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What About When the Best View Is The Best View?

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PROLOGUE: THE KOREA DECISION

On Saturday, June 24, 1950, President Harry Truman, spending the weekend with his family in Independence, Missouri, received a call from his Secretary of State, Dean Acheson.[1] "Mr. President, I have very serious news," Acheson began.[2] North Korea, a communist country with close ties to the Soviet Union, invaded South Korea, a country that was viewed as under the protection of the United States.[3] North Korea's actions immediately reminded United States officials of "Manchuria and Munich and the Western non-response they believed led to World War II."[4] They also saw North Korea's "invasion as a test for the fledgling" United Nations.[5] It was, by any measure, a national security crisis.

Upon receiving this news, President Truman cut his trip short, returned early to Washington, and convened a select group of his senior advisors.[6] In attendance were Acheson, Secretary of Defense Louis Johnson, Chairman of the Joint Chiefs of Staff General Omar Bradley, four other State Department policy officials, the civilian service secretaries, and Chiefs of Staff from the Army, Navy, and Air Force.[7] Although Acheson was a lawyer by training who had clerked for Justice Louis Brandeis, accounts of the meeting do not record the attendance of a single practicing lawyer—not even the Attorney General.[8] President Truman accepted his advisors' recommendations to, among other things, supply South Korea with additional arms and order United States naval and air units to assist in the safe

1. *See, e.g.*, DAVID HALBERSTAM, THE COLDEST WINTER: AMERICA AND THE KOREAN WAR 89 (2007); DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 402 (1969). The invasion actually took place on June 25, 1950 in the Koreas, but it was a day earlier in the United States. *See* STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 71 (2013).

2. HALBERSTAM, *supra* note 1, at 89.

3. *See, e.g.*, ACHESON, *supra* note 1, at 405 (discussing the relationship between North Korea and the Soviet Union and stating that the invasion was "an open, undisguised challenge to [the United States'] internationally accepted position as the protector of South Korea").

4. GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 640 (2008).

5. *Id.* at 641.

6. *See, e.g.*, GLENN DURLAND PAIGE, THE KOREAN DECISION (JUNE 24–30, 1950) 125–41 (1965) (providing a detailed discussion of the meeting); ACHESON, *supra* note 1, at 405–07 (same).

7. PAIGE, *supra* note 6, at 125 (listing the participants in the meeting).

8. *See, e.g.*, *id.*

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evacuation of United States civilians from South Korea, using force, if necessary.[9]

The following night, amid steadily worsening reports from Korea, President Truman convened virtually the same set of senior advisors.[10] Again, accounts of the meeting do not record the presence of any practicing lawyers.[11] Among other things, President Truman ordered United States airplanes and naval vessels into combat against North Korea.[12]

The next day, the President met with congressional leaders to inform them of his decisions. On Secretary Acheson's advice, he decided not to ask for a joint resolution affirming those decisions.[13] The public response was overwhelmingly positive.[14] As one commentator stated, "I have lived and worked in and out of [Washington] for twenty years. Never before in that time have I felt such a sense of relief and unity pass through this city."[15] Members of Congress echoed this support, although a small number questioned whether the President had the constitutional authority to commit United States forces to combat in Korea without congressional authorization.[16]

Just a few days later, on Friday, June 30th, General Douglas MacArthur sent an urgent cable to the Pentagon recommending the use of ground troops in Korea.[17] MacArthur had been dispatched to Korea from Japan to inspect the fighting front. Secretary of the Army Frank Pace, after conferring with General Bradley and the Chief of the Staff of the Army, conveyed this recommendation to President Truman by phone at 4:57 a.m.[18] During the call, President Truman approved the recommendation in part.[19] Later that morning, he discussed the full recommendation with a select group of senior advisors.[20] Attendees included

9. *See id.* at 137–41 (detailing Truman's decisions); ACHESON, *supra* note 1, at 406 (same).

10. *See* PAIGE, *supra* note 6, at 131 (noting that the "conferees were substantially the same as those who had met the previous night"). The only differences were that Undersecretary of State James Webb did not attend the second meeting, with Deputy Under Secretary H. Freeman Matthews arriving as the meeting ended in his stead, and that Secretary of the Navy Francis Matthews only arrived after the meeting had adjourned. *Id.* at 131–32.

