So, Chayes argued, as a legal matter, Cuba effectively *consented* to be bound by the actions taken by the OAS member states. The State Department reprinted and disseminated Chayes’ speech in its formal publication, the *Bulletin*.

Of course, the most visible, and arguably most consequential, articulation of the Administration’s case came in the President’s address to the nation and his prior warnings to the Soviet Union. The Meeker theory appeared in the Presidential account, but not alone. In the September 13th “warning,” the President announced more broadly that the United States “will do whatever must be done to protect its own security and that of its allies.”<sup>49</sup> It would do so, the President proclaimed, on his “full” authority as Commander-in-Chief.<sup>50</sup>

The speech to the nation rested in part on this constitutional authority, joined to the “traditions of the nation and hemisphere,” which he also referred to as involving “a special and historic relationship” between the U.S. and its hemispheric

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45. *Id.* at 520.

46. *Id.* at 517–18.

47. Memorandum from Walter W. Rostow, Counselor of the U.S. Dep’t. of State, to the Sec’y (Oct. 23, 1962) (on file with the Kennedy Library) [hereinafter Memorandum from Walter W. Rostow].

48. Abram Chayes, *The Legal Basis for U.S. Action on Cuba*, DEP’T ST. BULL. XLVII, No. 1221 (U.S. Dep’t of St., Washington, D.C.), Nov. 19, 1962, at 763.

49. Memorandum from Walter W. Rostow, *supra* note 47, at 481.

50. John F. Kennedy, *President States U.S. Policy Toward Cuba*, DEP’T ST. BULL. XLVII, No. 1214 (U.S. Dep’t of St., Washington, D.C.), Oct. 1, 1962, at 481–82.

neighbors.<sup>51</sup> The President also added references to the Rio Pact and the U.N. Charter.<sup>52</sup>

Where, in summary, did all this leave the Administration's legal position? At the heart of it was the Rio Pact, concededly "subordinate" to the U.N. Charter but in this instance allowing for actions not requiring U.N. authorization. Cuba, while barred from participation in OAS processes, was bound by member state decisions reached through the Organ of Consultation. The U.S.S.R., not a signatory to the Pact, could nonetheless be directly affected by a quarantine directed against its ships and authorized under this regional arrangement. The President made clear at the same time that over and above all of these sources of authority, he possessed the inherent constitutional power to institute a quarantine. And within a year, key Administration senior legal officials, the Legal Adviser and his Deputy Meeker, stressed that the Cuba case was unique, to be decided in the common law tradition on its particular facts, and among the considerations properly built into the analysis was the incapacity of the U.N. Security Council to perform its prescribed function. Hence, here was all the novelty and flexibility that a common-law adjudicatory approach can entail.

### C. CRITICISMS

The Administration's legal position on the quarantine was subjected to immediate criticism. Chayes candidly granted early on that "many, perhaps most" scholars disputed the Meeker theory (setting to one side for the moment the other elements of the Administration's legal argument, particularly as they were presented in the President's September warnings and address to the nation).<sup>53</sup>

Quincy Wright, writing in the *American Journal of International Law*, found the Administration's "arguments . . . not convincing."<sup>54</sup> Only an actual armed attack, warranting an act of self-defense, would have been sufficient to sustain the case for the quarantine. Short of an aggression on that scale, and in the event that all attempts to settle the conflict by peaceful means failed, the only United States recourse was to the United Nations. A further complication for the Administration, Wright wrote, was the quarantine's primary focus on the U.S.S.R. The OAS resolution could not bind the Russians: "a state's rights under international law cannot be reduced by a treaty to which it is not a party."<sup>55</sup>

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51. Chayes, *supra* note 48, at 715–16.

52. John F. Kennedy, *The Soviet Threat to the Americas, Speech to the Nation*, DEP'T ST. BULL. XLVII, No. 1220 (U.S. Dep't of St., Washington, D.C.), Nov. 12, 1962, at 715–16 [hereinafter Kennedy, *Speech to the Nation*].

53. CHAYES, *supra* note 9, at 48.

54. Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 560 (1963).

55. *Id.* at 558.

In sum, Wright concluded, the Administration's case failed: "It cannot be easily argued that the United States satisfied its international legal obligations."<sup>56</sup> It had acted as a great power is wont to do: in its own interests, applying its superior resources to overwhelm a smaller state. The actions of the United States mirrored in this respect those of Britain in its seizure of the Suez Canal, or the U.S.S.R. in its intervention in Hungary in 1956.

Another prominent critique—one even sharper and more extensive—came from political scientist William Geberding, but in this case with a twist. Geberding agreed that the United States' legal position lacked merit.<sup>57</sup> But unlike Wright, he saw no point in judging the United States action by legal standards.<sup>58</sup> This was a situation of political crisis, and the President rightly chose a course of action that, in Geberding's judgment, resulted in "one of the great successes" of United States foreign policy.<sup>59</sup> The question of the legal status of the blockade was "unanswerable;"<sup>60</sup> more to the point, it was of "comparatively little significance."<sup>61</sup> And there was no evidence that the Administration cared much one way or the other about legal issues, which had "little, if any, influence" on the formation of policy.<sup>62</sup>

Geberding did not neglect to lay bare his doubts about the Meeker theory. At bottom, he concluded, it was "compensatory legalizing."<sup>63</sup> The resort to the OAS process may have been "politically prudent,"<sup>64</sup> a tactical move having more to do with effective political implementation than with law in any normative sense. The President's advisers affirmed that regardless of what the OAS did, the Administration was determined to act to protect, through the quarantine, what it viewed to be a vital national security interest. In fact, the President said as much in his press conference on November 20, 1962.

The Geberding analysis covered a number of problems he identified in the Administration's legal position. He added to the possible charges against it one weakness Wright omitted from his analysis: the inconsistency of the blockade with United States commitments under the Treaty negotiated and ratified on the Law of the Sea. Geberding pointed out that that Treaty entered into force on September 30, 1962, and United States adherence to it was proclaimed while the quarantine was in effect. At the United Nations, this very question was raised and the argument advanced that a blockade could be justified only by a declaration of war. Geberding could not have known it at the time, but, as discussed below,

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56. *Id.* at 563.

57. *See* Geberding, *supra* note 10, at 198–99.

58. *See id.*

59. *Id.* at 175.

60. *Id.*

61. *Id.*

62. *Id.* at 176.

63. *Id.* at 197.

64. *Id.* at 196–97.



United States policymakers were well aware of this problem with the legal option of the blockade when it was debated and adopted.

#### D. ABRAM CHAYES, FOR THE DEFENSE

Abram Chayes laid out his extended defense in his full-length book published eleven years later. It appeared in a series published “in collaboration” with the American Society of International Law, its purposes fully in line with Chayes’s own: to explore the rule of law, in crisis, where “issues of war and peace” were involved, and to answer the fundamental question of whether law was ignored, decisive, or merely influential.<sup>65</sup>

In this well-written and lively book, Chayes displayed both deep learning and no small measure of ingenuity in making his case. The answer he offered to the central inquiry—whether law operates as a full, modest, or negligible constraint—was, effectively, “all of the above.” On one level, there was a touch of modesty in his account: “the law [in the Crisis] does not come off too badly.”<sup>66</sup> It did function as a constraint “substantively, but not decisively, and not directly.”<sup>67</sup> Did it conform to the “caricature” of the client, in this instance the President, committing to his counsel that “if you tell me that it would be illegal, I won’t do it?”<sup>68</sup> Not quite, Chayes wrote, but “close.”<sup>69</sup> Law could be said to be one of the “critical forces molding [the] decision.”<sup>70</sup>

Chayes stressed that the law of the case was marked by “indeterminacy.”<sup>71</sup> Law was properly viewed as “an indeterminate datum rather than a categorical norm,”<sup>72</sup> and it should not be confused with “a set of fixed, self-defining categories of permissible and prohibited conduct.”<sup>73</sup> Given how decisionmakers make their choices in crisis, “it is impossible that legal considerations should *not* enter the process of decision.”<sup>74</sup> This is in part because, while the law-as-rule may not hold sway, the influence of law-type thinking on moral deliberation—the close kinship of law and morals—inescapably affects the policy discussion: “Legal norms and moral precepts are two expressions of the same human imperative” and cannot be put into “neat, analytically separate components.”<sup>75</sup> And even if the law is violated, it still matters how much, just as it makes a difference, Chayes wrote, whether a sixty mph limit is exceeded by only five mph,

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65. Roger Fisher, *Foreword* to CHAYES, *supra* note 9, at v.

66. CHAYES, *supra* note 9, at 4.

67. *Id.* at 35.

68. *Id.*

69. *Id.*

70. *Id.* at 6.

71. *Id.* at 27.

72. *Id.* at 34.

73. *Id.* at 34–35.

74. *Id.* (emphasis in original).

75. *Id.* at 40.

or considerably more.<sup>76</sup>

At the same time, Chayes called for attention to the role of law in justification of an action that may have been largely predetermined, deemed compelling if not inevitable by the policymakers. He conceded that in a case judged by the government to involve “vital interests,”<sup>77</sup> and in which the failure to take action against the missile emplacements would have constituted a “major political reverse,”<sup>78</sup> one could doubt the constraining effect of the law *ex ante*. But there was still value, a role for the law, in a legal review and post hoc justification, provided that it rested on neutral, valid principles. In a memorable analogy, Chayes assigned a place in the annals of effective post hoc justifications to the Declaration of Independence.<sup>79</sup> Chayes could strike boldly like this: he also compared the Security Council with the Electoral College, in making the point that neither is a “viable institution.”<sup>80</sup>

Thus, the justification produced by the Administration reflected “a professionally serious and responsible effort to deal with the legal issues.”<sup>81</sup> It provided a “discipline and check”;<sup>82</sup> it served to show that the law had been “adequately reviewed”<sup>83</sup> and “adequately consulted.”<sup>84</sup>

And yet, for all this, Chayes cautioned that how, and to what degree, law in crisis guides, molds, or influences the decisions made—whether as law or in its moral disguise—is “unknowable.”<sup>85</sup> Law and policymaking are connected through a “complicated interplay.”<sup>86</sup> This is the inevitable outcome of the deeply human character of deliberation within the high councils of state. As the records of the Crisis showed, “each [of the decision makers] tended his own garden, incorporating into it—whether for decorative purposes, or more substantial reasons, whether much or little—what he drew from the legal debate he heard.”<sup>87</sup> Legal considerations in this respect functioned no differently from those of a diplomatic or political nature. They “operated on decisions not directly, but immediately, filtered through the different purposes, perspectives, and susceptibilities of the players in the central game.”<sup>88</sup> The reach of the law, the degree to which it was influential, was “a matter of time, occasion, and persons.”<sup>89</sup>

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76. *Id.* at 26.

77. *Id.* at 2.

78. *Id.* at 3.

79. *Id.* at 43.

80. Chayes, *supra* note 48, at 765.

81. CHAYES, *supra* note 9, at 49.

82. *Id.* at 41.

83. *Id.* at 42.

84. *Id.*

85. *Id.* at 5.

86. *Id.* at 102.

87. *Id.* at 34.

88. *Id.* at 30.

89. *Id.* at 105.

It was also a question, Chayes insisted, of the alternatives. In the case of the Crisis, the alternative was pure *raison d'état*: assertion of the right of self-defense, as the United States would have construed it in circumstances of vital national interest. But to have yielded to this view would “signal”<sup>90</sup> that the United States did not take law “very seriously,”<sup>91</sup> that “values other than law were being chiefly relied on as a justification for action.”<sup>92</sup>

Within this framework, Chayes defended the Administration’s international legal position as one well-supported by the criteria for sound justification: “a professionally serious and responsible effort to deal with the legal issues.”<sup>93</sup> The Meeker Memorandum was written with the understanding that the Security Council would not authorize the quarantine, and that even a General Assembly recommendation was “problematical.”<sup>94</sup> Reliance on the OAS authorization became necessary, as did the claim that the quarantine was not an enforcement action.

That it was such an action, Chayes conceded, could be supported by a “reasonably good argument.”<sup>95</sup> But the contrary case, as developed by Meeker, was supportable, and it was a mistake to assume that the unanimous OAS vote counted for little or nothing. The OAS was “neither supine nor a rubber stamp.”<sup>96</sup> Chayes chose to credit the argument that Cuba, while expelled by the OAS from its consultative processes, was still bound by the regional association’s actions pursuant to the 1947 Pact. He also rejected the view that the authorization failed as an action directed against a non-member, the U.S.S.R. The effects of the quarantine, he maintained, could not be “hermetically sealed.”<sup>97</sup> In the event that “impacts outside the region seem to warrant it,”<sup>98</sup> the U.N. had the power to act to contain those effects.

Chayes concluded, in effect, that lawyers have to be realistic. The interpretation of Article 53 of the U.N. Charter, by which the Security Council authorization was deemed unnecessary, was an admittedly “drastically” narrow reading of that provision.<sup>99</sup> This was, he further noted, an aggressive interpretation in just the “first [such case] involving use of force by a regional organization.”<sup>100</sup> But the U.S.S.R. rendered inoperable the formal processes by which international law is made. The problem was the “unworkability”<sup>101</sup> of the relevant U.N.

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90. *Id.* at 66.

91. *Id.*

92. *Id.*

93. *Id.* at 49.

94. *Id.* at 16.

95. *Id.*

96. *Id.* at 53.

97. *Id.* at 56.

98. *Id.*

99. *Id.* at 57.

100. *Id.* at 59.

101. *Id.* at 61.

Charter provisions. While the arguments put forward by Meeker and adopted by the United States suffered from “soft spots,”<sup>102</sup> the alternative was worse.

And, in an additional prong of his argument, Chayes emphasized the significance, both political and legal, of the postwar growth of international organizations. Perhaps it is here, in the discussion of the operation of these organizations, that Chayes came closest to investing law and legal process with a political function. For example, what constituted an “armed attack” was a question that presents as legal in nature but required agreement about the political procedures for resolving it. Because that question was at bottom political, not much “weight” was to be attached to the judgment of international lawyers.<sup>103</sup> So “the legal problem [in the Crisis] was to determine which of the actors and entities on the international scene was empowered to make the political decision . . . .”<sup>104</sup>

This, Chayes surmised, is what Attorney Robert Kennedy meant when he referred to the OAS process as political, not legal.<sup>105</sup> That there was an OAS “defined the terms on which [the political problem] had to be faced.”<sup>106</sup> There were concrete advantages to be had, to be sure. The OAS was “indispensable” in quickly obtaining the support of Latin American states for the quarantine.<sup>107</sup> Moreover, the form of support also mattered, as an OAS resolution, not just a statement, provided a “formal and considered expression of position on a sharply drawn question.”<sup>108</sup>

#### E. “BEHIND THE SCENES”—THREE KEY QUESTIONS

The Chayes account certainly does not neglect all ambiguity or uncertainty about how the Administration weighed the legal issues. Yet while he judged the actual effect of legal analysis to be “unknowable,”<sup>109</sup> he urged an appreciation that it was a “moulding” factor,<sup>110</sup> even if one that operated indirectly on the decision. One reviewer characterized this vantage point as “sociological.”<sup>111</sup> Law as a consideration was unavoidable; the decision-makers understood that as a practical, geopolitical matter, the question of legality would be raised, and had to be addressed. And yet Chayes would not have the reader dismiss the normative power of the legal factor. The law’s claim transcended in significance the merely tactical. It was not only one of a number of boxes to be checked: it was law, and

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102. *Id.* at 62.

103. *Id.* at 86.

104. *Id.* at 85.

105. *Id.* at 72. (For the context of the Kennedy remark, see *infra* p. 24.).

106. *Id.* at 72.

107. *Id.* at 74.

108. *Id.* at 76.

109. *Id.* at 5.

110. *Id.* at 6.

111. Carroll Quigley, *The Cuban Missile Crisis and International Law: A Review*, 81 AM. HIST. REV. 695 (1976), [http://www.carrollquigley.net/book-reviews/The\\_Cuban\\_Missile\\_Crisis\\_and\\_International\\_Law.htm](http://www.carrollquigley.net/book-reviews/The_Cuban_Missile_Crisis_and_International_Law.htm) [https://perma.cc/9JD7-DNZC].

its demands as such broke through in the course of those aspects of the EXCOM deliberations that touched on the moral limits, if any, on United States action.

With the Kennedy tapes and oral histories, along with other sources of documentation available now but not in Chayes's time, it is possible to trace the course of the legal deliberation and reexamine the closeness of the fit between Chayes's account and the historical record. There are still ambiguities, pieces of evidence that do not line up neatly, and, as Chayes would suggest, states of mind and subtle differences in perspective that are in the end, unknowable. References in documents or discussions to "law" or "legal reasons" do not explain themselves. Is the reference only to a box, a political reality of the deliberation that can be disposed of with a check mark—or is more required?

For example, in an internal memorandum dated October 19, 1962, approved for public release thirty years later, the Director of the Central Intelligence Agency, John McCone, recounted deliberations of the day before about the blockade option. McCone noted that the "United States would make such statements concerning a condition of war as is necessary to meet the legal requirements of such a blockade . . . ." <sup>112</sup> A question critical to the discussion involved the need, or not, for a declaration of war, and McCone reported the view that it "would be avoided if possible." <sup>113</sup> McCone referred to the decision to limit consultations outside the government prior to action, except as it would "prove necessary for legal reasons to assemble the OAS and secure the necessary approval to invoke the Rio Pact." <sup>114</sup>

A communication like McCone's suggests one participant's clear understanding that law mattered. But in what sense did he mean "legal reasons?" Chayes might have replied that this is the wrong way to ask the question. The point, he likely would have insisted, is that because decision-makers felt compelled to take law into account at all, it had to have counted for something. It forced adjustments in the planning: it required consultations within the government, then outside of it; and it shaped to some degree the timing of the blockade and the public justification provided for it. Some participants may have taken this impact to have a normative dimension, others only a geopolitical one, but there was, all the same, an impact. On this analysis, law cannot lose. Any legal activity around the legal quarantine could be held to establish that law was, on Chayes's theory, taken appropriately into account.

This is the most limited of the claims that the law can make. There is the further question of how law can be said to be taken seriously beyond the simple fact that it may consume time and resources to discuss and manage. These are

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112. Memorandum from John McCone, *reprinted in* CIA DOCUMENTS ON THE CUBAN MISSILE CRISIS 193 (Mary S. McAuliffe ed., 1992).

113. *Id.*

114. *Id.*

questions that could be asked of the role of the lawyers in the Cuban Missile Crisis, or in any exigent national security situation:

1. Which lawyers were brought in, and when, in the decision-making process?
2. With what degree of independence were they given their charge of developing legal advice?
3. How was the advice received, weighed, and incorporated into the Administration's legal position and public presentation?

The answer that the historical record yields on these issues could help clarify just how “seriously” the law was “taken.” That record suggests gaps in the Chayes’s defense, and deficiencies in holding the Crisis up as a model for the role of the lawyer and the rule of law in war and peace decision-making, in matters of vital national interest.

#### 1. WHICH LAWYERS WERE BROUGHT IN, AND WHEN, IN THE DECISION-MAKING PROCESS?

As Chayes noted, lawyers in the separate Departments—State, Defense, and Justice—were assigned the task of analyzing United States options for responding to the Soviet missile emplacement in Cuba.<sup>115</sup> Their work was done before the offensive weaponry was conclusively detected, as the United States monitored Soviet activity, and also when the United States issued “warnings” to the U.S.S. R. about the introduction of offensive weaponry. Chayes wrote that while the memos differed in their conclusions in various respects, they also reflected “broad agreement” on core questions such as the unavailability of the self-defense doctrine in the absence of armed attack, OAS’s authority to authorize the use of force in these circumstances, and the limits on unilateral action by the United States.<sup>116</sup>

But it would be a mistake to overstate the rigor or formality of the process by which lawyers were engaged to support the policymaking process. For example, when President Kennedy issued his September 13th warning, he drew on the assistance of only two lawyers—his brother the Attorney General, who was acting more as his most senior aide than as a lawyer, and the deputy Attorney General, Nicholas Katzenbach. The warning set out a justification of self-defense inconsistent with the legal positions taken in the previously prepared departmental

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115. Prior to the crisis, early in the Kennedy Administration, there had been early legal analysis of the authority of the President to institute a blockade. *See* Memorandum Opinion from Robert Kramer, Assistant Att’y Gen., to the Att’y Gen. on Authority of the President to Blockade Cuba, (Jan. 25, 1961), <https://www.justice.gov/file/20756/download> [<https://perma.cc/NM27-ENAM>]. This work appears consistent with the Administration’s preoccupation with the threat posed by Cuba, which was reflected in programs of “economic destabilization, covert operations, and assassination plots.” WILLIAM M. LEOGRANDE & PETER KORNBLOTH, *BACK CHANNEL TO CUBA* 43 (2014).

116. *See* CHAYES, *supra* note 9, at 23–24. In fact, Chayes overstates the “broad agreement” even among the departmental memos, as there is not found among them full concurrence about the applicability of self-defense. *Id.*

memoranda. The President declared that Russian offensive weapons installations in Cuba constituted a threat to national security and the United States had the authority to “do whatever must be done to protect its own security, and that of its allies.”<sup>117</sup> As President, he claimed the inherent authority to take the necessary action. So, while the departmental memos written in August certainly reflected serious activity by lawyers, they did not limit the President’s policy choices.

As for Meeker, he was summoned on the morning of October 18th, after the Administration had learned from surveillance photos of the offensive missile emplacements. Secretary of State Dean Rusk charged him with determining the “rights of the United States under international law” in that situation.<sup>118</sup> He was given the rest of the day, with a deadline to deliver his analysis by the end of the day, which he did at 7:00 PM.<sup>119</sup> It was made clear to him that the missiles constituted a serious threat, that they made a “military difference” to the United States’ defensive posture.<sup>120</sup>

In fact, Meeker understood that he was expected to develop a theory by which the United States could act to vindicate its “rights.” His rushed analysis was to set up a legal basis for United States action, not to put up unnecessary obstacles or raise troubling questions.

Meeker knew his client: he appreciated from his prior experience, on the eve of the Bay of Pigs, that on fundamental questions of national security, the Administration did not believe that law functioned as a constraint on the choices before it. At that time, when advised of the planned United States–supported exile invasion, Meeker raised legal concerns that it was “in clear violation of international law,” but Secretary Rusk asked him to stop bringing them up in memos to the President.<sup>121</sup> And Deputy National Security Adviser Walt Rostow was still clearer: “He said I should not concern myself with the large strategic policy matters implicitly beyond my understanding and confidence. I should go back to the State Department and tend to my legal business there.”<sup>122</sup>

This was an unequivocal statement of the lawyer’s role—his very competence—in a security crisis, and not a flattering one. Now, in this new crisis, Meeker was given half a day to produce a basis for United States action.