11. *See, e.g.*, *id.*

12. *Id.* at 178.

13. *Id.* at 187. The decision not to seek an authorizing resolution has been subjected to a substantial amount of criticism. *See, e.g.*, WALTER ISAACSON & EVAN THOMAS, THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE 509 (1986). In his memoirs Acheson explained his recommendation, noting that "the process of gaining" authorization may have done a "great deal" of harm, as "[c]ongressional hearings on a resolution of approval at such a time, opening the possibility of endless criticism, would hardly be calculated to support the shaken morale of the troops or the unity that, for the moment, prevailed at home." ACHESON, *supra* note 1, at 415. Acheson noted that President Truman agreed with this sentiment and was also disinclined to seek authorization in fear of establishing a "precedent in derogation of presidential power to send our forces into battle." *Id.*

14. *See, e.g.*, ISAACSON & THOMAS, *supra* note 508 (noting that it "was hard to find a dissenting voice in Washington, or around the country"); PAIGE, *supra* note 6, at 193–95.

15. PAIGE, *supra* note 6, at 171 (quoting Joseph C. Harsch, *Christian Science Monitor* 1 (June 29, 1950)).

16. *See id.* at 195–200 (detailing congressional reaction).

17. *See id.* at 248.

18. *See id.* at 249.

19. *See id.*

20. *See id.*

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Acheson, Johnson, the President's special foreign affairs adviser Averell Harriman, Deputy Secretary of Defense Stephen T. Early, the civilian service secretaries, and uniformed Chiefs of Staff.[21] Leading accounts again show no record of attendance by a practicing lawyer.[22] At the meeting, President Truman decided to grant General MacArthur broad authority to use ground troops in Korea.[23]

In early July, Secretary Acheson had his Department issue a legal memorandum explaining the constitutional basis for President Truman to act without congressional authorization.[24] By the time hostilities ended with the signing of the Korea Armistice Agreement on July 27, 1953, an estimated 33,000 Americans had been killed and another 105,000 had been wounded.[25] Congress still had not passed a declaration of war or enacted a statute authorizing the President to use force in the conflict.

INTRODUCTION

We could not help but think of President Truman's decision to send United States forces into combat in Korea when we read Bob Bauer's new article: "The National Security Lawyer, In Crisis: When the 'Best View' of the Law May Not Be the Best View."[26] The trigger was not the specific constitutional question at issue, although the scope of the President's inherent constitutional authority to use force absent congressional authorization is an undeniably important issue.[27] Rather, we thought of President Truman's decision because it vividly illustrates how the capabilities and constitutional powers of the President dramatically increased in the period following World War II. These developments created the modern national security Presidency and subsequently led to a number of reforms designed to check Presidential power—trends that both form the backdrop for and illuminate Bauer's argument.

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21. *See id.* at 251.

22. *See id.*

23. *See id.* at 249, 252 (describing the meeting, which "last[ed] only thirty minutes").

24. U.S. DEPARTMENT OF STATE, 23 DEPT. ST. BULL. NO. 574, AUTHORITY OF THE PRESIDENT TO REPEL THE ATTACK BY KOREA, 173 (July 3, 1950).

25. HALBERSTAM, *supra* note 1, at 4.

26. Robert F. Bauer, *The National Security Lawyer, In Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. L. ETHICS 175 (2018).

27. Legal scholars continue to debate the scope of the President's constitutional authority to use force in the absence of congressional authorization, and the literature on the topic is vast. Although a discussion of the topic is beyond the scope of this article, for representative samples of the major schools of thought on it, see JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–11 (1993) (arguing that the President has very limited authority to use force absent congressional authorization, primarily to "repel sudden attacks"); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 143–81 (2005) (arguing that the President has broad authority to initiate hostilities in the absence of congressional authorization); Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, Att'y Gen., Re: Authority to Use Military Force in Libya (Apr. 1, 2011) (taking intermediate position that the President may order the use of force in the absence of congressional authorization if doing so would further important national interests and not constitute "war" in the constitutional sense).