The record strongly suggests that Meeker was asked to establish a legal theory to support a blockade that did not depend on a prior declaration of war. Meeker recalled that he was asked to meet with Rusk early in the afternoon of the 18th.

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117. John F. Kennedy, *Remarks at Press Conference* (Sept. 13, 1962), <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHA-126.aspx> [<https://perma.cc/X8TL-Z7YZ>]. See also Quincy Wright, Abram Chayes & Dean Acheson, *The Cuban Quarantine*, 57 AM. SOC’Y OF INT’L L. PROC. 13 (Apr. 25–27, 1963) (remarks of Hon. Dean Acheson).

118. Meeker, *supra* note 1, at 337.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

A cabinet meeting occurred earlier, apparently ending just before the Meeker-Rusk meeting: The Cabinet discussion on the crisis began at 11:10 AM and ended at 1:15 PM.<sup>123</sup> So, he and Rusk apparently met immediately afterward. That Cabinet discussion had narrowed the key policy options to two—air strike or blockade—and the question of whether the blockade required a declaration of war loomed large. Many advisers, chief among them Under Secretary of State George Ball, believed that it did. The President made it clear that he did not want to consider a declaration of war, and he did not wish to have the blockade option tied to one.<sup>124</sup> A memorandum he dictated one evening during the fateful week stated that he was “most anxious” to remove a declaration of war from consideration.<sup>125</sup>

Meeker’s task, then, was to build the legal case for a blockade without a war declaration, and it was this position that he constructed. Certainly, there is no evidence that he was asked to consider whether, as a threshold matter, United States military action of any kind was legal. The Administration had determined that it would act; inaction was not an option. The President “was convinced from the beginning that he would have to do something,”<sup>126</sup> his brother, the Attorney General, later wrote: “the U.S. could not accept what the Russians had done.”<sup>127</sup> Speechwriter and advisor Ted Sorensen concurred, writing in his account that Kennedy would have moved forward with the blockade in the absence of OAS approval “because our national security was directly involved.”<sup>128</sup>

The Cabinet discussions also shed light on the policymakers’ immediate concerns in calling on legal support in the middle of the deliberations, after the options had been pared down and the blockade was under consideration. The former United States Ambassador to the U.S.S.R., Llewellyn Thompson had noted in the October 18th meeting that the Russians had a “curious” concern for an asserted legal basis, and that “running a military blockade legally established [would] greatly deter them.”<sup>129</sup> Thompson’s point was directed at Soviet psychology: it was a tactical and not a legal point, and it was focused on the blockade option.

When, then, were the lawyers brought in to develop the legal case for the course of action the President was considering? If the question is primarily about the pivotal Meeker Memorandum, that lawyer came to his task later, in this critical sense: after it had been determined that the United States would act and the President had stated his position that he had the unilateral authority to take any

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123. THE PRESIDENTIAL RECORDINGS: JOHN F. KENNEDY (Sept.–Oct. 21, 1962) 512 (Timothy Naftali & Philip Zelikow eds., 2001).

124. *See id.* at 145–46.

125. STERN, CUBAN MISSILE CRISIS, *supra* note 12, at 66.

126. ROBERT F. KENNEDY, THIRTEEN DAYS 33 (1969).

127. *Id.*

128. THEODORE C. SORENSEN, KENNEDY: THE CLASSIC BIOGRAPHY 699 (1965); *see also* Edwin M. Martin Oral History, Box #2 (May 20, 1966) at 29 (on file with the Kennedy Library).

129. THE KENNEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS 137 (Ernest R. May & Philip D. Zelikow eds., 1997) (tape of meeting in Cabinet Room on Oct. 8, 1962).



such action as was necessary; after the blockade made it to the short list of policy options and the President made it clear he did not want it conditioned on a declaration of war; and after the Russian expert present for the discussions made the case that the Russians would be affected by a legal justification.

2. WITH WHAT DEGREE OF INDEPENDENCE WERE THE LAWYERS GIVEN THEIR CHARGE OF DEVELOPING LEGAL ADVICE?

This question is effectively one about the respect for lawyers and their craft, about the space provided for them to arrive at conclusions grounded in law and accepted forms of legal reasoning. On this score, the record is mixed or, at least, complicated.

Meeker clearly appreciated from his Bay of Pigs experience that in some matters—“large strategic policy matters”—lawyers in the Kennedy Administration could expect limited involvement.<sup>130</sup> There was a difference Rostow had made clear to Meeker at the time of the Bay of Pigs between the business of national security, when vital interests within that sphere were threatened, and the ordinary “legal business” that was properly Meeker’s concern back at the State Department. Meeker was not subjected to pressure, as in facing a demand that he change a legal opinion: he was just sent away to mind his own (legal) business.

It was also clear that at the October 18th meeting between Meeker and Rusk, the lawyer understood that the specific issues required a particular legal resolution. The outcome policymakers favored was a blockade without a declaration of war, and no reliance on the U.N., where Russia waited with veto ready at hand. Without a doubt Meeker devoted considerable ingenuity and skill to the construction of his legal theory. He knew, however, what the Administration expected, and he provided it. The “legal business,” he had learned, was not to interfere with the policy machinery when it churned through matters implicating vital interests.

Meeker was not the only lawyer to confront the limits on his advisory role. Assistant Attorney General Norbert Schlei developed a memorandum for the Department of Justice that relied on the Monroe Doctrine: the long-standing policy of the United States to reject a European military presence in the Western hemisphere.<sup>131</sup> Provided along with the memorandum was a proposal for points to be included in a presidential statement, one which referred unmistakably to the Doctrine’s concern with “the historical and regional aspects of the rights being asserted by the United States.”<sup>132</sup> President Kennedy reacted poorly to mention of the Monroe Doctrine. “What the hell is that?” he snapped.<sup>133</sup>

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130. Meeker, *supra* note 1, at 329.

131. Memorandum from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to the Attorney General *Re: Legality Under International Law of Remedial Action Against Use of Cuba As a Missile Base by the Soviet Union* (Aug. 30, 1962), reprinted in CHAYES, *supra* note 9, at 108–34 (App. I) [hereinafter Schlei Memorandum].

132. *Id.*

133. Interview with Norbert Schlei (Feb. 20–21, 1968) at 12 (on file with the Kennedy Library).

Immediately the President's aides, including Schlei, convened a separate meeting to make revisions, which were dictated in the main by National Security Advisor McGeorge Bundy and intended to redirect the claim of authority away from explicit or especially direct allusions to the Doctrine.<sup>134</sup> The President, presented with the rewritten document, then pronounced it "good enough."<sup>135</sup> It is possible to see this episode as one of a President making a policy judgment within his unique authority over what an administration will share publicly of the legal advice provided to him. Or, alternatively, it could be seen as a lawyer having to stand by and observe the principal's revision of his work.

Then there was the moment on October 19th, when the EXCOM considered most intensively the legal issues, and Robert Kennedy concluded his participation in the discussion by saying to his deputy Katzenbach: "Remember now, you're working for me."<sup>136</sup> Precisely what he meant is not altogether clear. Meeker later suggested that the remark was offered "half-humorously."<sup>137</sup> But it appears to have been made at the tail end of the Attorney General's participation in the legal discussion, and in particular on the heels of his expressed conviction that there was sufficient legal justification for a blockade without a declaration of war. Katzenbach did not disagree: as will be seen, he did not believe that even OAS approval was required. Kennedy still felt compelled to make clear who was the boss: he, the client, was.

Taking it all together, the talented lawyers in the Administration worked with a clear understanding of the role they should play. Meeker learned much during his Bay of Pigs experience and certainly emerged from his meeting with Rusk with some clarity about what the policymakers needed from him. Schlei gave his theory of the case, only to watch it undergo material revision. And Robert Kennedy wanted his deputy to keep in mind who he worked for.

### 3. HOW WAS THE ADVICE WEIGHED, AND INCORPORATED INTO THE ADMINISTRATION'S LEGAL POSITION AND PUBLIC PRESENTATION?

Various lawyers at different moments were active on the Cuba issue, before and after the crisis actually materialized. Tracing the effect of their work is complicated by two factors: 1) the lawyers were not united in their views, and 2) the Administration chose among the multiple strands of legal analysis, and on occasion threw them all together, as it judged the political circumstances to require.

There is not, as noted, quite the "broad agreement" Chayes attributed to the original, early memos prepared by Defense, State, and Justice. Within Justice, moreover, there were two lines of argument. Schlei put his emphasis on the Monroe Doctrine, which the President did not care for. His superior, Deputy

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134. *Id.*

135. *Id.*

136. Meeker, *supra* note 1, at 344.

137. *Id.*

Attorney General Katzenbach, took yet another tack. He embraced without reservation the right of self-defense. He did not believe any further legal support was needed.

The record does not contain a written legal memorandum from Katzenbach to compare to Meeker's. However, the Deputy Attorney General formally presented his position to EXCOM when it deliberated on October 19th on the legal issues.<sup>138</sup> In fact, Robert Kennedy insisted that Katzenbach speak first, ahead of Meeker, who had been preliminarily recognized to present the legal position he had hurriedly developed the day before. As Rusk turned to Meeker, Kennedy interjected "Mr. Katzenbach."<sup>139</sup> He made it clear that the position Katzenbach would articulate—that no more than a claim of self-defense was required—was the Justice position. Kennedy did not show much interest in the requirement of OAS approval: "that's all political; it's not legal."<sup>140</sup>

Chayes acknowledged Kennedy's remark but suggested that it was meant primarily to keep the President's options open. Kennedy had been hawkish for most of the discussions. The blockade was not clearly his policy preference, nor had the President definitively settled on this option by the 19th. Chayes also suggested that Kennedy may simply have been worried about the risks of an adverse OAS vote: a political, not a legal, concern.

Katzenbach cannot, however, be seen only as a facilitator of Bobby Kennedy's maneuvers within the EXCOM. The Deputy was a lawyer and law professor; prior to joining the Administration, he had co-authored with Morton A. Kaplan a treatise on international law, *Political Foundations of International Law* (1961). The stand Katzenbach took for the Department of Justice at the EXCOM meeting was consistent with the thesis of *Political Foundations*. In a "loose bipolar system,"<sup>141</sup> the co-authors wrote, the U.S.S.R. and the United States would strive "to solidify and expand their blocs."<sup>142</sup> Each would adopt strategies for "strengthening ties of bloc commitment,"<sup>143</sup> and each would have to accord the other a relatively free hand within its respective bloc-centered theaters of operation.

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138. *Id.* at 339.

139. *Id.*

140. *Id.* at 344; STERN, CUBAN MISSILE CRISIS, *supra* note 12, at 57, 61. A notation in McGeorge Bundy's Minutes of the October 22, 1962 National Security Council meeting indicates that Robert Kennedy did believe that an OAS resolution would provide needed support for the blockade. Minutes of the 507th Meeting of the National Security Council (Oct. 22, 1962), [http://avalon.law.yale.edu/20th\\_century/msc\\_cuba041.asp](http://avalon.law.yale.edu/20th_century/msc_cuba041.asp) [<https://perma.cc/H5WZ-T4UD>]. There is no recording of this meeting, only the Minutes to go on. The Bundy account seems inconsistent with the comment reported by Meeker and, more generally, with the hawkish stance Kennedy took throughout the deliberations, including the advocacy of direct military action without apparent anxiety about the legal basis for it. STERN, CUBAN MISSILE CRISIS, *supra* note 12 (Kennedy still favoring an invasion on October 18th). The aggressive self-defense theory that Kennedy's deputy advanced at the October 18th meeting further raises doubt that Kennedy was concerned with the legal standing of the quarantine.

141. NICHOLAS D. KATZENBACH & MORTON A. KAPLAN, *POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 94 (1986).

142. *Id.* at 99.

143. *Id.* at 100.

Hungary, for example, could be considered part of the “Soviet security system,”<sup>144</sup> and the United States would refrain from a challenge to U.S.S.R. security interests there, just as the U.S.S.R. would have to accord similar recognition to United States security interests elsewhere, as in Western Europe or Latin America. Where those interests were threatened, each of the superpowers might have to “tolerate . . . forcible intervention,”<sup>145</sup> and each would do so “whether or not some legal pretext for the action could be found.”<sup>146</sup>

About law and its role, Katzenbach and his co-author were straightforward: “all systems of law tend to break down in crisis situations.”<sup>147</sup> There was further pressure on law resulting from the shift in the great power dynamic in the bipolar system, one in which the “legal values associated with non-intervention . . . meet far less support under current world conditions than they did during the ‘balance of power’ period.”<sup>148</sup> More stress was introduced by the nuclear threat looming over U.S.–U.S.S.R. confrontation, and for that reason, in the nuclear age, the U.N. Article 51 provision for self-defense against “armed attack” was not “fully adequate.”<sup>149</sup> Indeed, it may have been “naïve and futile.”<sup>150</sup> Katzenbach went on:

Must a state wait until it is too late before it may defend itself? Must it permit another the advantages of military build-up, surprise attack, and total offense, against which there may be no defense? It would be unreasonable to expect any state to permit this—particularly when given the possibility that a surprise nuclear blow might bring about total destruction, or at least total subjugation, unless the attack were forestalled. Neither the United States nor the Soviet Union is likely to do so unless one or the other is immobilized by large segments of domestic or Allied opinion.<sup>151</sup>

Katzenbach’s views seem to have influenced the more formal memorandum prepared by Norbert Schlei in November. In his oral history on file at the Kennedy Library, Schlei included among the key sources he consulted “a very interesting paragraph” in a memorandum authored by Katzenbach.<sup>152</sup> Apparently a faithful rendering of views expressed in *Political Foundations*, the memorandum as recalled by Schlei discussed “the development of power blocs” and “how it might make a legal difference just which position a given territorial area had

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144. *Id.* at 102.

145. *Id.* at 103.

146. *Id.*

147. *Id.* at 6.

148. *Id.* at 55.

149. *Id.* at 212.

150. *Id.* at 211–12.

151. *Id.* at 212 (emphasis in the original).

152. Interview with Norbert Schlei, *supra* note 133, at 9.

with respect to the bloc, what you could do there.”<sup>153</sup> Schlei based his memorandum on this perspective, further built out with reference to the Monroe Doctrine.

There is no reason to doubt that Katzenbach’s formal views of the limits of international law shaped, if they did not determine, his presentation on October 18, or that they were not somehow the same view he communicated in private to his superior, the Attorney General. Moreover, this advice influenced the Administration’s internal, private assessment of the justification for the quarantine, as well as the public presentation of it. Ted Sorensen noted that while the President deleted an explicit reference to self-defense, the doctrine lurked implicitly in his message to the nation. There, in explaining the unique threats posed by nuclear capability, the President stated: “We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril.”<sup>154</sup>

In effect, the Administration was echoing Katzenbach’s position that in the nuclear age, this sort of offensive capability, introduced in an area of supreme regional significance to the United States, constituted a form of “armed attack” on which a claim of self-defense could be based. And this is how Sorensen recalled the American position: “an act of national and collective self-defense.”<sup>155</sup> Schlei believed that this was the “actual position” of the Administration—fundamentally more his own than Meeker’s.<sup>156</sup>

The President’s warning of September 13th had rested almost entirely on the inherent power of the executive to defend the nation. In his televised address, Kennedy joined together the disparate lines of legal argument for the quarantine. It was all there: the Rio Pact, the UN Charter, the reference to the Monroe Doctrine in the appeal to the “traditions of this nation and hemisphere,” and his own public warning in September, which invoked his authority to defend the nation.

To the question of the weight the work of lawyers carried, there are two possible answers. One is that the lawyers’ views had little weight to speak of, considering the various and inconsistent theories apparently commandeered in support of a decision already made. Or, the position actually held by the Administration was the one articulated by the President in his September 13th warning, crafted by Katzenbach and defended at the October 19th EXCOM meeting: the right of self-defense in a nuclear, bipolar age.

This last position, of course, is not the one celebrated by Chayes, nor one that he would have defended as embodying the value of “law.” If anything, Katzenbach’s views in the matter more clearly resembled those of Dean Acheson, who thought the legal question to have little significance when a great

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153. *Id.*

154. Kennedy, *Speech to the Nation*, *supra* note 52, at 716.

155. SORENSEN, *supra* note 128, at 708.

156. Interview with Norbert Schlei, *supra* note 133, at 9.

power's interests were so directly and seriously challenged. Sometime later, Acheson wrote that when "the power, position and prestige of the United States" is so threatened, "the law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty."<sup>157</sup> For Acheson, the legal analysis was beside the point.

The scholarly discussion of the Administration's legal position has generally stopped at the question of international law. How Kennedy and his advisers viewed their domestic legal authority has occupied little attention; one scholar recently characterized any such analysis as "rare."<sup>158</sup> It is strange that, in gauging the Administration's legal decision-making culture, the inquiry would slight the question of the domestic legal authority the Administration was claiming or assuming. In our time, following the experiences in Vietnam and Iraq, it would be inconceivable. In any event, it is illogical to assume that on war and peace matters, the latitude that the Administration asserted that it possessed in the domestic sphere would shed no light, or have no bearing, on its interpretation of its international legal obligations.

In critical respects, and specifically in the breadth of its claim of legal authority, the Kennedy Administration's approach to its obligations under United States law was similar to its stance on international legal requirements. The President referred in his October 22nd speech to a congressional resolution on Cuba, pursuant to which he purported to act. The resolution, signed into law on October 3, 1962, declared that the United States was "determined . . . to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States."<sup>159</sup> On the face of this, the President appeared to suggest that the Administration had authorization from the Congress, much as it had authorization of a similar kind from the OAS to proceed with the use of force as necessary.

As in the case of the OAS, however, the Administration in fact held firm to the position that it needed no such authorization. A member of the press put the question to the President directly, at a press conference on September 13, 1962. He asked whether there was any "virtue in the Senate or the Congress passing the resolution saying you have that authority?" The President answered: "no." A Congressional declaration, "speaking as they [members of Congress] do with a particular responsibility," could be "useful." So if Congress wished to have its say, the President would welcome the support, but he did not need it.<sup>160</sup> There is some suggestion in remarks by Chayes that the Administration preferred not to have explicit authorization but instead just "support . . . for whatever he [the

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157. See Quincy Wright, Abram Chayes & Dean Acheson, *The Cuban Quarantine*, 57 AM. SOC'Y OF INT'L L. PROC. 13 (Apr. 25–27, 1963) (remarks of Hon. Dean Acheson).

158. Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L. J. 1626, 1659 (2014).

159. S.J. Res. 230, 87th Cong. (1962).

160. John F. Kennedy, *Remarks at Press Conference* (Sept. 13, 1962), <http://www.jfklibrary.org/AssetViewer/Archives/JFKWHA-126.aspx> [<https://perma.cc/X8TL-Z7YZ>].

President] wanted to do.”<sup>161</sup> And the resolution to which the President referred on October 22nd did not provide an explicit authorization, only a determination that action might be required.

As a political matter, Congress clearly did support the President taking action as necessary in Cuba. There appears to be little evidence of dissent, or much suggestion that such action would be controversial. Even Senator Wayne Morse, years later the chief critic of the Johnson Administration’s legal basis for intervention in Vietnam, put himself on record saying that “to protect our security, you [the executive] do not need any advance authority from Congress.”<sup>162</sup>

Had Congress concluded otherwise, it would have been disappointed. The Administration rejected even the course of consultation on Cuba. Only after President Kennedy had decided upon the quarantine, and the preparations for it were underway, did he summon Congressional leaders to the White House for a briefing. As Sorensen related the meeting, legislative leaders did not raise the question of authorization—though Congressman Charlie Halleck did object to the absence of consultation—but the President did encounter questions about whether quarantine was the best course. He was unmoved. He was confident that he had chosen wisely, and certain that the choice was his alone: he made clear that “he was acting by Executive Order, presidential proclamation and inherent power, not under any resolution or act of Congress.”<sup>163</sup> It was his call; presidential authority was the law of the case.

As for the OAS and its role, it did indeed move speedily to support the United States position and proved, in Chayes’s word, “indispensable” in that respect.<sup>164</sup> However, it is difficult to see in the record how the OAS action supports the view that the Administration was proceeding with legal requirements much in mind. It was true, as Chayes pointed out, that the OAS rendered a unanimous vote, which it was not always able to do on other issues the United States brought before it. At the same time, however, the stakes were exceptionally high for the United States, and the member states were left with no doubt about the importance the United States attached to the vote. The State Department made clear that the arguments to the Organ of Consultation would not rely on legal niceties. As the Department advised its posts, the key was to apply “pressure”—“whatever pressure tactics . . . will be most effective in securing the prompt support.”<sup>165</sup> The Department

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161. See *Living History Interview with Abram Chayes*, 77 *TRANSNAT’L & CONTEMP. PROBS.* 459, 464 (1997).

162. *Situation in Cuba, Hearing Before the Comm. on Foreign Relations and the Comm. on Armed Services on S. J. Res. 226, S. J. Res. 227, S. Con. Res. 92, S. Res. 388, R. Res. 389, and S. Res. 390*, 87th Cong. 60 (1962) (statement of Senator Wayne Morse, Member, Senate Committee on Foreign Relations).

163. See SORENSEN, *supra* note 128, at 702.

164. CHAYES, *supra* note 9, at 74.

165. Telegram from Secretary Rusk to All Posts (Circular 702) (Oct. 21, 1962) (on file with the Kennedy Library).

stressed that member states were to understand that failure to support the United States would come at a considerable political cost.

F. THE POLITICS OF LEGAL THEORIES: RECONSIDERING THE WORK OF  
NORBERT SCHLEI

Meeker's theory won the day in histories of the legal decision-making during the crisis. Schlei's approach, invoking the Monroe Doctrine, was met with Presidential disapproval. The President's resistance was rooted in the imperatives of politics and diplomacy. This insistence on striking the reliance on the Doctrine may have reflected a sound policy judgment, but it did not improve the coherence of the Administration's statement of its position under international law. It is a notable instance of the client flatly overruling the lawyer's judgment of the "best view"—even a best view fashioned to support the result the policymaker favored.

Schlei recognized the diplomatic and political perils of building the Monroe Doctrine into the analysis. He understood that any suggestion of unilateral United States action would have sat poorly with Latin American allies, and the Monroe Doctrine would have called forth memories of nineteenth and early twentieth-century American regional bullying that could have only caused problems for the United States in its relationship with its neighbors to the south. He later reflected in his oral history of these events that the Monroe Doctrine had "a lot of enemies"<sup>166</sup> and that more generally "people have trouble with the idea of a nation acting singly in such a drastic way."<sup>167</sup> But in arguing for its relevance to the United States legal position in the missile crisis, Schlei could point to a long history of United States adherence to the principle that there are "regional variations" effectively recognized in the international law of self-defense,<sup>168</sup> and that the Monroe doctrine reflected "an explicit qualification on a regional basis of general legal concepts in so far as the Western Hemisphere is concerned."<sup>169</sup> While Schlei did not neglect to mention Latin American sensitivity to questions of "self-determination and non-intervention,"<sup>170</sup> he endeavored to show how, in the Cuba case, the introduction of Soviet offensive capability fell "wholly outside the reasons advanced by our allies in Latin America for opposing interventionist aspects of the [Monroe] Doctrine."<sup>171</sup> So, the United States legal position, Schlei argued, was not inconsistent with international law. Such law is, "after all, essentially a generalized statement in terms of rules and policies of the reasonable expectations of states as derived from their practices in making claims and reacting to the claims of others."<sup>172</sup>

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166. Interview with Norbert Schlei, *supra* note 133, at 9.

167. *Id.*

168. Schlei Memorandum, *supra* note 131, at 111.

169. *Id.* at 113.

170. *Id.* at 112.

171. *Id.*

172. *Id.* at 113.



Moreover, Schlei could not be faulted for disregarding or going beyond the Department's own stated policy on the continued viability of the Doctrine. In July of 1960, the Department responded to U.S.S.R. Premier Khrushchev's contention that the Doctrine was "dead": far from it, the Department answered.<sup>173</sup> It declared that principles of the Doctrine were "as valid today as they were in 1823."<sup>174</sup> The Doctrine guarded the "inter-American security system" from "any extension to this hemisphere of a despotic political system."<sup>175</sup> The OAS operated to implement these principles.

That, of course, was the Eisenhower Administration's formulation of the current state of the Doctrine. The Kennedy Administration was not bound by it. Its attention to Latin American sensibilities may have precluded so direct a restatement of the Doctrine, even with the acknowledgment of the central role of the OAS.

But Schlei clearly understood that the Administration would not surrender claims to special regional security interests. The subsequent case the President made to the public on October 22nd established at least that much. In Katzenbach's view of international relations, the Doctrine may have been antiquated—a holdover from nineteenth-century balance of power politics, and not as clearly relevant in the twentieth century's loose bipolar system, maintained under constant threat of nuclear conflict. And yet his "bloc" theory could easily accommodate regional security policies, as Schlei well appreciated. At the least, the Katzenbach view and Schlei's attention to the Monroe Doctrine intersected in practical application. The Schlei argument had the virtue of candor in stating an international legal position consistent with the actual motivation of policymakers—what they believed was at stake.

It is interesting to consider President Kennedy's rejection of Schlei's analysis in light of recent controversies about the process by which lawyers are given their say in major national security policy matters. The Office of Legal Counsel (OLC) is expected to speak with clear independent and professional authority, and there has been bitter contention over perceived assaults on its institutional integrity. OLC may not have held the commanding position in 1962 that it did years later, and to a considerable degree today, in interpreting law for the executive branch. But Schlei believed that it was the office on which the President most naturally relied in the first instance (especially with his brother at the helm of the Department of Justice).

In the case of Cuba, however, the OLC analysis was revised on a material point at the insistence of the principal-client, and one of its essential components removed or deliberately obscured. Senior political leadership, the Attorney

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173. *The United States Reaffirms the Monroe Doctrine*, in *MONROE DOCTRINE: ITS MODERN SIGNIFICANCE* 185–87 (Donald Marquand Dozier ed., 1965).

174. *Id.*

175. *Id.* at 186.

General and his Deputy, instead pressed their own views. There was a Departmental position, but it was not OLC's, and it was not in writing. Nor was it likely that the Department's leadership would have thought it wise to memorialize it.

What emerged from this process was a deft analysis Meeker produced at the State Department to sustain the position that the President concluded made the most sense as a matter of strategy and policy. Because of its inevitable weaknesses, a major defense had to be mounted on its behalf, a task undertaken with energy and skill—but not convincingly, in the judgment of “many, if not most” scholars, as Chayes admitted. If this defense can be seen as the best possible face to be put on strained legal reasoning, it is not certain that this served the rule of law, or captured the role of law, particularly well.

Both Meeker and Schlei were fine lawyers, but Schlei had more time, and he brought his analysis more closely into line with the United States' flexibility to act as he well knew it would—that is, in the service of what the President judged to be its vital interests. With less time, and under instruction to create a legal justification for a blockade instituted without U.N. authorization or a declaration of war, Meeker was required to thread the needle finely to satisfy client demand. It was perhaps Meeker who was put into the most difficult position, the “good lawyer” given a very difficult assignment.

## II. THE BASES-FOR-DESTROYERS EXCHANGE

### A. THE CONTEXT

President Roosevelt's decision to bypass Congress and authorize an exchange with Great Britain of destroyers for bases developed in circumstances not too dissimilar from those faced by President John Kennedy twenty-seven years later. The United States government confronted what was, of course, a non-nuclear, but still existential, crisis: Germany's sweep through Europe, and the threat that Great Britain would be next to fall. Moving aid to the U.K. was an urgent policy priority, “the single most time-consuming matter of all those with which the president had to deal during that crowded crucial summer.”<sup>176</sup> Hanging in the balance, it seemed, was “the difference between death and survival for freedom's cause.”<sup>177</sup> Great Britain, from the King to the Prime Minister to its Ambassador to the United States, pleaded for help.<sup>178</sup>

Like Kennedy, Roosevelt needed the lawyers, but Kennedy could also count on domestic support for unilateral action, including a helping hand from a Congress not only sympathetic to his goal but perhaps even more inclined toward aggressive military measures. It was important that Kennedy have the help; and

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176. KENNETH S. DAVIS, *FDR: INTO THE STORM 1937–1940* 605 (1993).

177. *Id.* at 607.

178. HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES: THE LOWERING CLOUDS 1939–1941* 282 (1954).

yet, in the prevailing political conditions, it did not concern him nearly as much as it did Roosevelt. Poised to seek an unprecedented third term, Roosevelt faced political demands that required him to have a serviceable legal rationale for acting alone. Roosevelt could not afford the appearance of assuming extraordinary power, of becoming dictatorial in ambition and in the breadth of the executive authority he claimed.

And yet the President could not count on Congress' blessings. In fact, a determined faction within the Congress, including Senate Naval Affairs Committee Chair David Walsh, had put him on notice on this very question of support for Great Britain that it expected no action imperiling American neutrality—much less action taken on a broad claim of presidential power. Roosevelt confronted a “constant effort of the . . . isolationist group in Congress, to tighten the restrictions on executive discretion.”<sup>179</sup> By 1939, the Administration had made progress in altering the terms of highly restrictive neutrality legislation, allowing for private “cash and carry” sales to belligerents.<sup>180</sup> But it remained handcuffed in providing the level of direct, government-to-government support for which the allies were pleading.

The Administration's fencing with Congress on this issue was key to the importance, in the end, of the legal case for unilateral action. Well before the planning for the transfer of bases, the Administration had been “getting around” legal and political barriers in moving material support to allies.<sup>181</sup> The Administration was only so subtle about it. In June of 1940, the President acknowledged a sale of “surplus” Hell Diver bombers to Great Britain, some of which had been in service for only three months. The President seemingly made light of the characterization of this equipment as “surplus”: “As you know, a plane can get out of date, darned fast.”<sup>182</sup> Two years before, the President had conceded under pressure the existence of secret arrangements to supply arms to France. The crash of a Douglas bomber on a test run—with a French pilot on board—caused an uproar, exposing “Administration secrecy about French aircraft orders . . . and sensationalized anxieties about . . . presidential secrecy and usurpation of authority.”<sup>183</sup> Then again, in March of 1940, there occurred a major delivery of airframes and engines.<sup>184</sup> Even before war broke out in Europe, Roosevelt was actively

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179. John C. Donovan, *Congressional Isolationists and the Roosevelt Foreign Policy*, 3 *WORLD POL.* 299, 313 (1951).

180. RICHARD MOE, *ROOSEVELT'S SECOND ACT: THE ELECTION OF 1940 AND THE POLITICS OF WAR* 72–73 (2013).

181. ROBERT SHOGAN, *HARD BARGAIN: HOW FDR TWISTED CHURCHILL'S ARM, EVADED THE LAW, AND CHANGED THE ROLE OF THE AMERICAN PRESIDENCY* 177 (1995). Shogan's Chapter 9, which traces the development of the Administration's legal and other maneuvering to move aid to the allies, is entitled “Getting Around the Law.”

182. *Id.* at 83.

183. MICHAEL S. SHERRY, *THE RISE OF AMERICAN AIR POWER: THE CREATION OF ARMAGEDDON* 84 (1987).

184. FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* 326 (1990).

mapping out avenues of circumvention of United States neutrality obligations.<sup>185</sup> But he was forced to bob and weave, with the result that “he was seen, at least in Congress, as a duplicitous schemer.”<sup>186</sup>

Resistance within Congress to the President’s maneuvers to aid the Allies intensified in the so-called “mosquito boat” episode.<sup>187</sup> There it was discovered that the Administration planned to transfer to Great Britain a fleet of twenty-three boats, by canceling existing U.S. contracts for the delivery with a private contractor and having the vessels made available to the U.S. ally. Chairman Walsh took to the floor to protest: “Who in God’s name,” he exclaimed, “in Congress or in the Country, thought, when such a power [to modify contracts] was given, that these contracts for our own protection would be modified or changed in order to assist one side or the other, or all sides, of belligerents at war?”<sup>188</sup> Walsh argued that this was objectionable on various grounds. It was a threat to U.S. neutrality; it would endanger U.S. defenses by depleting its fleet; and it reflected an unacceptable “feeling” among executive branch officials that Congress was somehow “interfering with their prerogatives” and they could do as they pleased.<sup>189</sup> The law was clear, Walsh declared—more than sufficient to “dispose of the whole matter.”<sup>190</sup>

Then, for good measure, Congress passed into law the “Walsh Amendment,” a prohibition on any transfer of Navy material or equipment without a certificate from the Secretary of the Navy stating that the equipment was not “essential” to the national defense.<sup>191</sup> A further amendment, the so-called Vinson Amendment, provided that no naval vessel could be sold or otherwise disposed of “except as provided by law.”<sup>192</sup>

There was no doubt that the “Walsh and Vinson Amendments were enacted specifically to restrict the President’s authority to transfer destroyers to the British.”<sup>193</sup> Yet in an early draft of his opinion on the destroyers deal, Attorney General Jackson attempted to argue otherwise: he wrote that “[it] is . . . clear that Congress did not intend [in the relevant statutory enactments] to stop aid to the allies . . . .”<sup>194</sup> The President, provided this draft for review, put a “?” in the

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185. *Id.* at 309. For example, meeting with Jean Monnet in October of 1938, FDR “suggested that in case of war the French could circumvent the Neutrality Act through assembly plants in Canada to which American companies could shift parts.” *Id.*

186. MOE, *supra* note 180, at 65.

187. See DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS* 235–39 (2016).

188. 86 CONG. REC. 8779 (1940).

189. *Id.* at 8778.

190. *Id.*

191. See Act of June 28, 1940, ch. 440, § 14(a), 54 Stat. 676, 681 (1940).

192. See Act of July 19, 1940, ch. 644, § 7, 54 Stat. 7779, 780 (1940).

193. William R. Casto, *Attorney General Robert Jackson’s Brief Encounter with the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 374 (2010) [hereinafter Casto, *Jackson’s Brief Encounter*].

194. Robert Houghwout Jackson, Draft of opinion re: sale of over-age destroyers to Great Britain (on file with the Library of Congress, Washington, D.C.).

margin by this sentence.<sup>195</sup> In the final published version, the sentence did not appear.

Jackson issued an informal opinion on June 20, 1940, immediately prior to the enactment of the Walsh Amendment, concluding that the mosquito boat sale would not be lawful.<sup>196</sup> Was this an indication that lawyers faced with strong presidential policy preference would resist, and give a reading of the law as it was clearly written its due? The record on this point is hardly clear. By the time the Attorney General provided this advice, the politics of the mosquito boat deal had become untenable for the Administration. Jackson understood that Congress objected strongly to the very transaction. The White House then chose to make the most of a difficult situation, given the opposition of a “hostile Congress” and the fact that “Senator Walsh had already informed his committee that the deal was dead.”<sup>197</sup>

Later, as will be seen, when the Attorney General’s opinion presented awkward problems for the legal clearance of the bases-for-destroyers deal, he distinguished it on grounds that could be fairly characterized as “disingenuous.”<sup>198</sup> What had changed were the level of congressional resistance and the movement of public opinion on the question of American neutrality.

That Jackson’s rationale for the bases-for-destroyers exchange was flawed and patently results-oriented is by now—and it was largely at the time—widely appreciated. Commentators may disagree about the particulars of the weaknesses or, in any one instance, their seriousness.<sup>199</sup> Few would dispute Jack Goldsmith’s summary conclusion that Jackson and those assisting him “exploited ambiguities and loopholes in the law. They read the relevant precedents in ways that favored presidential power. They stretched the meaning of statutes and treaties. And they did not always give full play to contrary arguments or precedents.”<sup>200</sup>

The question of continuing interest is not what these lawyers as a technical matter got “wrong,” but how to view the interplay of law and politics in the production of their advice. Could it be said, for example, that for these lawyers their legal analysis was mere “cover” for an action that was political in nature, and that they shaped analysis without much regard for coherence, transparency, or the implications for statutory or constitutional precedent? Or did they take care with the role of law and the legal process, acting, as Goldsmith has suggested, in “good faith”<sup>201</sup>—demonstrating through their extensive deliberations and

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195. *Id.*

196. See BARRON, *supra* note 187, at 237.

197. *Id.* at 238.

198. WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL 230 (2002).

199. A remarkably thorough account of the development of the Jackson opinion is found in William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-For-Bases Deal*, 52 AM. J. LEGAL HIST. 1 (2012) [hereinafter Casto, *Advising Presidents*].

200. Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 199 (2010).

201. *Id.* at 199.

revisions that law counted and that their “client,” the President, could not just do as he pleased?<sup>202</sup> If it is accepted—as it should be—that they were acting under exigent conditions, did they offer a model for how lawyers having a strong policy justification for supporting the policymaker might also demonstrate respect for law and for a well-structured legal advisory process?

#### B. THE LEGAL RATIONALE FOR UNILATERAL ACTION—AND CRITICISM

The Administration then faced the question of what to do, as the European situation deteriorated and Congress remained an unwilling partner in providing a legislative remedy and blessing the provision of the destroyers to Great Britain. As in the case of the Cuban Missile Crisis, the legal theory has since received close attention, and a fair amount of critical commentary even at the time. Also, as in the aftermath of the Cuban Missile Crisis, few if any have claimed that the legal theory that the Administration eventually adopted was constructed straightforwardly, the product of conventional analysis drawing on an accepted inventory of legal authorities. It was creative, to be sure, but not so clearly credible, and an analyst’s judgment of which side of the line it fell depended on how much weight he or she might give the policy objective the legal reasoning served.

But the Jackson opinion developed so clearly along policy-focused and political paths that it is difficult to see in what ways the law’s claims were meaningfully upheld. The lawyers who worked out this legal theory were highly conscious that the exercise in which they were engaged was, at bottom, political, and that the success of their legal work would be determined for all practical purposes by the wisdom and success of the Administration’s policy.

In this respect, the bases-for-destroyers case was more profoundly a victory of policy and politics over law than the Meeker opinion the Kennedy Administration relied on in 1962. Even if the times, some twenty years before, were different and the standard for a depoliticized legal process more relaxed, the Roosevelt Administration lawyers understood that they were ranging well beyond the legal limits in advancing the President’s policy goals. They appreciated that they were not merely writing an opinion helpful to those goals; they were responsible for producing the key to the Administration’s public political posture. The legal opinion they produced was not a piece of the strategic puzzle. It was the solution, the final and decisive move of a political strategy that they helped to execute. Their participation in the politics of the episode was not limited to the writing of a legal opinion.

#### 1. THE PRIMARY THEORIST: BENJAMIN COHEN

The author of the core legal justification was Benjamin Cohen, a lawyer assigned to the National Policy Power Committee of the Department of the

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202. See BARRON, *supra* note 187, at 252.

Interior. With modifications, what he propounded largely determined the Administration's position, as eventually affirmed in an opinion by Attorney General Jackson.<sup>203</sup> Cohen was a brilliant lawyer, by all accounts, but in this instance, he held a clear and impassioned view about his mission: that he should supply the best argument to support a policy in which he believed deeply. As his biographer notes, the case he made was "creative if disingenuous," because he considered the "legal issues [to be] subordinate to the political."<sup>204</sup>

This was not only a background policy concern that wove its way through the legal analysis and must be disentangled from the more technical argument. Cohen built his policy and political judgments into the very opening of the opinion that he forwarded to the President, in draft, on July 19, 1940:

The policy of the United States to nations resisting aggression is not based on sentiment alone. It is rooted in very real and material interests of this country. In the present state of the world, the maintenance of British sea-power is of inestimable advantage to us, in terms of our national defense . . .

Under these circumstances it is lacking in national foresight to consider action taken to facilitate aid to Great Britain as unrelated to our own national defense. It cannot lightly be assumed that statutes designed to safeguard our national defense were intended to block action dictated by a realistic appreciation of the interests of our national self-defense.<sup>205</sup>

It would be a mistake to imagine that Cohen was wasting ink on rhetoric. One explanation of his lengthy preliminary foray into foreign policy is that he was aware that the argument to follow was strained, and required critical context to bolster its acceptability. These appeals to the nation's "very real and national interests," and to the exercise of "foresight" in evaluating its national defense posture, were meant to set up a framework for an expansive consideration of the relevant statutes. The laws in place could not be "lightly assumed"<sup>206</sup> to stand in the way of action required in the national defense. As Cohen saw the matter, what was wanted, and should control the legal analysis, was a "realistic appreciation of the interests" of that national defense. Yet, Congress well aware of the circumstances in Europe, had specifically legislated to enforce United States neutrality obligations and block precisely the transfer that Cohen undertook to justify.

In his opinion, Cohen tackled the statutory impediments by concluding that the destroyers could be sold or transferred under a 1916 statute governing the

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203. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484 (1940) [hereinafter Acquisition of Naval and Air Bases].

204. LASSER, *supra* note 198, at 230.

205. Memorandum from Benjamin V. Cohen to President Franklin Roosevelt (July 19, 1940), in BENJAMIN V. COHEN PAPERS, at 1 (on file with the Library of Congress, Washington, D.C.) [hereinafter Letter of July 19, 1940].

206. *Id.*

disposition of equipment “unsuited to present needs,”<sup>207</sup> and under the more recent Walsh Amendment, requiring certification from the Secretary of the Navy, that the transfer did not involve equipment essential to the national defense. The 1940 law was, of course, the result of congressional objections to precisely such a transfer, of the mosquito boats. Cohen, one might say, turned the enactment on its head: he converted it from a restriction to an authorization, and he did so by effectively concluding that ships, supposedly not essential to the national defense, were in fact essential because by strengthening Great Britain, they would bolster American defenses. Cohen also studiously disregarded the legislative history of the 1940 enactment, including Chairman Walsh’s emphatic statement that he wanted “every” piece of military equipment retained in the United States and available for United States military use.<sup>208</sup>

Cohen’s dismissal of the relevance of the Attorney General’s prior opinion on the mosquito boats followed from his readiness to move as it suited his analysis from high-level principle to highly technical reasoning. As he wrote to the President in the letter transmitting the draft memorandum, he was confident that the Jackson mosquito boat opinion could be distinguished on “sound technical grounds.”<sup>209</sup> On another point, such as the proper construction to be given the standard “essential to the national defense,” Cohen eschewed anything resembling what might be called “technical” reasoning. Then, as in the treatment of United States treaty obligations under the Hague Convention, Cohen felt compelled to supplement if not compensate for the intensely technical case with an appeal to considerations of equity, fair play, justice, and even common sense.

Just as Cohen opened the memo with ringing principle, he closed the same way, calling attention to what he deemed the legal implications of German disregard of its obligations under the Kellogg-Briand Pact. Having renounced war, Germany had embraced it, invading neutral countries. “Certainly,” Cohen wrote, “neutral countries are warranted in taking some measures of reprisal”:

International law rests on mutuality. International law which is not mutually observed becomes the instrument and ally of aggression.<sup>210</sup>

Hence, the United States government, “normally” barred from active aid to a belligerent confronted with this aggression, “would seem to be fully justified” in the circumstances brought about by Germany’s breach of its treaty obligations.<sup>211</sup> The question is one of “morality” and not only law: “there is no particular merit or morality in neutral countries observing rules of law in their relations with a belligerent which refuses to observe these rules in its relations with them.”<sup>212</sup> Cohen

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207. *Id.* at 1–2.

208. *See* 86 Cong. Rec. 8784 (1940).

209. Letter of July 19, 1940, *supra* note 205, at 1.

210. *Id.* at 11.

211. *Id.*

212. *Id.*



then concluded his analysis by affirming that the proposed transfer “may help very materially to keep the dangers of war from our shores.”<sup>213</sup>

Cohen did not neglect altogether a technical defense of unilateral action. He attempts a distinction between vessels owned and outfitted within the United States on order of a belligerent and those ships equipped for war that are sold privately and not put into active military service until they leave the United States. In doing so, Cohen disregarded a specific statutory prohibition on the United States “sending” of vessels, however and whenever equipped for war, out of United States jurisdiction in support of a belligerent power. Cohen chose to read that law as only prohibiting the United States from functioning as a base for belligerent operations.

Of course, Cohen was not addressing a private sale—the United States government would be making the transfer possible to serve an explicit policy of aiding a belligerent. Yet Cohen argued that the opinion can “assume” that the sale is private, which “avoids any question of the government committing an un-neutral act by furnishing directly supplies or equipment to a belligerent power.”<sup>214</sup>

The President was not persuaded that he could proceed on the basis of Cohen’s legal position. It is unlikely that he was concerned with how well Cohen had grappled with the precise prohibitions of the Espionage Act or United States obligations under international law. He was skeptical that the Secretary of the Navy could plausibly supply the certification called for by the Walsh Amendment.<sup>215</sup> “After all, Roosevelt thought, the whole point of the Walsh Amendment had been to block the transfer.”<sup>216</sup> In July of 1940, Roosevelt more than anything else needed a legal position strong enough to overcome intense congressional skepticism and a public still leery about American involvement in the European conflict. As Harold Ickes put it, “He couldn’t get away with it in public opinion.”<sup>217</sup>

Cohen’s efforts were not wholly unavailing. His opinion passed through two additional rounds of editing and reorganization before changes in politics and the international situation rendered it suitable as the disclosed, public legal basis for unilateral presidential action in transferring the destroyers.

## 2. THE PUBLIC UNVEILING OF THE COHEN CASE; THE SHIFT IN POLITICAL CONDITIONS

The next phase in the evolution of the Administration’s legal posture involved a twofold maneuver by which the legal analysis was previewed publicly, but in the guise of the considered editorial opinion of eminent private lawyers, including Dean Acheson. This was partly a bid for respectability, introducing a formal legal

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213. *Id.*

214. *Id.* at 10.

215. LASSER, *supra* note 198, at 221–22. Harold Ickes and Tommy Corcoran were similarly skeptical. *See* ICKES, *supra* note 178, at 271.

216. BARRON, *supra* note 187, at 243.

217. ICKES, *supra* note 178, at 271.

defense of the President's authority into the public debate, and perhaps also a test of congressional tolerance for the proposition that the President could act without regard to the Walsh Amendment. The other audience was the President himself. Cohen and Acheson hoped to impress on him that he had available a legal option to act alone.

On August 11, 1940, Acheson and his co-authors published a letter, crafted primarily by Cohen and Acheson but with Cohen not joining as a co-signatory, that made the case for presidential authority to consummate a destroyer sale or transfer.<sup>218</sup> The letter tracked Cohen's argument on material points, with variations. In some passages, the language was drawn verbatim from Cohen's memo, including the first two passages stressing "very real and material" American interests "not based on sentiment alone."<sup>219</sup> The core strategy was also Cohen's, which was to stress that the exchange or sale would strengthen United States' defense overall.

Acheson and his co-authors offered their readers one other assurance missing from Cohen's memo. A congressional majority, the letter writers asserted, likely favored this action, and they declared that they would not have supported this initiative in the face of contrary congressional opinion. But with time running out for formal legislative action, there was sufficient existing authority to support presidential action and it was necessary to rely on it. This argument underscored the close tracking of public opinion by the supporters of this initiative to help Great Britain.

The Administration had not left public opinion to chance; and to the extent that congressional sentiment had shifted, it could quietly take some credit. The President had solicited the support of William Allen White's Committee to Defend America by Aiding the Allies,<sup>220</sup> which issued a call for the "United States [to] throw its material and moral weight on the side of the nations of western Europe . . . that are struggling in battle for a civilized way of life."<sup>221</sup> Also with Administration encouragement, General John Pershing had been recruited to advocate for the cause of providing the destroyers to Great Britain, making his case in a national radio address broadcast on all three networks on August 4, 1940.<sup>222</sup>

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218. See Dean Acheson et al., *No Legal Bar Seen to Transfer of Destroyers*, N.Y. TIMES, Aug. 11, 1940. Acheson's co-signatories were Charles Burlingham, Thomas P. Thacher, and George Rublee.

219. Another example, also appearing word for word: "There is no reason for us to put a strained or unnecessary interpretation on our own statutes contrary to our own national interests." *Compare with* Letter of July 19, 1940, *supra* note 205, at 1.

220. SHOGAN, *supra* note 181, at 138.

221. *Id.* at 148.

222. ANDREW JOHNSTONE, *AGAINST IMMEDIATE EVIL: AMERICAN INTERNATIONALISTS AND THE FOUR FREEDOMS ON THE EVE OF WORLD WAR II* 96 (2014). The Chicago Tribune, reporting on the address, commented tartly that the three-network radio time allocated to the speech was a "privilege that has been accorded to few persons other than the President." Chesly Manly, *Pershing Urges Naval Craft Be Sold to the British*, CHI. TRIB. (Aug. 5, 1940), available at [http://chicagotribune.newspapers.com/browse/Chicago%20Tribune\\_4351/1940/08/05](http://chicagotribune.newspapers.com/browse/Chicago%20Tribune_4351/1940/08/05) [https://perma.cc/V8W7-4WHC].

By the time the Attorney General turned to Cohen's arguments in shaping his own formal opinion, "momentum [was] building for Roosevelt to act without express congressional support."<sup>223</sup> With the passage of time in that summer of 1940, the political conditions for more assertive action took a more favorable turn. Senator McNary, Republican leader and vice-presidential nominee, advised the White House that he would not challenge the proposed transfer if a "plausible" rationale for it could be offered.<sup>224</sup> Public opinion also shifted in favor of more active support of beleaguered allies, in one poll to almost to two-thirds, at sixty-two percent.<sup>225</sup>

Within this framework of national policy and politics, the rest of the letter published in the *Times* reproduced large swathes of statutory text to make Cohen's main technical point. The law, implementing U.S. treaty obligations, permitted private sales of ships already equipped for war and not built or armed on the express order of a belligerent for its purposes. Like Cohen, the authors were prepared to characterize the materials as obsolescent and not essential to the national defense (as would be certified by the Secretary of the Navy). The letter acknowledged the Walsh Amendment but contended that "Congress deliberately refrained" from "more drastic restrictions on executive authority" than the requirement that the Secretary of Navy certify that the transfer could be made without harm to United States's defenses.<sup>226</sup>

The origins and intent of the Cohen-Acheson initiative are well-known, and yet it is a notable instance of lawyers working quietly to build a political case for what they knew was a weak legal position. Their letter must be seen within the context of the Administration's political program for influencing the public in favor of the transfer and easing the Congress into at least acceptance. It was part and parcel of an initiative that proclaimed the public political support that it was intended in part to help generate.

### 3. THE JACKSON OPINION OF SEPTEMBER 1940

What remained was for the President to receive from the Attorney General a formal opinion tracking the Cohen case. Acheson contacted Jackson, then on vacation in Pennsylvania, and pleaded the "dreadful urgency" of such an opinion.<sup>227</sup>

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223. BARRON, *supra* note 187, at 246.

224. *Id.* at 249. The Republican nominee Wendell Wilkie, whom the Administration hoped to enlist in the cause, wavered, then publicly and vigorously attacked the President for exceeding his authority. *Id.* at 251.

225. SHOGAN, *supra* note 181, at 231. Congressional supporters of FDR's policy pointed to public opinion in defending the President from claims that he was exceeding his authority and compromising U.S. neutrality. See, e.g., Chesly Manly, *Release of U.S. Arms to Allies Stirs Warning*, CHI. TRIB., June 8, 1940, available at [http://chicagotribune.newspapers.com/browse/Chicago%20Tribune\\_4351/1940/08/05](http://chicagotribune.newspapers.com/browse/Chicago%20Tribune_4351/1940/08/05) [<https://perma.cc/V8W7-4WHC>] (citing floor debate in which one Democratic Representative proclaimed that "public sentiment [was] overwhelming" behind the President's policy of support for the allies).

226. Acheson, *supra* note 218.

227. DEAN ACHESON, MORNING AND NOON 223 (1965).

Jackson committed to consider the matter.<sup>228</sup>

Among the materials he consulted was a memorandum solicited from Deputy Solicitor General Newman Townsend, who assessed the arguments put forward by Acheson and his co-authors in the *Times* letter. It is not clear whether Townsend was aware that the letter was a revised version of the legal memorandum prepared within the government and already provided to the President. In any event, Townsend gave it a passing grade: While the analysis was not airtight and relied in part on the wrong statutes, the legal construction presented, Townsend concluded, was “permissible” and “might be sustained in the light of the legislative history.”<sup>229</sup> But Townsend, like Cohen, counseled that the opinion would stand and fall in the end not on its technical merits but on the political climate in which it was issued:

After all is said, the question of the disposition of over-age destroyers is probably more political than legal. Whether desirable or undesirable, I think it must be admitted that public opinion often has a great deal to do with what construction the courts will give to a statute. In this case if the great weight of public opinion favors the release and sale of over-age destroyers to the British Government, a construction of the statutes permitting this to be done, even though somewhat legalistic, will receive the general public endorsement, and should it reach the court’s will, I think, be approved by them.<sup>230</sup>

Townsend followed up his political assessment of this memo with a handwritten addendum emphasizing problems with the legal analysis of the United States’s compliance with its international legal obligations. The Hague Convention’s application, he wrote, was not “fully thought out,” apparently in the *Times* editorial piece authored by Acheson and Cohen.<sup>231</sup> But, he added, “The President is not greatly worried about either international law or the Hague Convention.”<sup>232</sup>

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228. *Id.*

229. Memorandum from Newman A. Townsend to the Attorney General (Aug. 13, 1940), in ROBERT HOUGHWOUT JACKSON PAPERS, 5 (on file with the Library of Congress, Washington, D.C.) [hereinafter August 13th Memorandum from Newman A. Townsend]. Townsend uses the legislative history to minimize the Congress’s intention to limit the President’s discretion to dispose with limited conditions of the naval equipment, and to blunt the apparent application of the Espionage Act provisions passed to enforce U.S. neutrality obligations. In a separate, unsigned memorandum in the Jackson papers, on which the full opinion appears to have been largely based, it is conceded that the legislative history on the second point is “meager.” Memorandum from Newman A. Townsend Regarding Old Destroyers (Aug. 15, 1940), in ROBERT HOUGHWOUT JACKSON PAPERS, 3–4 (on file with the Library of Congress, Washington, D.C.). Nor on the first point is the affirmative conclusion especially forcefully presented. It is argued only that it would “seem” that the Walsh Amendment might not supersede prior, more permissive grants of presidential discretion. *Id.* at 4.

230. August 13 Memorandum from Newman A. Townsend, *supra* note 229, at 5.

231. Note from Newman A. Townsend to the Attorney General, in ROBERT HOUGHWOUT JACKSON PAPERS (on file with the Library of Congress, Washington, D.C.).

232. *Id.*

Townsend could not have been more correct. Essential to any account of the development of the Administration's legal position is the lawyer's understanding of the client's expectations—in this instance, FDR. Acheson had learned that the President had no use for legal impediments to the execution of policy imperatives: He had, after all, lost his job at the Department of Treasury over a question of legal principle.<sup>233</sup> The Attorney General in his posthumously published memoir acknowledged that FDR was a “strong skeptic of legal reasoning.”<sup>234</sup> Confident in his own judgments, the President “found difficulty in thinking that there could be legal limitations on them.”<sup>235</sup> On several occasions, and not only the one fatal to Acheson's Treasury tenure, the President had made clear that lawyers were to do what the Chief Executive needed done, or “heads . . . will have to fall.”<sup>236</sup> The President's insistence on can-do lawyering extended to high constitutional principle: He exhibited every “readiness to act over the heads of elected representatives.”<sup>237</sup> He took a broad view of his constitutional “prerogatives” as President.<sup>238</sup>

Jackson turned to the preparation of his opinion with this understanding of his client. Acheson and Cohen had impressed on him the urgency of reaching the right legal result to facilitate the policy. The Assistant Solicitor General advised him that it was possible to arrive at that result through a merely “permissible” legal analysis.<sup>239</sup>

An additional factor was Jackson's own keen political instincts and commitments. Those who knew, and have written about, Jackson understood that he was “deeply political,”<sup>240</sup> and among those who could be considered a “political loyalist”<sup>241</sup> of Roosevelt. Also, during the period in question, Jackson entertained the possibility of running for President if Roosevelt did not seek a third term.<sup>242</sup> Jackson grasped in full the circumstances in which he would have to evaluate the legal option open to the Administration in entering into an agreement with Great

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233. JAMES CHACE, *ACHESON: THE SECRETARY OF STATE WHO CREATED THE AMERICAN WORLD* 63–67 (1998) (detailing the consequences of Acheson's opposition on legal grounds to the President's plan to set the price of gold without congressional authority).

234. ROBERT HOUGHWOUT JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 59 (John Q. Barrett, ed., 2003).

235. *Id.* at 74.

236. Casto, *Jackson's Brief Encounter*, *supra* note 193, at 365, n.7. An example Jackson provided was the President's determination to push past congressional inaction in funding a new Washington, D.C. airport. He did not want to hear of legal problems with a plan to have the President fund the project on his own authority. “Bob,” he told Jackson, “I want you to get Harry Hopkins' WPA legal men together with Harold Ickes's PWA legal men at once and knock their heads together until you get that money knocked out of them. Get this straightened out. I want to break ground . . . a week from Monday.” JACKSON, *supra* note 234, at 48.

237. 237. JACKSON, *supra* note 234, at 47.

238. SHOGAN, *supra* note 181, at 47. It was on this basis that the President considered a possible blockade undertaken jointly with Great Britain against Japan to be within his prerogative as Chief Executive.

239. *See* August 13th Memorandum from Newman A. Townsend, *supra* note 229, at 5.

240. BARRON, *supra* note 187, at 241.

241. SHOGAN, *supra* note 181, at 104.

242. *Id.* at 104–06.

Britain for the transfer of the destroyers. When Acheson called him while he was on his Pennsylvania vacation, there was no suggestion that the question of the moment was one of law, but rather of how a particular legal problem impeding the adoption of an urgently needed policy could be solved. The message was that something needed to be done. Acheson was not addressing the appeal to someone insensitive to the political pressures of the moment.

Jackson then proceeded to produce an opinion, released on September 3, 1940, that contained a legal analysis informed by Cohen's views but framed differently in material respects.<sup>243</sup> One change of consequence, in critical if not legal terms, was the casting of the transfer as an "exchange" of the destroyers for access through a long-term, ninety-nine-year lease of British naval and air bases in the northern Atlantic. Supporters of the transfer believed that this strategy was "more politically realistic."<sup>244</sup> While this adjustment in the terms of the arrangement may have been "important"<sup>245</sup> to Jackson's formal opinion, it is not at all clear—and indeed it is unlikely—that however the transfer was structured, the Jackson legal opinion would have been fundamentally different. Cohen had concluded that a sale was lawful when there was no exchange element; the Cohen-Acheson letter made no mention of a trade. The "net benefit" analysis, perhaps stronger with an exchange, had been fashioned without it.

Overall, Jackson's analysis was at once candid in acknowledging reliance on an expansive view of executive authority, and somewhat less than frank in dealing with the murkiness of the Administration's position under the relevant statutes. The opposition Congress had expressed to the very question Jackson was addressing—unilateral transfer of naval vessels to a belligerent—went unaddressed in the opinion. Jackson largely disregarded legislative history and chose instead to read the various statutes governing the disposition of surplus or obsolete equipment as a clear indication that Congress did not intend to impose "arbitrary" restrictions on executive authority to provide for military transfers like the one contemplated for the destroyers.<sup>246</sup> Where Townsend saw reason for doubt, Jackson detected or at least presented to the reader undeniable clarity of legislative purpose. Throughout his opinion he resorted to characterizations such as the "clear recognition" in the law,<sup>247</sup> the "clear import of seemingly plain language,"<sup>248</sup> "ample" statutory authority,<sup>249</sup> alternative readings that Congress "obviously" did not intend<sup>250</sup>—all leading to a permissive conclusion that was "inescapable."<sup>251</sup>

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243. See *Acquisition of Naval and Air Bases*, *supra* note 203, at 489–94.

244. Casto, *Advising Presidents*, *supra* note 199, at 51.

245. BARRON, *supra* note 187, at 253.

246. See *Acquisition of Naval and Air Bases*, *supra* note 203, at 484.

247. *Id.* at 489.

248. *Id.*

249. *Id.* at 488.

250. *Id.* at 492.

251. *Id.*

The paths through the statutes Jackson worked so hard to clear allowed him to deny that the transfer would have to “rest upon [Article II]’s power alone . . . .”<sup>252</sup> Jackson was signaling that he was unwilling to force the question of executive authority, that is, by having it function as the decisive basis on which the President could act in the face of either ambiguous or contrary congressional directive or intent. In the event, however, that the reader would have any doubt about statutory prohibitions or limitations, it would have to be resolved by clear reference to the President’s power as Commander-in-Chief, who was also in “control of foreign relations.”<sup>253</sup> The Attorney General concluded that the statutory authority he found for the proposed exchange of destroyers “unfit” for domestic use was consistent with his “high sense of responsibility which follows his rank as Commander in Chief of his nation’s defense forces.”<sup>254</sup>

The legal reasoning Jackson used to support the preferred policy was the one Cohen had built in his July draft, when the question was one of sale, not exchange. In the final opinion, Jackson argued that an exchange would strengthen American defense overall, and so the United States was gaining more than it was giving up. Under the Walsh Amendment, the Secretary of the Navy had to certify that the transfer did not involve the disposal of material “essential to national defense.” In Jackson’s analysis, that the equipment could be “useful” did not mean that it was “essential.” Jackson also resorted to an appeal to common sense, arguing that “good business sense is good legal sense”—meaning that both sides would get something out of the exchange.<sup>255</sup>

Concluding that the Chief of Naval Operations could lawfully certify that the equipment was not “essential” to national defense, the Attorney General made a key move. He essentially argued that the Chief had effectively no choice but to certify on the basis of a net benefit. He took Cohen’s creative turn of analysis and built it into a requirement binding on the Chief of Naval Operations in making a certification. The conclusion to be drawn was clear: that the exchange with Great Britain would improve the United States’s overall defense posture.<sup>256</sup> The net-benefit analysis was not only permissible in the Chief’s deliberations; it was mandatory that he consider such factors as “remaining useful life [and] strategic importance.”<sup>257</sup>

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252. *Id.* at 486.

253. *Id.*

254. *Id.* at 489. It was on this basis that Jackson determined that the President could not merely vary the terms of sale of vessels determined to be “unfit for further use,” as provided for under the Act of March 3, 1883, but that he could summarily dispose of them altogether as the “public interest” requires, in meeting his “high sense of responsibility” as Commander-In-Chief.

255. *Id.* at 492.

256. *See id.* at 492–93.

257. *Id.* at 492. Admiral Stark, the Chief of Naval Operations, had long resisted the notion that the destroyers were not needed. But eventually he relented, issuing a certification carefully crafted as being “in accordance with” Jackson’s opinion. *See* Letter from H.R. Stark, Admiral and Chief Naval Officer, U.S. Navy, to the President of the United States (Sept. 3, 1940), in 7 BENJAMIN V. COHEN PAPERS (on file with the Library of Congress, Manuscript Division, Washington, D.C.).

Jackson's relentless emphasis on the exchange component may have improved the argument for a net benefit to United States defense, but it was somewhat of a canard. The Administration's objective was to move the destroyers to Great Britain, and the exchange was an afterthought—devised later in the deliberations, its function primarily political. It was helpful to the public presentation of the case, but it was not central to the policy. Jackson, however, put it front and center in the opinion, and along with the string of adjectives characterizing the law as clear or plain and his legal conclusion as “inescapable,” it served to bolster the political salability of the Administration's position. The United States had “gotten something” for the destroyers; it had made a good deal.

Jackson turned toward the end of the opinion to the difference he must necessarily find between this conclusion, on the transfer of destroyers, and the opinion he rendered on the mosquito boats. Once again, the Attorney General rejected the suggestion that there was any doubt in the matter. It was “clear,” he declared, that the statutes restricted only vessels built or equipped on the order of a belligerent, with the intent that they be committed—or reason to believe that they would be committed—to the service of a belligerent after departure from the United States.<sup>258</sup> Such was not the case with the destroyers. This, too, followed Cohen's July analysis.

#### 4. CRITICISM

It is fair to characterize the reception accorded to Jackson's opinion as critical. Edwin Corwin famously raged that the Jackson opinion was an “endorsement of unrestrained autocracy in the field of our foreign relations, neither more nor less.”<sup>259</sup> He attacked across a broad front, assailing the opinion for engaging with and misreading irrelevant statutory authority. Also critical of Jackson's reliance on the President's “plenary powers,” Edwin Borchard wrote that “it had never heretofore been supposed that the President as Commander in Chief of the Army and Navy could transfer a part of the Navy to a foreign Power.”<sup>260</sup> Herbert W. Briggs called for renewed attention to the raw fact that Congress had acted expressly following the mosquito boat episode to block equipment transfers like these.<sup>261</sup> Briggs also picked up on Jackson's virtual direction to the Secretary of the Navy to adopt a certification standard that was intended to lead to the desired outcome. Quincy Wright was more generous, but from an unexpected direction inconsistent with a core premise of the Administration's position. Granting that the Attorney General's analysis of the United States's neutrality obligations was

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258. *Id.* at 494–95.

259. Edward S. Corwin, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES, Oct. 13, 1940.

260. Edwin Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690, 692 (1940).

261. Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L L. 569, 587 (1940).



“by no means convincing.”<sup>262</sup> Wright argued that the United States was not a neutral state at all, and that the President was free to make the deal in the exercise of his “broad independent powers” in foreign affairs.<sup>263</sup>

In drawing his distinction between the destroyer deal he found lawful and the mosquito boat transfer he had ruled out of legal bounds, Jackson employed a dizzying series of moves to subordinate rigorous legal analysis to the dictates of policy. In opining on how the Secretary of the Navy might judge what was “essential” to national defense, the Attorney General stood back from statutory language in the light of legislative history and insisted on the long view—what might be called the general principle of the matter. One had to be sensible: If the exchange was useful to the country’s defense posture, the Chief of Naval Operations was required to take this decisively under consideration. Then, in dealing with the nettlesome problem of the mosquito boat opinion, Jackson abandoned this long view for a more narrow and technical one, mining statutes and international law for authority governing private or commercial sales—except that the case at hand centrally concerned direct United States government policy and action to aid a belligerent. The principle of the matter then receded into the background, and his opinion applied a deep discount to both the nation’s neutrality obligations under international law and Congress’ enactments to enforce them.

In fact, there was a larger principle at stake that apparently moved Jackson and supplied what was, for him, powerful grounds for his opinion, particularly on the question of the United States’s fidelity to its obligations under international law. Cohen had written in his July draft that Germany had effectively forsaken its rights to full non-belligerent neutrality by the United States, among other nations, by committing aggression against neutrals in violation of its obligations under the Kellogg-Briand Pact.<sup>264</sup> This consideration—not permitting Germany to have it both ways in its relations with neutrals—was both reasonable and moral: “There is no particular merit or morality” in enforcing neutrality for the benefit of a country “which refuses to observe these rules” in its own conduct.<sup>265</sup> In a speech given after the issuance of his opinion the Attorney General elaborated on this view.<sup>266</sup> The world had changed, and along with it the international legal principles governing neutrality: “a state which has gone to war in violation of its obligations acquires no right to equality of treatment from other states . . . It derives no rights from its illegality.”<sup>267</sup>

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262. Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 AM. J. INT’L L. 680, 683 (1940).

263. *Id.* at 680–81.

264. See Letter of July 19, 1940, *supra* note 205, at 10.

265. *Id.* at 11.

266. Robert H. Jackson, *Address at the Inter-American Bar Association*, 35 AM. J. INT’L L. 348 (1941).

267. *Id.* at 354.

Jackson's development of the Cohen argument in this speech was—to the reader inclined to see it this way—resourceful. For example, Jackson cited the Budapest Articles of the Interpretation adopted in 1934 by the International Law Association.<sup>268</sup> This was a learned association, to be sure, but not so clearly one with the authority to articulate binding standards or rules of international law. When Jackson then shifted to a more conventional source of authority, the Kellogg-Briand Pact, he constructed a theory of enforcement out of the Pact's preamble, a move which gave rise to one scholar's observation that “it is not normal to give preambulatory language such operative effects.”<sup>269</sup> Between these steps, Jackson confronted the problem—which he then stepped away from—of defining a limiting principle in identifying the kinds of aggression that function to suspend neutrality obligation. He said simply that there are “flagrant cases of aggression where the facts speak so unambiguously that world opinion takes what may be the equivalent of judicial notice . . . .”<sup>270</sup>

All of this came later. At the time of his opinion, the Attorney General would not commit to this view or express it openly.<sup>271</sup> It was similar in this respect to his careful handling of preclusive executive authority. This latter rationale was touched on, and then disclaimed as in any way central. Jackson was steering his opinion around points of high sensitivity for the Congress. The Administration may well have understood that Congress was unlikely by September 1940 to go to battle over the transfers. He saw no reason in framing his case to risk provoking that confrontation.

### C. ASSESSING THE PROCESS AND SUBSTANCE OF THE JACKSON OPINION: THREE KEY QUESTIONS

The process by which the Administration's legal position was formulated can be subjected to the same questions raised about the performance of lawyers during the Cuban Missile Crisis.

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268. *Id.* at 355, n.5.

269. Robert J. Delahunty, *Robert Jackson's Opinion on the Destroyer Deal and the Question of Presidential Prerogative*, 38 VT. L. REV. 65, 82 (2013).

270. Jackson, *supra* note 266, at 356.

271. Others supporting the Roosevelt policy had publicly avowed a similar view. Henry Stimson argued in 1932 that traditional neutrality principles required reconsideration and revision in light of obligations of signatories to the Kellogg-Briand Pact to resist aggression. See Stuart L. Weiss, *American Foreign Policy and Presidential Power: The Neutrality Act of 1935*, 30 J. OF POL. 672, 674 (1968). It was not at the time a settled or generally accepted view. The Espionage Act enforced United States obligations under The Hague Convention, Article 6 of which prohibited “the supply in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever.” Convention Between the United States and Other Powers Concerning the Rights and Duties of Neutral Powers in Naval War, art. 6, Oct. 18, 1907, 36 Stat. 2415, 2428 (entered into force for the United States on Feb. 1, 1910).

1. WHICH LAWYERS WERE BROUGHT IN, AND WHEN, IN THE DECISION-MAKING PROCESS?

The bases-for-destroyers process was from beginning to end policy-driven and, at least in the conventional meaning of the term, “political.” The lawyers, beginning with Benjamin Cohen, were never really “brought in,” but were active participants in a policy debate they feared would suffer for want of legal ingenuity in justifying the right outcome. Cohen lobbied the President for the position that, with some revisions, Robert Jackson later adopted. The President balked, not so much because the legal arguments lacked force, but because, in the political conditions of the moment, they lacked credibility. He could not sell them to the Congress, perhaps also not to the public. As Assistant Solicitor General Townsend advised Jackson, the success of the Administration’s case for unilateral action would depend on favorable public opinion. If the public could be brought to the Administration’s side, arguments like the one that Acheson and Cohen devised for publication in the *Times* would suffice.

2. WITH WHAT DEGREE OF INDEPENDENCE WERE THEY GIVEN THEIR CHARGE OF DEVELOPING LEGAL ADVICE?

It is difficult to assess the independence the lawyers were afforded to reach conclusions on the merits. The most senior lawyers, certainly Jackson, understood that the President had no use for “legalisms.” Roosevelt was direct on that point and meant what he said, as Acheson well knew. Heads would roll if the lawyers could not find a way for the President to do what he thought needed to be done. The performance of lawyers in the bases-for-destroyers case did not reflect an expectation of independence in the rendering of their legal judgment.

The Jackson opinion was a highly political document in the sense that it conceded none of the difficulties of which the lawyers were well aware. The language chosen to present conclusions was conclusive, unequivocal: adjectives like “clear” and “inescapable” and “obviously” populate the analysis. The document was constructed to meet the requirements of advocacy. The lawyers were making the case for the Administration’s policy; the uncertainties of the analysis gave way to the urgency of the Administration’s political and policy goals.

And then there is the matter of Roosevelt’s direct involvement. Jackson shared the draft of his opinion with Roosevelt, who then introduced into the text handwritten edits.<sup>272</sup> Roosevelt, neither a lawyer nor a layman much impressed with legal reasoning, was engaged in a political vetting—a clear indication of the primary use the document was expected to serve. His involvement extended, remarkably, to striking precedents he regarded as of “dubious value.”<sup>273</sup>

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272. JACKSON, *supra* note 234, at 97–98. See the handwritten draft with the FDR edits in ROBERT HOUGHWOUT JACKSON PAPERS, (on file with the Library of Congress, Washington, D.C.).

273. JACKSON, *supra* note 234, at 98.

3. HOW WAS THE ADVICE RECEIVED, WEIGHED, AND INCORPORATED INTO THE ADMINISTRATION'S LEGAL POSITION AND PUBLIC PRESENTATION?

The question of how the Administration built legal advice into its deliberations on the proposed transfer is hard to answer on the historical record, if only because the lawyers of central importance—Cohen, then Acheson—provided a legal position that the President did not at first consider to be politically viable in the then-prevailing state of public opinion and of his relations with the Congress. When political conditions changed, there was then room to adjust the standards for the legal defense of unilateral action. In effect, Roosevelt imagined, as he did in similar cases, that lawyers could generate the needed rationale, and turned to them when the political moment was right. The decision had been made; now the lawyers had to do their part, and they did.

There is one respect in which the lawyers might be seen to have obtained an adjustment in policy in return for a favorable legal analysis. The Administration had contemplated a sale, the premise of the original draft. Later the Administration and Great Britain negotiated the deal as an exchange, with the United States receiving a long-term right of access to British bases in the Atlantic and the Caribbean. This revision bolstered the case that the exchange as a whole would strengthen the United States's defenses and supported the Secretarial certification required by the Walsh Amendment.

The evidence suggests that the revision did not reflect a technical legal concern about a sale transaction. Other political considerations, namely public opinion and congressional sensibilities, made it advantageous to the Administration to show or claim that it had gotten more out of the deal—specifically, enhanced the United States's defense overall. But the core line of argument in July and the Administration's position as formally set out in the Jackson opinion applied equally to sale and exchange. In both cases, the lawyers were prepared to state that the aid to Great Britain was in the United States' self-interest, a boon to its defense. Little in the record indicates that had the Administration not negotiated the exchange, and had the transfer been structured differently, the lawyers would have balked.

Jackson disputed in his posthumously published memoir that his legal position was “made-to-order.”<sup>274</sup> He believed that the mechanism of an exchange placed the legal position of the government “in very different legal light.”<sup>275</sup> But less clear is whether the exchange affected the course the legal analysis would have taken if the deal over the bases had not come to pass. The Attorney General appreciated that the lawyers' work from May to September occurred during a “critical period in American history.”<sup>276</sup> With Congress unwilling to support the President's resort to more active actions against the Axis, the “internal policy”

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274. *Id.* at 91.

275. *Id.* at 89.

276. *Id.* at 82.

shifted to “independent executive action.”<sup>277</sup> The Administration nonetheless had to take care with the means employed, for political reasons. Roosevelt told the Attorney General that Prime Minister Churchill appeared not to understand that even if he possessed the legal power to make an outright gift of the destroyers, “it would not be politically possible.”<sup>278</sup>

Robert Jackson did what he believed the circumstances called for: to “go a very long way to find authority to sustain that kind of an exercise of power where the congressional process seemed stalled.”<sup>279</sup> He could claim credit for tightening the Cohen presentation on July 11th, organizing the opening without the latter’s rhetoric about the “foresight” required in emergency conditions to protect the national interest. He went directly to the question of whether the president could enter into the exchanges as an executive agreement. He improved on Cohen’s structure and introduced some rigor into the presentation of his legal theory, but the theory remained in essence precisely as Cohen had fashioned it. Indeed, the Attorney General never fundamentally disagreed with Cohen, describing the July draft as “well-thought-out” and “well-reasoned.”<sup>280</sup>

In following Cohen so closely, Jackson appeared moved by Cohen’s conviction that, as he wrote in another context, it would be wrong to allow “the letter which killeth destroy the spirit which giveth life.”<sup>281</sup> In his work to give legal life to the bases-for-destroyers exchange, Cohen managed to stretch the law to do what he thought was right, and he persuaded Jackson to do the same.

Two years later, Cohen’s view led him to affirm the constitutionality of the wartime internment of Japanese Americans.<sup>282</sup> A memorandum he co-wrote embraced the broad proposition that “actions truly necessary for the national security cannot be lightly assumed to be barred under a Constitution ‘intended to endure for ages to come’ . . . .”<sup>283</sup> This was a different kind of policy, and it was not destined to be judged favorably in the years ahead, but in his justification of it, Cohen relied on the same reasoning he brought to the defense of the bases-for-destroyers exchange.

#### D. STANDARDS FOR INTERPRETATION

Cohen, Jackson, and Acheson were all brilliant lawyers capable of making whatever they could of a difficult assignment. However, this intellectual agility only goes so far. A well-structured but tendentious and erroneous legal analysis is

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277. *Id.*

278. *Id.* at 90.

279. *Id.* at 48.

280. *Id.* at 95.

281. BENJAMIN V. COHEN PAPERS (on file with the Library of Congress, Washington, D.C.).

282. Memorandum from Benjamin Cohen, Oscar Cox & Joseph Rauh on the Japanese Situation on the West Coast (Feb. 10, 1942), in BENJAMIN V. COHEN PAPERS (on file with the Library of Congress, Washington, D.C.).

283. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819)).

certainly superior to a poorly presented argument with the same flaws. Craft values are not unimportant. Yet the Jackson bases-for-destroyers opinion, like the Meeker theory embraced by Chayes, was wrong. The record shows that the lawyers were not mistaken or deluded about the quality of their work, if quality is defined by adherence to high standards of transparency, rigorous logic, and careful treatment of the relevant authorities.

That Jackson believed that he was acting in good faith begs the question of what, for this purpose, good faith consists of. It is hardly enough to say that it is tantamount to belief in the soundness of the policy that the advice serves. United States's policy toward Great Britain in 1940 was conceived and pursued with admirably good intentions—it was, William Casto has said, morally and politically defensible “to ignore the law in order to enable the President to assist Great Britain in a life-or-death struggle against Nazi Germany.”<sup>284</sup> It is also difficult to dispute the shallowness, not to say the dangers, of a conception of law so dependent on an agreement about the particular policy aims under legal review.

“Good faith” can also be equated or associated with lawyers doing their best—taking seriously their construction of the legal case. This view is closely related to the emphasis placed on a thoroughgoing process for reviewing legal options.<sup>285</sup> Law then does “count” because it is not overlooked or slighted in the policy process. The lawyers are consulted, their work is discussed and revised, and here and there, the process may result in an adjustment of some kind to the policy to facilitate legal clearance.

This process defense is important, especially where a government modifies a policy in substance to address legal requirements. Of course, there was no such modification in the bases-for-destroyers episode, in which the switch to an exchange was promoted by political considerations. Thus, the rest of the “process” consisted of engaging the lawyers in providing a defense for policy without the promise, and hardly the commitment, that any of it would amount to much on the merits. With its attention to sheer activity among lawyers—the generation and discussion of drafts—it appears somewhat like an “A” awarded for effort.

One cost of all this activity is candor, as in the Jackson opinion's focus on the presidential objective of acquiring bases for which the destroyers would be due consideration. Working hard to get an opinion right is a virtue. Working hard to mask its deficiencies is what is reasonably expected of, and even admired in, an advocate. But once the skilled advocate is done, he or she might risk suspicion of being, like the client, a “duplicitous schemer.”

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284. Casto, *Advising Presidents*, *supra* note 199, at 135.

285. David Barron refers in the Jackson case to “all the meetings [that the Attorney General] had sat through, all the legal wrangling he had engaged in, all the theories he had seen rejected, and all the revisions to the final deal that had been made.” BARRON, *supra* note 187, at 252. The record suggests that much of this time the participants in the debate were attempting to work the politics in their favor, or to await the moment when it would swing their way. And, as noted, the key revision—the exchange—was a product of political judgment about what was to be needed to make the sale.

### III. WHAT IS THE LAWYER TO DO?

#### A. THE QUESTION OF INTERPRETIVE STANDARDS

Lawyers called upon to exercise professional and independent judgment when policy imperatives are at their most acute face a hard task. They might remain “in the game,” to borrow from Omar Little’s characterization, participating in the policy process, but as professionals, they are not to allow the quality of their advice to suffer from end-justifies-the-means reasoning. Today’s Office of Legal Counsel affirms that executive branch lawyers may remain lawyers for a client in this facilitation role, but their work still requires them to determine “an accurate and honest appraisal of applicable law.”<sup>286</sup> The lawyer must adhere to a “principled, forthright” analysis<sup>287</sup> even if it “constrain[s] the Administration’s . . . pursuit of desired practices or policy objectives.”<sup>288</sup> And this standard—or best practice—is binding irrespective of the character of the legal question presented: this is “always” the lawyer’s responsibility.<sup>289</sup> The obligation remains to find a best view of the law.

In moments of national security “crisis,” the lawyer is then stuck with difficult choices: stretch to the snapping point any license to “facilitate,” risk marginalization in the policy process, or complicate if not obstruct the policymakers’ capacity to pursue the course deemed to be in the nation’s security interest. National security legal policy, Charlie Savage has written, “occupies an indistinct space between what *should* be done and what *can* be done.”<sup>290</sup>

With particular intensity in the controversies over these matters in the second Bush Administration, scholars have devoted considerable attention to the overarching question of law’s constraining effect on policy formation, and also to the way lawyers in counseling their clients can provide for whatever constraints law can supply.<sup>291</sup> The Obama Administration revised and reposted the OLC Statement of Best Practices to clarify the office’s professional standards.<sup>292</sup> How can lawyers succeed in achieving facilitation of their principal’s objectives while advancing and arguing for reliance on the “best understanding of what the law requires”?

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286. OLC Statement of Best Practices, *supra* note 4, at 1.

287. *Id.* at 2.

288. *Id.* at 1.

289. *See id.* at 2.

290. CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 38 (2015).

291. *See* ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010) (arguing that law does little to constrain the modern executive and that politics serve as an effective check on the presidency); Richard Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (critiquing Posner and Vermeule and arguing that “law” and “politics” are not distinct concepts and that each operate to prevent executive lawlessness); Curtis Bradley & Trevor Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013) (exploring what it means for law to constrain the Presidency and arguing that “constraint” should be understood to mean when law exerts force on presidential decision-making as a result of its status as law).

292. *See* OLC Statement of Best Practices, *supra* note 4.

Scholars could grant, as does Professor Peter Margulies, that this was a major challenge for lawyers faced with the “urgency of national security matters.”<sup>293</sup> Still, “too often” lawyers get it wrong,<sup>294</sup> as Margulies believed that the Bush Administration lawyers did, exhibiting “disregard for law.”<sup>295</sup> The key for Margulies is a kind of “judgment,”<sup>296</sup> and the exercise of that judgment in exigent conditions with attention to particular factors: 1) open dialogue with other institutional actors, including looking for opportunities for post-action ratification; 2) weighing whether a proposed outcome would yield a “net positive aggregate of institutional consequences,” considered in the long and medium term;<sup>297</sup> and 3) harmonizing executive policy with evolving domestic and international norms. What Margulies has in mind is something akin to “good faith modifications of existing law.”<sup>298</sup>

The Margulies thesis would focus the lawyer on the inevitability but also the limits of proverbial “envelope pushing.” He would not question that lawyers may have to occasionally engage in it. More important to him is that lawyers take the consequences of this “envelope pushing” seriously, fully conscious of what they are doing and willing to reckon with the effects. The obligation of the lawyer in these circumstances is in part to adopt sound procedures and engage with other institutional actors. The more complicated expectation is “judgment,” which by definition, is always hard to exercise skillfully. Few lawyers are equipped to reliably gauge the “net positive aggregate of institutional consequences,” viewed in the intermediate or long term.<sup>299</sup> Whether they have succeeded is rarely easy to evaluate in hindsight with anything approaching consensus.

Other scholars have tried to define the line marking the difference between a respectable and an indefensible legal opinion. Dawn Johnsen has taken the second Bush Administration to task for departing from a “best view” ethos and resorting to “extreme” legal interpretations.<sup>300</sup> It is not enough for a legal position to be “merely plausible,” according to Johnsen,<sup>301</sup> or merely “reasonable.”<sup>302</sup> The

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293. Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 *FORDHAM INT’L L. J.* 642, 644 n.8 (2006).

294. *Id.* at 642.

295. *Id.* at 646.

296. *Id.* at 643.

297. *Id.*

298. *Id.* at 662.

299. *Id.* at 643.

300. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1560, 1563, 1585–86 (2009) [Johnsen, *Faithfully Executing the Laws*].

301. *Id.* at 1580.

302. Dawn Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 *HOUS. L. REV.* 1065, 1076 (2016) [hereinafter Johnsen, *When Responsibilities Collide*]. Johnsen notes my endorsement on an earlier occasion of a standard of “reasonable, good faith” interpretation, but finds that, like the others cited critically, it “would risk encouraging government lawyers to push the envelope of acceptable legal practice.” *Id.* at 1077.



aim is a view of the law that is the “best, most accurate.”<sup>303</sup> Johnsen’s concern is largely with OLC’s performance under policy pressure, and the “best, most accurate” standard tracks the best practices that OLC has published.

How, then, does a lawyer decide when she has arrived at this “best view”? As Randall Moss has written, the determination might be “exceedingly difficult,” and in any event, “compelling arguments might support opposing conclusions.”<sup>304</sup> In the end, like a judge, the lawyer must decide which of the choices is “best,” selecting the most “coherent” of the possible treatments of the principles and precedents.<sup>305</sup> Moss writes that “if there exists a best view of the law that judges are capable of finding through reasoned analysis, then there is no reason to conclude that executive branch lawyers are any less able, or under a lesser duty, to do so.”<sup>306</sup>

This analogy to judging has its limitations. It overlooks the long history of judges, most markedly in national security cases, finding ways to defer to executive judgment.<sup>307</sup> It exhibits a key feature of this school of thought: when all is said and done, the view that is best is the one the OLC lawyer has adopted. The source of law—an appeal to OLC’s institutional authority—is decisive. It is this same feature that, in a crisis setting in which there are reasonable and maybe even compelling alternatives, is sure to give pause to the policymaker and his or her other legal advisers.

Rosa Brooks has come away from her senior legal advisory experience at the Department of Defense confident that while the rules of legal interpretation are sometimes “ambiguous,”<sup>308</sup> there are clearly “illegitimate and unethical forms” of legal interpretation.<sup>309</sup> Faulty legal reasoning involves “ignoring and selectively misreading various relevant texts in order to reach a predetermined outcome,” and the use of “selective and misleading citations and odd logical steps.”<sup>310</sup> At this point, a reader might be forgiven the reaction that he has seen objections worded much the same way in one advocate’s brief’s attack on another—or in dissenting opinions from Justices of the Supreme Court. Brooks insists, however, that there are discernible boundaries that mark off “permissible” from “impermissible” interpretations,<sup>311</sup> and she offers an analogy to playing

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303. *Id.*

304. Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1322 (2000).

305. *Id.* at 1321.

306. *Id.* at 1322.

307. For a critique along these lines, see, e.g., Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CAL. L. REV. 2203, 2208 (2007) (arguing the “disastrous” history of the courts’ inclination to be “highly deferential” in the national security context “so long as the government could offer a reasonable explanation for its actions”).

308. ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* 201 (2016).

309. *Id.*

310. *Id.*

311. *Id.*

hard within the rules, or cheating, in sports. The sport she chooses for illustrative purposes is tennis, where “calling a ball ‘in’ when you know it landed outside the baseline is cheating . . . .”<sup>312</sup>

The Brooks analogy first prompts the question of how usefully lawyers can repair to an intent-based standard that looks to whether the lawyer knows he is cheating. Few lawyers will admit to it because most, one can safely assume, do not believe they did it. Robert Jackson defended his performance on a record that would not seem particularly helpful to his case. Abram Chayes’s book-length justification of his team’s legal work on the quarantine runs into similar problems. When John Brennan, President Obama’s Special Assistant for Counterterrorism, then CIA Director, remarked in 2011 that lawyers never failed in his experience to supply a rationale for a policy that its author believed to be in the national interest,<sup>313</sup> it would have been rash to conclude that all or most of these lawyers were intent on “cheating.” Legal education promotes self-confidence more than it fosters introspection, and the very best lawyers are often the most self-confident.

The Brooks analogy also attempts to establish that in law, as in tennis, the baseline is fixed. Tennis is played within lines specified by rule, but in law, the main argument is often about where any such line should be marked off. The “game” of law pictured by Professor Brooks is one in which each team asserts its own claims about where that line is located. Then there typically follow additional contentions about whether the activity in question is within or outside the line, or (in Brooks’s words) on “the edge of the permissible.”<sup>314</sup>

A chief complaint registered about executive branch lawyers, primarily those within the Office of Legal Counsel, is that they rely on baseline-setting to tilt the game in the executive’s favor. They might profess a “best view of the law,” but it is also, as Trevor Morrison has written, a “best view” from *within* the executive branch, where the lawyers work with precedent developed within that branch and reflecting its “institutional traditions and competencies.”<sup>315</sup> Stated differently, the best view “is not the best view in any *decontextualized* sense.”<sup>316</sup> OLC lawyers give “special weight to certain executive sources of legal meaning.”<sup>317</sup> The game they play is the same, but played on a court built to executive branch specifications.

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312. *Id.* Brooks argues that in making the sweeping case for presidential authority in wartime conditions, including the authority to set the terms for interrogation, the Bush Administration made a “game-ending move,” in effect announcing that there were no rules by which the President would have to play or under which he would lose. *Id.* at 202.

313. SAVAGE, *supra* note 290, at 278–79, 484.

314. BROOKS, *supra* note 308, at 201.

315. Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1715 (2011) [hereinafter Morrison, *Constitutional Alarmism*].

316. *Id.* at 1714 (emphasis added).

317. *Id.* at 1717.

## B. THE LAW-POLICY INTERPLAY

While the battle over baselines can reflect jurisprudential perspectives, it also reflects major differences over policy preference or priority. This is always a factor at work in lawyering, but in national security policy—on questions of war or peace, life or death—lawyers come under particular pressure to establish a favorable “baseline” from which the legal analysis of particular facts can proceed in effectuating, if at all possible, a particular policy.

The pressure exerted by policy imperatives on the legal analysis necessarily increases or decreases in proportion to the perceived urgency of the policymaker’s objectives. Bush Administration lawyers who were convinced of the necessity of strong presidential power in national security were willing to take their chances on strained or aggressive interpretations. 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. They, too, have been influenced in their view of the law by their concerns over the substance of the policy. This can be seen, for example, in critiques of Bush Administration policies on surveillance or “enhanced interrogation techniques” (EIT) that persistently contest their practical effectiveness as well as their moral deficiency.<sup>318</sup> This critique held that EIT was bad policy because it did not work, but also because it was immoral, at odds with America’s values as well as its long-term interests. The legal authority cited for EIT has met with especially hard, skeptical questioning, which these critics easily concluded it would not sustain.

Karen Greenberg supplies useful examples of the interplay of legal and policy considerations in her sharp attack on the legal architecture of the Bush Administration’s “War on Terror.” She holds the government’s lawyers responsible for “specious legal reasoning,” “opinions that were deeply flawed,” and “strained and cynical readings of the law” in legally ratifying the EIT and Stellar Wind surveillance programs.<sup>319</sup> She is clear in her view that the evaluation of the legal work must be tested against the moral and other qualities of the policy goals. In the case of the War on Terror, these goals were “troublesome” in their skewing of the balance between security requirements and protection of civil liberties.<sup>320</sup> In Greenberg’s analysis, the law can make only somewhat of a difference in how we should view this conflict. Critiquing John Yoo’s analysis of EIT techniques, she stresses that a highly legalistic defense only underscores the problem that arises when “legality, regardless of morality or harm, becomes the focus of

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318. S. REP. NO. 113-288 (2014); “*Torture Doesn’t Work*” is Big Takeaway of CIA Report for Sen. Feinstein, PBS NEWSHOUR (Dec. 9, 2014), <http://www.pbs.org/newshour/bb/torture-doesnt-work-big-takeaway-cia-report-sen-feinstein/> [https://perma.cc/4YZ5-LADA]. John Yoo was quick to put the disagreement on that ground: “[T]he Feinstein report has one positive virtue: It has moved the debate beyond legality to effectiveness.” John Yoo, *Diane Feinstein’s Flawed Torture Report*, L.A. TIMES (Dec. 13, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-yoo-torture-feinstein-20141214-story.html> [https://perma.cc/K9Z9-L66S].

319. KAREN J. GREENBERG, ROGUE JUSTICE: THE MAKING OF THE SECURITY STATE 112–13, 118 (2016).

320. *Id.* at 118.

inquiry.”<sup>321</sup> Improved legal work would only make the policy with its moral shortcomings “less heinous.” It would not do to rely, as did Yoo, on just contriving “plausible [legal] cover” for what Greenberg describes as “rogue policies.”<sup>322</sup>

Sometimes, the underlying policy disagreement is obscured by the tendentious presentation of one view as principled and the other as result-oriented. Consider the recent debate between Dawn Johnsen and Harold Koh over the latter’s proposed reading of a “humanitarian exception” into the War Powers Resolution.<sup>323</sup> There is unquestionably an argument between the two over whether the demands of policy require a hard shove against legal limits through a common-law interpretation of Congress’s legislative plan or intention. Whether the push comes to shove implicates policy judgments, sometimes understood as a prediction of Congress’s likely choice, if presented with it, to include or exclude the contested exception.

Professor Johnsen believes that an expansive reading of presidential authority along the lines favored by Professor Koh is “bad policy.”<sup>324</sup> She believes that strict enforcement of the Resolution’s sixty-day clock serves to “promote Congress’s broad involvement in the prolonged use of military force,”<sup>325</sup> and that Koh “too quickly dismisses the value of requiring presidents ‘to keep their interventions short.’”<sup>326</sup> She also contends that Congress intended this broad involvement, and so this is as much a legal as it is a policy judgment. But she also believes that in judging the existence of “hostilities” for purposes of that clock, the loss of any life—not just American life, implicating congressional concern with a Vietnam-level engagement—is relevant, and her reasons are policy-based. To construe the law otherwise, she writes, would be “perverse,”<sup>327</sup> and “in addition to the moral imperative of valuing all human lives taken, the United States’s reputation and standing in the world depends dearly on this factor.”<sup>328</sup> Here Professor Johnsen’s legal position seems enmeshed with policy considerations of the kind that she might say Congress should insist on in enforcing the limits on executive military engagement in “hostilities.”

Law and the lawyer’s work come predictably under this pressure to rise to the moral occasion, or to meet the requirements of sound policy on matters of high seriousness. Roosevelt’s lawyers in 1940 thought they understood clearly the compelling reasons for bolstering British defenses against Nazi aggression. To them, the choice was between civilization and barbarism, even before any

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321. *Id.* at 105.

322. *Id.* at 40, 170.

323. See generally Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 *HOUS. L. REV.* 971 (2016); Johnsen, *When Responsibilities Collide*, *supra* note 302.

324. Johnsen, *When Responsibilities Collide*, *supra* note 302, at 1087.

325. *Id.* at 1102.

326. *Id.* at 1088.

327. *Id.* at 1096.

328. *Id.*

practical consideration of the requirements of American self-defense. Kennedy's lawyers, too, were responding to the directive that they provide the rationale for an American military action on which depended the world's hope of averting nuclear conflagration. It can be fairly said of these lawyers, as Greenberg describes the Bush Administration lawyers, that they went about "massaging and distorting and sometimes just plain disregarding the laws they were supposed to uphold."<sup>329</sup>

It is on just such moral and other high-stakes matters that agreement is not easily achieved. In Roosevelt's case, and less so but still to a considerable degree in Kennedy's, the presidents 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.

The recent Chilcot Inquiry into the British decision to go to war in Iraq in 2003 offers a powerful example of the problems faced in settling on a lawyering standard without regard to the sphere of policy within which the lawyer is advising.<sup>330</sup> The Inquiry harshly criticized the British government's policy to join the United States in the "coalition of the willing" without explicit U.N. authorization—the so-called "second resolution." It reviewed the lawyering on which the government relied, and while critical of various aspects of internal processes and public communication, the panel stopped short of second-guessing Attorney General Peter Goldsmith's substantive legal advice. It declined to decide whether the correct standard for interpretation was one of "reasonableness,"<sup>331</sup> which the Attorney General testified was no different from a "respectable legal argument."<sup>332</sup> It also did not take issue with the Attorney General's decision, later in the prewar period, to present the reasonable position he adopted as the "better view,"<sup>333</sup> even though Lord Goldsmith had made it clear to Prime Minister Blair that the "safer" course was to seek the second resolution.<sup>334</sup>

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329. GREENBERG, *supra* note 319, at 5.

330. 330. See THE REPORT OF THE IRAQ INQUIRY (2016), <http://www.iraqinquiry.org.uk/the-report/> [<https://perma.cc/6RL3-TEAC>] [hereinafter IRAQ INQUIRY]. The Section (Section 5: Advice on the Legal Basis for Military Action, November 2002 to March 2003), dealing with the performance of the Blair Government lawyers can be found at [http://www.iraqinquiry.org.uk/media/246506/the-report-of-the-iraq-inquiry\\_section-50.pdf](http://www.iraqinquiry.org.uk/media/246506/the-report-of-the-iraq-inquiry_section-50.pdf) [<https://perma.cc/5SJJ-4F2S>].

331. *Id.* at 100.

332. *Id.* at 103.

333. *Id.* at 166.

334. *Id.* at 164. Lord Goldsmith testified that the Armed and Civil Services who had requested a "yes" or "no" answer on legality, concerned with the liability of their personnel, "deserved more . . . than my saying that

The reasons for the Inquiry's suspension of judgment are not altogether clear. One critic, Philippe Sands, characterizes it as "self-restraint" on a "delicate matter," and suggested that the panel was not equipped with lawyers who could have counseled on the central legal question.<sup>335</sup>

But the Inquiry did have ample legal analysis on the record, and these views were overwhelmingly critical of the Goldsmith opinion. "Self-restraint" is not a likely explanation for the panel's refusal to take a stand. An alternative explanation, with more support in the record, is that the Inquiry concluded that while law and legal process mattered, its central focus should remain on the Blair government's policy—on the policymaker, not a lawyer. The government was not wrong, the Inquiry concluded, to expect that senior lawyers would be "positive and constructive"<sup>336</sup> in helping the government achieve its policy objectives. The policy presented an altogether different question.

Most significant, the Inquiry took note of the recent history of national security decision-making, closely considered by the Attorney General, in which "respectable" or "reasonable" legal arguments were deemed adequate to support use of force decisions.<sup>337</sup> In other words, lawyers were given considerable room within which to work toward a conclusion helpful to the policymakers. The Inquiry placed the responsibility for policy failure on the policymaker, confining its direct criticism of the legal work to the process by which the decision was reached and the transparency and timeliness with which it was provided to the cabinet, the parliament, and the public.

In the American "best view" school, policy may, or may not, impinge upon the legal decision-making process in two ways. First, if there is an alternative route to the executive policy preference, one that can be traveled without abandoning the best view standard, the lawyer is free—indeed obligated—to pursue it, in the interests of facilitating the key policy choice.<sup>338</sup> Second, it is generally accepted that the lawyer should distinguish carefully between law and policy, and in the end, if the issue is committed to policymaker discretion, by statutory command or by operation of the *Chevron* doctrine, the lawyer should not in the guise of legal interpretation withdraw the decision from the policymaking machinery. The best view does not, however, 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

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this was a reasonable case." So, he felt compelled to "come down clearly on one side of the argument or the other." *Id.* at 127.

335. Philippe Sands, *A Grand and Disastrous Deceit*, in 38 LONDON REV. OF BOOKS 9 (2016).

336. IRAQ INQUIRY, *supra* note 330, at 66.

337. *Id.* at 104–05.

338. See OLC Statement of Best Practices, *supra* note 4, at 2; Moss, *supra* note 304.

[than the best view] is fundamentally inconsistent with the concept of law itself.”<sup>339</sup>

To say that the nature of the divisions over national security lawmaking comes into clearer focus when those decisions are located more within policy than within law is not by means to suggest that there is no such thing as bad or sloppy legal work.<sup>340</sup> Lawyers responsible for deficient technical performance can exacerbate controversy over bad policy. They may also make the policy worse, by failing to clarify for the policymakers the moral or legal considerations. Assume, however, that better lawyers can be found, as is so often the case, to do as Meeker, Cohen, Jackson, and Acheson did: produce work which is roundly criticized as wrong, but nonetheless said by some scholars to be “brilliant.” Does a strained and cynical reading of the law, while also brilliant, satisfy craft standards and provide what Newman Townsend characterized as “permissible”?<sup>341</sup> Is the difference one that, in Karen Greenberg’s words, comes down to a tone or texture of “care and sobriety,” execution that is more “polished,” with the result remaining the same?<sup>342</sup>

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.

So William Casto can write that while as a technical legal matter, Robert Jackson’s opinion on the bases-for-destroyers exchange was wrong, “he should be praised for it.”<sup>343</sup> Robert Delahunty can acknowledge that Jackson offered statutory interpretations that were “unimpressive and unconvincing,”<sup>344</sup> cited case law that “did not remotely support” his position,<sup>345</sup> and strayed far from the legislative intentions behind the Walsh Amendment,<sup>346</sup> and yet, for all that, still suggests that Roosevelt’s attorney general should be credited with a “defensible, even plausible” construction of law and commended for being “pragmatic.”<sup>347</sup>

Of course, Jackson may also have received the benefit of the doubt because he was, after all, Robert Jackson, and to charge him with bad faith, with truly errant lawyering, may seem too much. For any “rule that would land Jackson or others

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339. Moss, *supra* note 304, at 1327.

340. This attention to policy is, moreover, a primary ground of the objections to the design of the decision-making process, as in the secretive development of the Yoo legal opinion in coordination with the Vice President’s office and outside normal review channels. The challenge to the lack of transparency or regular order is one route by which the defensibility of the policy is scrutinized. It is believed, by no means without justification in all cases, that governments determined to hide their activities may have reasons to fear that the policy surreptitiously pursued might not withstand public scrutiny or debate.

341. August 13th Memorandum from Newman A. Townsend, *supra* note 229, at 226.

342. GREENBERG, *supra* note 319, at 121.

343. Casto, *Advising Presidents*, *supra* note 199, at 9.

344. Delahunty, *supra* note 269, at 88.

345. *Id.* at 87.

346. *Id.* at 88.

347. *Id.* at 100.

in ethics trouble for a legal opinion cannot be the right rule.”<sup>348</sup>

But, policy weighs heavily in the accounting. There is, if not consensus, at least decisive majority support for the wisdom of the policy Jackson facilitated. Neither Lord Goldsmith, nor other government lawyers involving in advising on controversial Bush and Blair counterterrorism and war policies, can count on widespread support for those policies to help shape favorable assessments of their legal work.

### C. INDEPENDENT ADVICE: THE PROGRAM AND POLITICS OF “PROCESS”

Scholars and commentators concerned with “rule of law” structures in national security decision-making have also argued the centrality of a disciplined decision-making process to principal legal analysis. At issue is the integrity of those structures which, in turn, strengthen the conditions in which a “best view,” or similarly creditable legal position, can be formulated.

The argument for rigorous process, in essence “regular order,” is that it assures the consideration of the full range of views.<sup>349</sup> It also protects against undue secrecy and irregularity that can raise the risk, or exacerbate the appearance of the risk, of executive overreach.<sup>350</sup> Questionable conduct may flourish in the shadows. Bad process invites bad law.

These arguments at their highest level of generality can be met with no serious objection. The hardest question, as always, is one of application. It is well understood that particular process designs can be closely aligned with—and indeed intended to favor—particular outcomes, and that control of process is a regular ground of bureaucratic struggle. In the conflicts over national security law, the insistence on an ideal form of process relates closely to a particular vision of the role of the lawyers, and the manner in which legal analysis folds into the policy-making process. It is a vision of the “best view” as opposed to lesser, more result-

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348. Goldsmith, *supra* note 200, at 200.

349. In its review of the “torture memos” episode, the Department of Justice’s Office of Professional Responsibility Report stresses this point as a key “institutional concern.” DEP’T OF JUSTICE OFFICE OF PROF’L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF ‘ENHANCED INTERROGATION TECHNIQUES’ ON SUSPECTED TERRORISTS 260 (2009), [https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729\\_OPR\\_Final\\_Report\\_with\\_20100719\\_declassifications.pdf](https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf) [<https://perma.cc/ZJ5B-VF2G>] (finding that OLC’s position should have been widely circulated to “all attorneys and policy makers with expertise and a stake in the issues involved,” and the failure to do so “added to the failure to identify the major flaws in OLC’s decision”).

350. Jack Goldsmith notes that the so-called “War Council,” assembled by the Office of the Vice President, was a “secretive five-person group” that operated without the regular involvement of key legal officials, such as the State Department Legal Adviser, and “sometimes to the exclusion of the interagency process altogether.” GOLDSMITH, *THE TERROR PRESIDENCY*, *supra* note 8, at 20. The same criticism has been directed at the process reported to have been adopted to develop legal advice for the President in connection with the 2011 Libya operation. *See, e.g.*, Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), [http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html?\\_r=0](http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html?_r=0) [<https://perma.cc/82ZD-TPMC>] (criticizing the “increasingly politicized methods White House lawyers are using to circumvent established law”).



oriented views, and of substance as opposed to politics and executive self-interest.

In the national security lawmaking debate, these process conflicts tend to play out on two levels—the structure of lawyers’ involvement, and the participants in the legal discussion. The structure of the legal review typically presents the choice of a close integration of lawyers into the policy process, or a more distant, consultative role in which a highly specialized corps of lawyers is asked a question, deliberate, consult as necessary with their “client” on matters of fact or policy detail, and then “return” with their views. The second of these alternatives tends to correlate with the process often thought most appropriate for the role of properly independent lawyers. An OLC model that emphasizes its lawyers’ role as neutral, impartial advisors, whose judgment is independently arrived at, implies limits on their interaction with other policy participants within and outside the White House. OLC counsels are not denied contact with these other participants, including other agency lawyers, but they are not working as members of the same “team.”

This conception of process connects directly to the preferred outcome—legal advice that will constitute the “best view of the law.” OLC’s view cannot be just one of “various legal options . . . treated like competing policy recommendations,”<sup>351</sup> and the process as typically described must uphold both the OLC’s primacy in legal matters and its independence. Without process structured in this ideal form, the prospects for adoption of the “best view” are diminished.<sup>352</sup> So institutional processes become a vital part of maintaining an expectation of “best view” legal decision-making, and the outcome of that process “should be adhered to in all but the most extreme circumstances.”<sup>353</sup> To use the term coined by Professors Posner and Vermeule, this is a procedure for executive “self-binding.”<sup>354</sup>

If, however, the hold of “best view” thinking is relaxed in resolving critical national security issues, it does not follow that all process is dispensed with, or that whatever remains of process must be inadequate. A process could be structured that draws on OLC expertise without granting it the leading role and final say. Inter-agency task forces are not rare, nor in national security crisis management is it unprecedented to establish a special decision-making council or circle. President Kennedy’s Cuba crisis “EXCOM” is one such precedent. It is also not inevitable in such arrangements that the views of other agencies are ignored.

It is natural to imagine and to be concerned that the executive in this situation, when building an ad hoc process, is motivated largely by wanting to get the job

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351. Trevor Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Interpretation*, 124 HARV. L. REV. F. 62, 66 (2011) [hereinafter Morrison, *Libya*].

352. See, e.g., Johnsen, *Faithfully Executing the Laws*, *supra* note 300, at 1595 (noting that OLC process guidelines recommend interpretations “unbiased” by policymakers).

353. *Id.*

354. POSNER & VERMEULE, *supra* note 291, at 137.

done, come what may, and legal considerations are entirely subordinated to this objective. Things are rarely that simple. Assume a good policy—one with the majority support and historical vindication enjoyed by the Roosevelt policy of aiding the Allies in the summer and fall of 1940 (and maybe even the Kennedy Administration’s challenge to the Soviet Union over Cuba in 1962). 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.”<sup>355</sup>

It has been argued that a government that works around the normal process in this fashion surrenders a major advantage, sacrificing long-term institutional interests for short-term gain. An administration benefits from the ability to rely publicly on credible authority for its legal position.<sup>356</sup> When things line up well, and the lawyers can affirm the legality of the key policy, the Administration has secured a powerful source of validation. If, however, the independence of the lawyers is brought into question, and the government wrests from them the assignment, and gives it to lawyers more closely allied with the policy or political wing, policymakers may lose all or most of the value that independent legal decision-making can supply. If still convinced of the necessity of the policy, the President is free to disregard the legal advice or to overrule it, but it goes without saying that this is no small blow to the implementation of the policy, and a major risk to the government.

What the government must do to protect this long-term advantage may exact a heavy cost in pursuing a national security policy that itself is considered critical “long-term.” And the cost is not only that of a particular judgment about the nature of legal advice sufficient to sustain that policy. Within an institutional setting that counterposes a principled “legal” wing to a “political” wing of the government, the policymaker is in the—ironically—politically weaker position. The “best view” could be one of two or more well-supported positions; or one could be the “best,” while others are reasonable and could be argued in good faith. Yet the resolution of the question under best view theory remains firmly in the control of the lawyers. What the “best view” then has going for it is not only its content but also its source: an office or set of lawyers who are independent, “above politics,” which is a position that trumps, politically, the Administration’s own.

The policymaker might be inclined to fear at this point that control over policy has slipped from her hands into those of the lawyers. Moreover, any pressure

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355. Morrison, *Libya*, *supra* note 351, at 69. Professor Morrison uses the term to describe what policy makers may prefer to have from lawyers. Though, he makes it clear that it is not his favored interpretive standard, the “best view.”

356. *Id.*

from policymakers would itself be subject to the concern or allegation that it is “political,” and a threat to the lawyers’ independence. There is no escape from politics in this process, only differences in the points of entry and in impact.

Of course, there are other, not especially wholesome, mechanisms available to the executive in managing the risk. The selection of the right personnel for the independent legal positions is a first line of defense. With the right people in place, “process” can become the aggregation of discussions and meetings and drafts by which lawyers committed to a policy, and to the satisfaction of the policymakers’ demands, arrive at the result that is understood to be necessary. At this point, the process defect can be quickly, disingenuously, cured, with no adverse effect on the policymaker’s goals. There was ample process in Roosevelt’s legal advisory circles in 1940—much discussion and rewriting—but an outcome compatible with the President’s expectation was always clearly in sight. It was, in fact, the very goal of the process. And the lawyers were “on the team.”

#### D. THE PERSONAL EXPERIENCE OF CRISIS LAWYERING

Professor Goldsmith is less specific in his definition of the standard, though he would uphold an OLC institutional ethos of “detachment, professional integrity, and loyalty to the institution and to the law. . . .”<sup>357</sup> In other respects, Goldsmith is closer to Margulies than to Johnsen, putting considerable emphasis on the lawyer keeping in balance the various factors that may be in play. These include the client’s policy preferences and the pull of institutional executive branch authority in the President’s favor. “The challenge for the lawyer who faces these . . . considerations is . . . not to let them get out of control.”<sup>358</sup> This “is more an art than a science.”<sup>359</sup> The right answer is not just out there, waiting to be discovered. Imagining how the analysis will appear to future critics is essential to the task of acting “in a way that you’re going to be able to explain and justify later.”<sup>360</sup>

Various lawyers with senior executive branch experience volunteered to be interviewed off the record for this article, and they would agree that in urgent national security settings, lawyering is indeed more “art than science.” It did not even seem clear how they would communicate precisely, much less establish for themselves, what it would mean to show in future assessment of their work how they kept in balance the various factors weighing on the decisions. They agree that plausibility may fall short as a standard, while the “best, most accurate” alternative may go too far. In the extreme case, where the policy is deemed truly pressing, they might entertain a legal position that was “available”—though the nature of an “available” argument is unclear, other than that it has some colorable

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357. Goldsmith, *supra* note 200, at 196.

358. *Id.*

359. *Id.* at 197.

360. *See id.* at 201.

basis in law. The difference between “available” and “plausible” is similarly undefined.

What, then, is the guide for the lawyer in a critical national security decision-making process? It turns out, in the experience of a number of senior national security lawyers, to be fundamentally personal in nature, consisting of a sense of how far the particular lawyer is willing to go. The limits of tolerance are variously described: what the lawyer can “live with,” what he or she “could put [his or] her name on,” or what he or she could put forward with a “straight face.”<sup>361</sup>

The dilemma lawyers face in these situations may inevitably lead in this direction. Not all legal issues are comparable in gravity, and it is impossible for a lawyer to disregard the differences in defining how far the obligation to “facilitate” extends. The more serious the matter—the more the lawyer faces a “crisis”—the more tension the lawyer will experience between the demands of an honest and accurate legal analysis, and her additional “responsibilit[y]”<sup>362</sup> to facilitate the policymaker’s desired course of action. In deciding whether a facilitating answer can be presented and defended as an honest and accurate interpretation of the law, the lawyer may have no alternative but to look inward.<sup>363</sup>

There are self-evident tensions between the personal judgment lawyers may have to make about a legal position’s feasibility, and the suggestion that they consider how others might see it at some point in the future. The lawyer who is primarily concerned with what she can “live with” is not naturally led to consider what others later might think of her choice. She is writing a professional autobiography, not legal history. For the lawyer seeking to be true to herself—to her professional standards, her values, and her convictions—it should count for little how others might later pass judgment. She might also ask: how can she even successfully predict these later evaluations?

One other technique that national security lawyers favor in addressing these pressures bears mention: the avoidance of any analysis broader than needed to decide the particular issue. By staying “narrow,” the lawyer can light a path for the immediate policy imperative while refraining from building ambitious doctrinal structures or generating overly malleable precedent. This is a virtue, if

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361. Former National Security Agency Counsel Robert Deitz has suggested that lawyers are justified in “looking at any interpretation . . . to see what we could do arguably legally.” An arguably legal position, he elaborated, may not be persuasive but it cannot be “off the wall.” SAVAGE, *supra* note 290, at 181. This judgment of what is “off the wall,” a highly impressionistic standard, seems likely to vary from individual to individual, and once again depends on what the given professional is personally comfortable with.

362. OLC Statement of Best Practices, *supra* note 4, at 2.

363. And there is certainly nothing in this self-examination that raises the kind of questions of bad faith that have come up in recent national security controversies about the quality of national security lawyering. See generally Memorandum from David Margolis, Attorney Gen., U.S. Dep’t of Justice, to Attorney Gen. and Deputy Attorney Gen., Dep’t of Justice (Jan. 5, 2010), <http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolisMemo.pdf> [<https://perma.cc/F7B2-YDKP>] (decision regarding objections to findings of professional misconduct in the matter of the OLC memoranda on the use of “enhanced interrogation techniques”).

lawyers are otherwise inclined to rule in favor of the executive on a close question, or on a question that may not be so close but for which an aggressive interpretation is provided. But this restrained approach, limiting the reach of the analysis, goes only so far to solve the problem—and can add to it.

First, there is the risk that “going narrow” on the most controversial issues, more or less routinely, begins to approximate rule by decree. To say that the lawyer means to decide only *this* case can also inspire the suspicion that the approach was taken *just* in order to decide this case. The Supreme Court famously issued its opinion in *Bush v. Gore* on similar reasoning that it was unique, nothing like it to be seen anytime soon, and that equal protection doctrine presented many “complexities” that could not be boiled down to a simple rule of decision.<sup>364</sup> Nothing could be narrower than an opinion that declares itself non-precedential. Critics of *Bush v. Gore* saw this as confirmation that what mattered most to the majority was the result.<sup>365</sup>

Second, the availability of the option to narrow can let the lawyer off the hook. Knowing that this move is available is a consolation, if not an encouragement, when the pressure to produce the opinion sought by the policymaker is intense.

The lawyers for President Kennedy in the Cuban Missile Crisis did not leave a record of anguish or deliberation over these or other issues at the time they went about their work. Their immediate concern was the same question the President faced: how will the next generation, if there is one, view how he defended the nation’s security without provoking nuclear conflict? The lawyers did as requested and constructed a justification for the choice that he made. Their actions were taken in aid of policy, not of law, and their focus was singularly on the former and only instrumentally on the latter.

Chayes concluded that the law (and so the lawyers) did not come off too badly. But what if things had turned out, tragically, the other way? Had the quarantine ignited the dreaded nuclear exchange, would the lawyers have been celebrated in the way they are today, having established legal support for an Administration policy that involved bypassing the U.N. Security Council, rejecting the need for congressional authorization or even consultation, declining all diplomatic engagement prior to the institution of the quarantine, and deploying force on the claimed basis of the Rio Pact of 1947?

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364. *Bush v. Gore*, 531 U.S. 98, 109 (2000).

365. The literature on this is voluminous and the criticisms continued long after the decision. See, e.g., Elspeth Reeve, *Just How Bad Was Bush v. Gore?: Jeffrey Toobin says that it was very, very bad*, ATLANTIC (Nov. 29, 2010) <https://www.theatlantic.com/politics/archive/2010/11/just-how-bad-was-bush-v-gore/343247/> [<https://perma.cc/E9VS-ECAF>].

#### IV. AN ALTERNATIVE TO THE STANDARD LEGAL ADVISORY MODEL IN THE CRISIS SETTING

##### A. THE AFFLICTIONS OF “BEST VIEW”

In recent debates about how law constrains presidential conduct and must overcome “politics” to do so, OLC<sup>366</sup> is typically contrasted in stark terms with the Office of the White House Counsel (WHCO). OLC has the professional ethos and institutional commitment to the “best view” of the law. WHCO is the more “political” office, staffed by a president who wants his lawyers close by and fully attentive to the interests of the particular administration. The harshest critics of result-orientated executive branch lawyering are not too inclined to give OLC too much of the benefit of the doubt. They fear that, like WHCO, it is vulnerable to pressure to deliver results more clearly responsive to the President’s immediate policy requirements than to the law’s impartially determined demands.<sup>367</sup> But in general, in envisioning the role of the office, commentators accept that OLC operates with norms, within a culture reinforcing those norms, which are more likely to give law its due.<sup>368</sup>

The model has come under severe strain. The stresses were already visible in the design of OLC’s mandate as an office properly dedicated to the defense of executive branch prerogatives and to the “facilitation” of the president’s policy goals. It is neither advocate nor judge, but occupies an uncomfortable space in between.<sup>369</sup> It is not compelled to assess the best view, only *its* best view, and that view is properly taken with executive branch traditions and interests in mind, and with attention to the policies favored by the Chief Executive in office at that moment.

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366. See ACKERMAN, *supra* note 3, at 114 (“From Carter onward, political appointees [to the OLC] would dominate the top positions, and the staff of attorney-advisors would largely consist of brilliant young professionals, not seasoned old-timers with decades of government experience . . . . The OLC inherits a great tradition, but its present politicized condition resembles its mighty rival in the White House.”).

367. See *id.* (arguing that both the WHCO and the OLC do not serve as an effective check on the President and should be dispatched with in favor of a Supreme Executive Tribunal that would provide binding legal interpretations for the executive branch); Morrison, *Constitutional Alarmism*, *supra* note 315, at 1688 (reviewing Ackerman and arguing that the proposal for a Supreme Executive Tribunal, already of dubious constitutionality, is fundamentally unwise because the WHCO and the OLC offer faithful interpretations of the law and serve as a meaningful constraint on presidential decision-making).

368. See, e.g., Morrison, *Lybia*, *supra* note 351.

369. Professor Goldsmith has written that the OLC lawyer’s role within the executive branch:

doesn’t mean that you’re supposed to be political, and it doesn’t mean you can be an advocate in the same sense that you would if you were a private attorney advising a client. Rather, it means that the lawyer is a member of an Executive Branch and is not neutral to the President’s or to the commander’s agenda when advising him or her on a legal matter. Unlike a court that often just says “no” or “yes,” I never said “no” to any of my superiors without trying to find a way to help them find a way to achieve their desired ends within the law.

Goldsmith, *supra* note 200, at 196. Add to this that the President should receive the benefit of any reasonable doubt on a legal question. See *id.*

It is inevitable then, in the course of the interplay of law and policy, that arguments about “best views” will fall out roughly along the same lines as differences over policy. This is not new. Congressional critics of the Roosevelt policy favoring aid to the Allies in 1940 were all the more exercised about the executive’s legal machinations to put the policy into effect. President Kennedy was more fortunate in dealing with a Congress that, like the President, so strongly supported confrontation with the Soviet Union over Cuba that he heard little complaint about the legal basis for the quarantine—except that some members of the congressional leadership would have preferred yet more aggressive action. Sensitivity to legal considerations—to both the quality of the legal case and the process by which it was developed—rose and fell along with the extent and intensity of policy discord. In an “über-legalistic culture,” there is an assumption that policy and law are somehow normatively linked, such that bad policy is rooted in bad law while good policy must rest on adequate legal justification.<sup>370</sup>

In our time, a period of often-divided government, polarized politics, and the conduct of a controversial and novel global “war on terror” of indefinite duration, OLC is coming under increasing attack for a political approach to the law that serves up what the executive has ordered. The Second Bush Administration’s OLC and the “torture memos” may have rung the opening bell for this fight, but Republicans have joined Democrats in assuming that the President of the other party will draw from his legal team what he wants. Confirmation of OLC leadership has become an issue. The Office has functioned for most of the last two decades without a Senate-confirmed Assistant Attorney General at the helm.<sup>371</sup>

In national security matters in particular, the troubles run deep, to the point that Professor Goldsmith believes that OLC has come to have “no place at the table in important national security decisions.”<sup>372</sup> The explanation does not lie in the pronounced partisanship of national politics, though partisanship may, on some issues, be a factor. The primary concern is policy, which explains how it is that legal critiques do not sort out neatly into partisan camps. For example, allies and supporters of President Obama on other issues expressed major reservations about the content and transparency of his counterterrorism program. Inevitably, a major component of the criticism is that the policy was developed and implemented at the expense of law, and disregarded regular process.<sup>373</sup> Separating the

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370. See Blum, *supra* note 7.

371. Jack Goldsmith, *The Decline of the OLC*, LAWFARE (Oct. 28, 2015), <https://lawfareblog.com/decline-olc> [<https://perma.cc/675B-S57P>].

372. *Id.* Professor Daphna Renan traces the alteration in OLC’s fortunes, contrasting “the myth of a Supreme OLC dispensing formal legal opinions,” with “the reality today . . . [of] a less insulated, more diffuse, and more informal set of institutional arrangements” for supporting the executive with legal advice. She refers to the latter as “porous legalism.” Renan, *supra* note 5, at 809–10.

373. The literature is vast on this topic, and growing. But for a lucid overview of the criticism from both sides, and a response, see KENNETH ANDERSON & BENJAMIN WITTES, *SPEAKING THE LAW: THE OBAMA ADMINISTRATION’S NATIONAL SECURITY ADDRESSES* (2015).

two lines of attack, the legal and policy, is not a simple matter when they appear consistently interdependent,<sup>374</sup> and there seems little reason to hope, on the evidence of recent experience, that clashes over whose “best view” is really “best,” or whether there is a place for “reasonableness” or “good faith,” will bring these debates closer to a more satisfactory resolution.

On the “large strategic policy matters” that Walt Rostow thought unfit for lawyers, the lawyers find themselves in a difficult position. They will always encounter keen skepticism outside of government when their opinions coincide with presidential preference and facilitate unilateral executive action, and then skepticism from within when their judgment appears to get in the way of what are seen to be policy imperatives. They are being asked on these major questions to manage what is conceded to be the awkward space between advocacy and impartial adjudication. And however hard they may try, there is no way out of the politics of the situation. The decision to judge an action out of legal bounds, on what will be a contested assertion of the “best view,” has at least political consequences for a president executing high-priority security policy and managing the public communication and congressional interactions necessary to cultivate support for it.

It may also be more than we should ask or certainly expect of lawyers in this position to purge from their work any consideration of these consequences. Perhaps some can. But these lawyers work for specific administrations, with the desire to assist theirs in succeeding, and it is too much to assume that they will not identify with its goals. Those who have worked in the Obama Administration will recall the importance to many in the national security community of being faithful to “who we are,” which often meant conscientiously eschewing positions, or the appearance of positions, too much like those of the prior administration.<sup>375</sup> And former Bush Administration officials have been committed to rebutting this rejection of their policies and insisting that the changes made by their successors were not all they were cracked up to be.<sup>376</sup>

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374. Anderson and Wittes correctly appreciate that the contemporary arguments about national security policy, and counterterrorism policy in particular, tend to range across “law, morality and legitimacy.” *Id.* at 215. Progressive critics object to the conception of a global war against a non-state actor, perceiving in it “grave problems with law, legitimacy, and policy.” *Id.* at 219. And “at the most fundamental level of political morality, the United States cannot be in a permanent state of war and retain its open, democratic character.” *Id.* at 224.

375. David Cole has noted the belief of some progressive critics—“liberal pundits and human rights activists”—that there is too much Bush in the Obama policy. He rejects this judgment while remaining critical of the Obama Administration’s record on transparency. David Cole, *Breaking Away*, NEW REPUBLIC (Dec. 8, 2010), <https://newrepublic.com/article/79752/breaking-away-obama-bush-aclu-guantanamo-war-on-terror> [https://perma.cc/N66B-VARS]. The emotional tenor of the conflict on this point is brought home by this title assigned by Professor Jack Balkin to a posting on this subject, highly critical of the process for arriving at a legal justification for the 2011 Libya operations, “George W. Obama and the OLC.” Jack Balkin, *George W. Obama and the OLC*, BALKANIZATION, <http://balkin.blogspot.com/2011/06/george-w-obama-and-olc.html> [https://perma.cc/A2BJ-L62E].

376. For example, Matthew C. Waxman, formerly with the Bush Administration, concurs with the progressive critique that “Obama adopted incremental reforms and procedural adjustments [that] while improving them, also normalized and legitimated some practices that many civil libertarians and allied governments find



In this unhappy state of affairs, concrete reform proposals have by and large remained within a particular band of alternatives: rooting out the politics, or finding counterbalancing forces to check the effects of politicization. Professor Ackerman would establish fully independent legal advice for the executive branch, appointed with the advice and consent of the Senate. He would do away with OLC and WHCO. Jack Goldsmith stresses transparency as the “indispensable” check on executive “auto-interpretation.”<sup>377</sup> He also calls attention to the role in assuring this accountability of an energetic private network of lawyers and civil society organizations that hold government lawyers to account, promoting sound legal positions and litigating to vindicate them whenever possible.<sup>378</sup> There have been other proposals geared toward achieving bipartisanship in the appointments to OLC,<sup>379</sup> and to develop mechanisms within the Department of Justice to encourage a robust “executive constitutionalism.”<sup>380</sup>

Others have worked to redefine or refocus how we should think about legal constraint, and to counsel lower expectations. Scholars argue that law’s impact is subtler, more complex, than some may perceive, but no less significant for it. Chayes made his case along these lines, discouraging the “stereotype” of the lawyer who presents categorical norms that license or stop in its tracks proposed executive action. To summarize this defense of appropriate legal process: “unknowable” as the effect of law may be on a decision like the imposition of the Cuba quarantine, it is nonetheless part of the decision-making process, and as Abram Chayes put the point, it is one of the factors “molding” the final decision.<sup>381</sup> In effect, rather than expect law to occupy a commanding role in the outcome, we should make sure it is accounted for, no more but no less.

The choices then seem to be to “depoliticize” the legal advisory process, either radically or with more modest safeguards and checks, or to hold fast to and take comfort in a view like that of Chayes about the extent to which the law can actually influence the policymaking process. And, of course, the lawyers working within the process are urged to prize and rigorously implement craft values.

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abhorrent.” Matthew C. Waxman, *Why Obama’s National Security Strategy Seems a Lot Like Bush*, TIME (Nov. 4, 2015), <http://time.com/4098014/matthew-waxman-charlie-savage-power-wars/> [<https://perma.cc/U4QS-L92P>].

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

378. Goldsmith notes that these organizations “have done an extraordinary and underappreciated job [in the last decade] in watching and checking presidential legal excesses.” *Id.* at 226. For his comprehensive treatment of how this private network has developed and the role it now plays, see JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) [hereinafter GOLDSMITH, *POWER AND CONSTRAINT*].

379. Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CH. L. REV. 865 (2007).

380. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005).

381. See CHAYES, *supra* note 9.

## B. ANOTHER POSSIBILITY

There is an additional possibility. The traditional understanding of how legal analysis is fashioned and provided would yield to a different conception of the role of counsel in these exigent national security decision-making processes. This conception may help clarify the choice of interpretive standard and enhance the transparency and straightforwardness of the role of lawyers and law in the decision-making process. Instead of denying the complex relationship of policy to its legal underpinning, or disputing the impact of political pressures, it takes account of both, but without abandoning respect for legal constraints and requirements.

Consider Professor Goldsmith's decision to withdraw the Yoo memos on "enhanced interrogation techniques." He plainly found the work wanting in terms of basic lawyering quality. He wrote that while he did not doubt Yoo's good faith, or the pressures under which he worked, the memos did not, as a matter of legal craftsmanship, "seem even in the ballpark."<sup>382</sup> But in addition, there were considerations inherent to the "nature of the question"<sup>383</sup>—the interrogation of detainees in wartime—that were not reflected in the Yoo analysis. Surrounding the precise legal questions Yoo endeavored to resolve were these contextual factors, matters indeed of "large strategic policy," including: the "global campaign to end torture," "relations with the Muslim world," and "the nation's moral reputation and honor."<sup>384</sup> And "on the national security side," the considerations were similarly weighty: "tens of thousands of lives, economic prosperity, and perhaps our way of life."<sup>385</sup>

These are all compelling insights into what may have gone wrong in the Yoo approach. Maybe Yoo did not turn in his finest legal performance, as Goldsmith contends; or maybe, as lawyer, he was, in a sense, the wrong person, in the wrong role, to whom to turn in the first instance for the judgment required, given just the "nature of the question." For interwoven with the legal considerations were unquestionably matters of deep moral and policy significance.

Professor Gabriella Blum has suggested that the Yoo case is especially instructive if we ask ourselves how we might have reacted if his opinion had been a craftsman's *tour de force*.<sup>386</sup> Would those who judge him harshly for the conclusion he reached experience any change of heart? One imagines that something still would have struck them as wrong, and Goldsmith seems to get at least much of what the problem was: whatever one thinks of the analysis he adopted, John Yoo was being every bit the lawyer, but so much so, in such narrow terms, that the moral and policy dimensions of the issue were missing.

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382. GOLDSMITH, *THE TERROR PRESIDENCY*, *supra* note 8, at 145.

383. *Id.* at 148.

384. *Id.*

385. *Id.*

386. Professor Gabriella Blum, in conversation with the author.

The question must be asked: do OLC lawyers have the standing or competence or training to respond with concerns about our relations with the Muslim world, or the effect of a decision on the nation's honor, or the damage that could be done to the international campaign against torture? To whom would those lawyers turn for assistance with these questions, and how would these considerations be built into a traditional legal analysis manifesting the appropriate discipline and craft values?

There were considerations of this type before the decision makers in the Cuban Missile Crisis, and they were ones that Katzenbach wrote about when at Yale and then brought to the Kennedy Administration, and the ones that Dean Acheson in similar fashion injected into the EXCOM discussions. These were hard questions about the structure of international relations and the requirements of protecting against mortal threats, or corrosive assaults on national sovereignty. Next to these questions the elaborate legal reasoning in support of the United States action, which depended pivotally on an appeal to the Rio Pact, seems small and evasive. Similarly petty and convoluted appears the legal analysis eventually adopted to support President Roosevelt's proposed bases-for-destroyers exchange. As Cohen's original memo shows, there were policy—and as he saw them—moral imperatives that required re-thinking the domestic and international legal questions. Robert Jackson kept them out of the memo.

In cases like this—the ones that Dean Morrison has defined as “policies likely to trigger substantial public attention or controversy,”<sup>387</sup> and to which the executive attaches the highest policy priority—it is best to recognize that legal considerations might be built differently into the policymaking process. Under the OLC model, the lawyers are asked to opine, and they do at a sanitized distance, “facilitating” if they can but above all else holding fast to a best view. The policymakers must then disregard the advice or work with constraints it sets. Under a different model, the significance of policy for the legal analysis requires that the lawyer aid in bringing law to bear on the policy question, *all things considered*. On this model, in “large strategic policy matters,” the lawyers would openly leaven the analysis with just the kind of considerations that Goldsmith identifies. Lawyers in this role help to answer the question uppermost in the mind of a president who turns to his advisers, which is less “What is the law?” (though he certainly would want to know that), and more “What is the right answer here?”

This model requires embracing, not merely accepting, a renovation of process and the adoption of an interpretive standard that accommodates more flexibility than that of “best view.” The lawyers engaged in this work would work at close quarters with the policy team, charged with maintaining professional standards but not pictured as keeping an artificial or carefully cultivated distance from the policy apparatus. The White House Counsel might and likely should have ultimate accountability for an inter-agency process through which the advice is

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387. Morrison, *Constitutional Alarmism*, *supra* note 315, at 1733.

developed for the president. Of course, it is conceivable that the president could designate another senior agency lawyer to play that role, a choice that could vary with the issue. 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.

This legal support would consist of a full exploration of the legal grounds for action while allowing for all the relevant policy, moral, and other reasons, for or against the policy, to be identified and integrated into the legal deliberative process. The WHCO or other designated senior legal team leader would discharge a counseling role, in the broadest sense: to help meld the legal, policy, political, public communication, and other considerations, keeping in mind how the Administration might best explain its decision to a domestic and international audience.

The further effect of this process would be to allow for an interpretive standard that reflects the weight of those other reasons, and to make appropriate room for them. The more significant those considerations, the more appropriately the lawyers might develop in good faith a legal justification supportable as reasonable—one that, to cite again Professor Morrison's term, is the "best, professionally responsible legal defense" of the policy, even if it might meet with the objection that, by whatever measure this is determined, it is not the "best view." Lawyers would have more leeway to produce a justification for a pressing policy, all within the bounds of acceptable legal analysis. If, as Robert Jackson and his colleagues believed, the successful implementation of a policy would make the critical difference on a matter of vital national security interest, there would be no requirement for a "best view," and no incentive to pretend that one had met that requirement.

On national security matters of the highest importance, the balancing of relevant considerations, including legal issues, should allow for strong, reasonable, or even plausible legal theories to be good enough.<sup>388</sup> We can anticipate that much of the time, if there is a legal defense, it will fall somewhere between "best" and "plausible," and, whether it is admitted or not, what we might demand of the quality of the legal theory will vary with the importance of the policy objective. In all instances, it would have to be expected of the lawyers that their legal work would reflect craft values and satisfy professional standards.<sup>389</sup>

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388. Bob Bauer, *Power Wars Symposium: The Powers Wars Debate and the Question of the Role of the Lawyer in Crisis*, JUST SECURITY (Nov. 18, 2015), <https://www.justsecurity.org/27712/powers-wars-debate-question-role-lawyer-crisis> [https://perma.cc/Y8QQ-PN3H].

389. Peter Shane has written insightfully about the case for "statutory stretch" in presidential decision-making, as a preferred alternative to reliance on expansive claims of Article II authority. Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231 (2016). In setting the boundaries of what he calls "responsible stretch," he stresses, as does the argument here, both "exigency and transparency." *Id.* at 1265. Shane does not, however, argue for a revamped legal interpretive standard or a reformed legal advisory model. And he does not appear to limit the occasions for stretch to the national security context, writing more broadly of "executive initiatives that the president thinks to be especially urgent." *Id.* But he does consider it more likely that stretch will occur in that context, where judicial review is generally unavailable.

The critical condition for the adoption of this model, it must be emphasized, will be transparency—a full accounting to the public of the structure of the legal team responsible for the analysis and the substance of the legal position the Administration eventually adopted. In national security, when the executive is often functioning with little or no judicial oversight, transparency supplies the essential checking mechanism. In recent years, the executive has responded to this transparency pressure by moving toward more expansive, systematic disclosure.<sup>390</sup> More is better than less; a formal accounting, in all practicable detail, is not replaceable by piecemeal disclosures, much less those accomplished by leaks to the press.

The premise of this claim—that national security decision-making in crisis justifies the departure from OLC processes associated with the demand for the “best view”—is sure to provoke hard questions. Does the distinction between urgent national security and domestic policy matters hold? It seems that it should. As Professor Pildes has written, we have reason to recognize the special complexities of a “President’s decision-making calculus on . . . exceptional matters concerning international relations and use of force.”<sup>391</sup> What is exceptional is the profound importance to the governed of successful policy—protection from violence or the threat of terror or an imminent risk of war.<sup>392</sup> Presidents generally rank effectiveness in answering to public concerns about security as their leading responsibility.<sup>393</sup>

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390. The Obama Administration contended with strong criticism from Congress and non-governmental organizations of the adequacy of its transparency policy. For a complaint from Capitol Hill, and not the only one, see, e.g., Press Release, Senators Ron Wyden, Mark Udall & Martin Heinrich, Wyden, Udall, Heinrich Press Obama Administration for Additional Transparency on U.S. Drone Policy (June 26, 2014), <https://www.wyden.senate.gov/news/press-releases/wyden-udall-heinrich-press-obama-administration-for-additional-transparency-on-us-drone-policy> [<https://perma.cc/PMS6-ENNB>]. One NGO critique, from the American Civil Liberties Union, is contained in an extensive report, *Establishing a New Normal: National Security, Civil Liberties, and Human Rights under the Obama Administration* 5 (July, 2010) (“The administration’s commitment to transparency . . . has been inconsistent, and it has waned over time”), [https://www.aclu.org/sites/default/files/field\\_document/EstablishingNewNormal.pdf](https://www.aclu.org/sites/default/files/field_document/EstablishingNewNormal.pdf) [<https://perma.cc/S9ZR-H7PH>]. The Administration for its part stressed the “unprecedented amount of information” it provided “through speeches, public statements, reports, and other materials.” See Memorandum from the President, *Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations* (Dec. 2016), <https://lawfare.s3-us-west-2.amazonaws.com/staging/2016/transparency%20memo.pdf> [<https://perma.cc/AK54-625E>]. As the Administration drew to its close, it published a comprehensive REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (WHITE HOUSE, Dec. 2016), [https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf) [<https://perma.cc/7GRX-64U8>].

391. Richard Pildes, *Power Wars Symposium: What Role Should Law Play in Areas of Vital National and International Affairs?*, JUST SECURITY (Nov. 13, 2015), <https://www.justsecurity.org/27583/role-should-law-play-areas-vital-national-international-affairs/> [<https://perma.cc/7VEB-4LXR>].

392. See, e.g., Richard H. Pildes, *Conflicts between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT’L L. 145, 162 (2003) (“[G]overnments, including liberal democratic ones, typically believe there to be a higher and different set of stakes at issue in the context of terrorism.”).

393. See, e.g., THE WHITE HOUSE NATIONAL STRATEGY FOR COUNTERTERRORISM (2011), [https://www.whitehouse.gov/sites/default/files/counterterrorism\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf) [<https://perma.cc/7GKL-LS4H>] (The opening statement: “As the President affirmed in his 2010 National Security Strategy, he bears no greater responsibility than ensuring the safety and security of the American people.”). This is a view of presidential authority, and

Moreover, national security policy generates unpredictable challenges not easily dealt with by resort to previously established rules or long-standing precedent.<sup>394</sup> The pressure on presidents to keep legal considerations in balance with other concerns is enormous.

It is not within the field of national security overall that the adjusted standard of legal review would apply, but only on issues arising in what throughout this Article has been referred to as “conditions of crisis.” The distinction between the crisis and the regular but still pressing, even urgent, flow of events—between emergency and non-emergency—is not easily described. It will be necessarily open to disagreement. Oren Gross has written that “bright-line demarcations between normalcy and emergency are all too frequently untenable, and distinctions between the two made difficult, if not impossible.”<sup>395</sup> It is difficult to isolate any one factor that bears the weight of the analysis. Certainly, time constraints—the pressure to act quickly to protect vital national interests—would often distinguish the crisis from a serious but less critical challenge. But even here, there can be no hard-and-fast rule, no rule of thumb. Roosevelt’s lawyers were addressing a potential collapse of British defenses with calamitous consequences, but unlike Kennedy’s lawyers, the worst conceivable turn of events was more than weeks away. But was it any less a “crisis”? On this question, reliance on transparency is the best, and it may be the only protection against executive recklessness or manipulation. The executive will have to account for the claim of crisis and the policy-making process that was designed to deal with it.<sup>396</sup>

A critic may well answer 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. There is such

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thus a feature of public expectation of presidents, across the political spectrum. John R. Bolton, *Keeping America Secure: Five questions for the presidential candidates*, AMERICAN ENTERPRISE INSTITUTE (Oct. 10, 2015), <https://www.aei.org/publication/keeping-america-secure-five-questions-for-the-presidential-candidates> [https://perma.cc/J9LX-A58B].

394. Richard H. Pildes, *Kosovo, Syria: When It Comes to Military Force, What is the Proper Relationship Between Law and Political Judgment*, LAWFARE (Aug. 26, 2013), <https://www.lawfareblog.com/kosovo-syria-when-it-comes-military-force-whats-proper-relationship-between-law-and-political> [https://perma.cc/99BH-NSQU].

395. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L. J. 1011, 1022 (2003).

396. It may also be feared that every national security crisis involves justification of bellicose action, and this is another ground of concern about the relaxation of any standard of legal view. But this is not invariably the case. The Suez Canal crisis of 1956 is an example of a president acting to *halt* aggressive behavior. For a recent account of the Eisenhower Administration’s steps to roll back the British-French-Israeli invasion of Egypt, see MICHAEL DORAN, *IKE’S GAMBLE: AMERICA’S RISE TO DOMINANCE IN THE MIDDLE EAST* (2016). Harold Koh’s “humanitarian exception” to the otherwise applicable constraints of domestic and international law contemplates the use of force not for territorial acquisition or out of geopolitical calculation, but, in cases of humanitarian crisis, to save lives, alleviate suffering, and avert the threat to the international order of failing to do so. It is reasonable to test intuitions about the lawyers’ role by asking whether, if a “best view” of the law did not facilitate these policies, it would seem acceptable to turn to reasonable, good faith alternatives to support them.

a risk, another instance of having to reckon with the threat of bad faith, plain bad judgment, or the inexorable physics of the slippery slope. In thinking about national security policy, there are risks on both sides of the question: risk to the rule of law in loosening the interpretive standards, or damage to vitally needed policies in protecting against bad faith or judgment. The history suggests that presidents in all periods and all “exceptional” periods of crisis would prefer to run the second of these risks, and believe that it is the lesser of the two risks perceived by the public. And in recent American history, the courts have not been reluctant to police the risk-taking, aided in their work by a growing network of human rights and other rule-of-law proponents and activists.<sup>397</sup>

In the case of the Cuban Missile Crisis and the bases-for-destroyers episode, lawyers like Norbert Schlei and Ben Cohen were striving for a professionally responsible, plausible defense of a policy answering to the grave national circumstances then confronted. Their work was plainly shaped with an understanding of the difficulty and complexity of the choices facing the President. In neither situation could it be remotely suggested that they had adopted a “best view,” or that they persuasively argued that it was better than it was. What they came up with was the legal basis for the policy—the Administration’s legal position—and no more. A government might do well to say no more on its own behalf, relieved of the need to do as Attorney General Jackson did in insisting that his fundamentally preposterous position was “clear” and “plain”—in effect, the “best view,” if not the only one.

This revised model—a less OLC-centric and more flexible advisory standard with thoroughgoing transparency—would not constitute a bad turn of events for that beleaguered Office. It may, in fact, arrest any trends toward its marginalization in the national security legal advisory process. In fact, in the absence of the policymaker’s fear that, under a “best view” theory, OLC would have effective control of the policy, a legal advisory process adapted to national security crisis can call on OLC resources in bringing together all the government’s capabilities. OLC lawyers would participate in the discussion but would not lead it, nor pretend to, nor seek out more of a role in constraining policy choices than warranted by their training and core competence. They would not work under the pressure of being the last word—of knowing that their work will interfere with policy, or constitute for all practical purposes “de facto policy-making authority, which will not be regarded as legitimate . . .”<sup>398</sup>

In addition, and to the advantage of both offices, WHCO can take on a role free of the tensions that complicate the decision-making process and give rise to anxiety about adherence to regular process. This role would not require WHCO to expand with the hiring of lawyers who do what the OLC does and to shadow its

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397. See GOLDSMITH, POWER AND CONSTRAINT, *supra* note 378.

398. Eric A. Posner, *Deference to the Executive in the United States after September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J. L. PUB. POLICY 213, 243 (2012).

analysis of these difficult issues. It would not be driven to compete with the Department in the work of pure legal analysis, to presume on that basis to second-guess the Department's work product, or to pressure it to yield in the interests of "facilitation" to policymaker preference. If the lawyers to the President are openly given the charge to lead this sort of advisory process, then consultation with the OLC can be built into the deliberative process—though with appreciation of the limits of its say in "large strategic policy matters."

OLC could, of course, retain the leading responsibility that it has of resolving ordinary-course inter-agency legal disputes, and providing the binding advice on routine, other legal matters, like legislative analysis and the construction of signing statements.<sup>399</sup> Its authority in these matters might benefit from avoiding the overall weakening of its stature that has been brought about by its engagement in these high-level policy controversies.

There is, finally, in this arrangement the virtue that it does not hide its mode of operation: it better captures how the process functions, how the lawyers can be expected to perform under intense policy pressure. No more would be claimed for the legal basis than that it was the legal basis for the policy being pursued. A key function of transparency would be providing some check—necessarily, but vitally, a political check—on the executive's capacity for overstating or misrepresenting the "crisis" for which this process is designed.

To proceed in this way does not invite the government to throw all legal considerations to the side. There may be circumstances where there is no defensible legal basis for the proposed action. Should the government be prepared to insist otherwise, the transparency of the process assures that the issue will be openly joined. Neither the power of transparency, nor of a fully informed political response, should be underrated. In recent years, pressure for more openness from Congress, organizations dedicated to national security policy, and the press has met with notable, if not complete, success.<sup>400</sup>

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399. "In most of these cases," Professor Posner has written, "the President does not have any particular agenda, so the OLC can give honest advice without fear of retribution." *Id.* at 229. One might add that if retribution is not the concern, being ignored or overruled might be, and in these other cases, there is little risk of that.

400. The OLC Statement of Best Practices states that OLC "operates from a presumption that it should make its significant opinions fully and promptly available to the public" and that this presumption promotes, among other objectives, "the interests of Executive Branch transparency" and "public confidence in the legality of government action." OLC Statement of Best Practices, *supra* note 4, at 5. The OLC also maintains a website dedicated to online publication of its opinions, see DEP'T OF JUSTICE OFFICE OF LEGAL COUNSEL, *Opinions*, <https://www.justice.gov/olc/opinions> [<https://perma.cc/7DPE-2BG4>] (last visited Nov. 12, 2016). Nevertheless, there was continued congressional pressure on the Obama Administration to provide Congress and the public with more OLC legal materials and opinions. *See, e.g.*, Michael A. Memoli, *Sen. Rand Paul Ends Marathon Filibuster of John Brennan*, L.A. TIMES (Mar. 6, 2013), <http://articles.latimes.com/2013/mar/06/nation/la-na-pn-rand-paul-john-brennan-filibuster-20130307> [<https://perma.cc/SS3J-TXLL>]; Press Release, Senator Ron Wyden, Wyden Continues to Press Justice Department to Explain the Extent of its Authority to Kill Americans (Feb. 8, 2012), <https://www.wyden.senate.gov/news/press-releases/wyden-continues-to-press-justice-department-to-explain-the-extent-of-its-authority-to-kill-americans> [<https://perma.cc/V262-ANVS>]. During the intervention in Libya in 2011, the Administration also offered detailed information to Congress and the public about its legal position on



Why not allow the lawyers to opine independently and leave the government to “face the consequences” of disregarding the advice?<sup>401</sup> This is where the problem of the “best view” shows most clearly, especially with an eye on the strange, weakly defined position that the OLC lawyer occupies between advocate and impartial arbiter. It is not clear why a government should “face the consequences” of declining to embrace a best view, at the expense of what it deems critical policy, when a reasonable, professional responsible defense of that policy lies at hand. That legal basis bears consideration apart from any presumptively binding “best view,” and yet with a best view on offer, with all the rhetorical power of the term, the administration enters into the debate at a severe disadvantage. Perhaps it is a best view to some, less so to others, or it is just a best view but not by much. It does not seem that a sound policymaking process, with the complex considerations always at issue in the national security sphere, benefits from subjecting the policymaker to that disadvantage—or from ignoring that this disadvantage is, to a significant degree, political.

One further question to be considered in evaluating this alternative legal decision-making model is whether it ignores a middle ground. Under an OLC-centric model, that Office could provide a range of alternatives, not elevating one among others as the “best.” Or, should the White House or other agency take the lead, it could be asked to hold more closely to a best view justification of the legal options it offers.

But to shift the application of the standard in this fashion risks losing in each instance what a reformed structure is meant to provide the officeholder. If the OLC is not the source of best view, it is unclear what supports its claim to primacy in the legal advisory process. But to hold an interagency legal structure to a “best view” advisory standard complicates the executive’s access to a more flexible range of legal options grounded in reasonableness, good faith, and a full exposure to the relevant policy objectives. The key point about best view is that by definition it is meant to crowd out the alternatives and put the executive under pressure to adopt it, or to explain at considerable political peril why this best advice was not followed.

## CONCLUSION

The question taken up in this article tends to produce strong and not infrequently inflamed opinions, swept up in in the national security lawmaking controversies of recent years. It may be useful to state clearly both the claims made, and those *not* made, in this Article.

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the issue of war powers. See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep’t of State).

401. Blum, *supra* note 7, at 287.

## A. CLAIMS MADE AND NOT MADE

## 1. CLAIMS MADE:

- a. The “best view” theory of the law in critical national security decision-making will not prevail over the executive’s judgment of what is vitally necessary to protect the national interest. With a look back, to step safely away from red-hot contemporary conflicts, it is difficult to see evidence in paradigmatic cases—the Missile Crisis or the bases-for-destroyers exchange—that policymakers perceived any basis for deferring to lawyers on a “best view” theory, if the best view would complicate or impede the adoption of the preferred policy. There is no reason to imagine that in future situations of the same kind the executive would accept the “best view” as a limitation.
- b. Whether in the more standard case—when lawyers are summoned to devise options for effecting the policy already in development—or in the more unusual one—as in 1940, when the chief lawyers were immersed in the policy issues and actively promoting their views—the executive will expect lawyers and policy staff to work closely together to chart a defensible path to the desired policy goals.
- c. Insisting that lawyers in these circumstances operate outside this consolidated process, as the model for OLC holds that they should in order to devise independent legal advice “unbiased” toward the policy, is disruptive to the national security legal decision-making process. By establishing distance for these lawyers from policy development, this process tends to limit the legal options available in supporting the policy and may subtly or more directly operate to remove control of the policy from the control of the policymakers.
- d. In fact, the claim here is very specifically that the primacy normally accorded the “best view,” and for that reason the role that “best view” advocates would confer on OLC, are not appropriate to the requirements of the complex interplay of law and policy in a national security crisis setting.
- e. A White House-directed process need not be pictured as one that is fatally “political,” nor one that must somehow function to support the president only by narrowing the range of views solicited on the legal issues or leaving OLC out altogether. The issue is not whether there is an appropriate process but how, in these circumstances, it is structured, and who leads it.
- f. By confronting the issues raised by the idealized “best view” process involving OLC and its role in rendering “presumptively binding” opinions in a national security crisis, the debate over the role of lawyers can address the realistic requirements of sustaining a responsible and transparent alternative. One clear advantage would be less of a need for lawyers to overstate the Administration’s legal position, allowing them to

present it, reasonably and in good faith, as just that—the Administration’s position.

- g. Such a process would allow for the legal team to work through to advice that constitutes a reasonable, good faith basis for policy. This is not to say that in any and all circumstances, the team will be able to provide advice consistent with the executive’s goals, but the possibility should not be ruled out from the beginning on the grounds that nothing but a “best view” will suffice.
- h. If there is such a basis, the executive should not be expected to abandon the policy, seek change in the law before acting, or seek ratification after the fact—though the President is always at liberty to do any of this. But, of course, the President might choose in some situations to both advance the reasonable, good faith position and seek legal change or ratification.

## 2. CLAIMS NOT MADE:

- a. The case made here for broadening the legal options beyond those representing the “best view,” as determined by a specialized corps of lawyers, does not mean that the executive decides what the law is and that there is no clear legal limit in any case on what he or she proposes to do.
- b. This same case also does not assume or endorse the view that lawyers can make up whatever passes in appearance as a legal argument and argue that it is a “reasonable, good faith” legal argument. Lawyers who do this are rightly criticized for it, and those executives who rely on such argument should have to answer for it.
- c. It is not argued that within an integrated policy and legal process the policymakers should be freer to put political pressure on members of the legal team to alter their best judgments about the law. Even within such a structure, the lawyers should have their full measure of professional independence in determining whether there is a legal basis for the action the executive proposes to undertake.
- d. It is not an element of the case that OLC should no longer on most issues play its traditional role as the presumptively binding legal voice within the executive branch. Its role should remain undisturbed for the vast majority of its work.

A further objection that this perspective invites is this: that not all executives can be trusted not to “wag the dog” and to define crisis to mean just those policy matters a White House would prefer to address outside those normal legal channels. Here, once again, the answer is simply that the transparency requirement performs the key checking function, serving to bring the executive’s decision to operate in this manner to the attention of the other branches and the public. Transparency and its consequences should have a sobering effect on the executive: there are only so many times, and so many issues, that will lend itself to

resort to such a process without keen scrutiny and the prospect of a high political cost.<sup>402</sup>

#### B. MR. LITTLE AND THE LAW GAME

Omar Little challenged the defense lawyer for imagining that he and his witness were somehow playing different “games”—that Omar was a “parasite,” feasting on the drug trade of the city, and the defense lawyer was representing the moral standards of the community. No, Little, is arguing: with my weapon and your legal training, we are both “parasites,” each participating in his own fashion in the devastation of his community. The “best view” theorist might reply that this is indeed the point: lawyers must be held to a rigorous standard for legal analysis, or they will corrupt the role of law by joining the policymaker in the same game—fulfilling the “client’s” demands.

In effect, the best view critique of law’s role in the game takes interpretive standards other than best view as a form of “cheating,” in the term used by Jack L. Sammons in an insightful discussion of the ethics of the lawyering “game.”<sup>403</sup> The game of legal counseling for these purposes is defined by a lusory attitude, a commitment to playing the game according to its constitutive rules—that is, the rules within the lawyering craft that determine how the game may be properly played. Those rules govern the interpretive standards permissible in arriving at a particular legal conclusion. While the client has an objective developed outside the game—the “prelusory” goal—the lawyers may assist only “through the means permitted by the constitutive rules, customs, or other norms” of the game itself.<sup>404</sup> The lawyer who cheats, disregards the rules: she does not “view the game from the internal perspective in which the game itself is an end but externally and instrumentally as a means toward some end”<sup>405</sup>—e.g., the policymaker’s goal.

The best view theory is a game design that excludes reasonable, good faith argument in support of the policymaker’s objectives. The lawyer who employs it has cheated, allowing the prelusory goal—the client’s objective—to direct her choice. She is now playing a different game, the client’s, but has taken herself out of the lawyer’s. She is not playing her own game well.

Yet it is unclear what consideration supports a game design within which reasonable, good faith argument becomes cheating. Perhaps the concern is that there is no true substance to this standard, and that it simply accommodates too many

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402. Another answer is that there is really no hope in the event of bad faith. If it is assumed that the executive and his or her senior legal advisers will routinely act in bad faith, then closing off one avenue for manipulation leaves many others open. The executive can rig the game in all sorts of ways, including in the staffing of senior legal positions.

403. Jack L. Sammons, *Cheater! The Central Moral Admonition of Legal Ethics, Games, Lusory Attitudes, Internal Perspectives, and Justice*, 39 IDAHO L. REV. 273 (2003).

404. *Id.* at 285.

405. *Id.* at 281.

weak positions and opens up too many dubious moves to facilitate the policymaker's goals. A similar objection can be lodged against a best view when there is genuine disagreement about whether it is best, or best by just a hair, and the disagreement over the legal interpretation seems to mask the true source of the conflict—the policy.

Under both standards, the test is the lawyer's sense of professionalism, her commitment to the craft, what she can put her name on, and what she can live with. In fashioning reasonable, good faith arguments to support the policymaker in a crisis setting, she need not, and should not, be seen to be cheating.

The very assessment of how lawyers have performed in crisis, whether they have acquitted themselves professionally or have cheated, benefits from accepting the complex interplay of law and policy and the place of reasonable, good faith argument in counseling policymakers in the crisis setting. In the 1940 and 1962 cases, the lawyers experienced keenly the policy imperatives. To judge them by a "best view" standard is to judge critically: There is no case to be made that they satisfied that standard under even the most generous construction. Nor is there any reason to believe that lawyers in the future charged with similar tasks will meet this test any more successfully when striving to "facilitate" the policymaker's objectives. It is not only more realistic but also more fitting and productive to ask of them that their interpretation of the law be reasonable and developed in good faith, all things considered, and publicly disclosed.