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Bauer's article critiques what is considered to be one of the key accountability mechanisms checking the modern national security Presidency, namely, the "best view" approach to government lawyering. As Bauer describes it, this accountability mechanism has both substantive and procedural aspects. Substantively, it calls for government lawyers to provide the President with their "best view" of the law. Procedurally, it calls for those lawyers to be as insulated as possible from political pressure, while still being part of the Executive Branch.[28]

Taking issue with the prevailing wisdom, Bauer argues that it is "unrealistic" to expect the President to defer to what politically-removed lawyers believe to be the "best view" of the law during national security crises "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."[29] Even more provocatively, Bauer argues that the appropriate role of the Executive Branch lawyer should not be to determine the "best view" of the law. Rather, he claims, Executive Branch lawyers should endeavor to present "legal positions grounded in reasonable, good faith readings of the law, subject to thoroughgoing transparency requirements."[30] This advice, Bauer argues, should be provided through a legal advisory process that is closely integrated with the policy process and coordinated by appropriate senior government lawyers (typically the White House Counsel), and not through a process that assigns the task of providing definitive advice to a legal office (typically the Office of Legal Counsel (OLC) at the Department of Justice) that is largely removed from the policy process.[31]

Bauer's claims strike the reader as a dramatic break from the currents of reform that have dominated the last half-century of development on national security lawyering. And Bauer's model does, indeed, diverge from at least one key element of the "best view" model. But viewed against the backdrop of President Truman's Korea decision, one is also struck by the degree of overlap between Bauer's position and the "best view" position he critiques, particularly compared

28. As Bauer acknowledges, there is a vast literature on the shortcomings of Executive Branch lawyering, and a number of scholars have thus, in recent years, put forward "concrete reform proposals." *See* Bauer, *supra* note 26, at 247. Many of these reformers would undoubtedly support the notion that Executive Branch lawyers should provide their "best view" of the law, although the approaches they endorse would still diverge in certain ways—for example, consider the debate between Professors Ackerman and Morrison over the former's proposal for a Supreme Executive Tribunal. *See infra* note 71. In advancing his alternate approach, Bauer does not generally distinguish between potentially different variations of the "best view" approach or define specifically the position to which he is responding. (Nor, for his purposes, does he necessarily need to, as he means for his proposal to take issue with all variations of the "best view.").

For our purposes, when referencing the "best view" we mean the approach delineated in the text above—i.e., having a legal office relatively removed from White House or operational pressure (likely OLC) providing it the "best view" of the law. We recognize that commentators might recommend implementing this approach in various ways, and we try to identify these differences where relevant.

29. *See* Bauer, *supra* note 26, at 182.

30. *Id.* at summary.

31. *Id.* at 6.

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to how the Executive Branch approached legal issues before the rise of the national security Presidency.

Consider the following. We think Bauer is correct to argue that: the President must weigh multiple equities and, particularly during crises raising existential concerns, sometimes pursue a course of action that is legally available, even if not supported by the "best view" of the law; that the legal review process should be integrated with, rather than excluded from, policy development; and that OLC should play an appropriate role in that process, with a senior government lawyer, likely the White House Counsel, elevating any areas of disagreement to the President for decision. But we question the extent to which advocates of the "best view" approach, whatever their other objections about Bauer's piece, would ultimately dispute these points. Indeed, despite the differences that exist between Bauer's position and the "best view" approach, both are a far cry from the days when President Truman met with his national security team three separate times to hash out decisions with fundamental separation of powers implications with nary a practicing lawyer in the room.[32]

Reading Bauer's article against the backdrop of the rise of the modern national security Presidency also serves to illuminate what we believe to be the key difference between Bauer's views and those of the "best view" advocates. Drawing from his fascinating analysis of two detailed case studies—the Cuban Missile Crisis of 1962, and the bases-for-destroyers exchange the United States entered into with Great Britain in 1940—Bauer appears to go beyond the claim that the President may, at times, have to pursue a course of action other than that supported by the "best view" of the law. He appears to argue that Executive Branch lawyers should shy away from even advising the President on a presumptively binding "best view," lest they put the President "under pressure" to adopt it.[33]

If this is Bauer's view, we think it is mistaken; if it is not, we think he should clarify. Bauer correctly observes that in the case studies he recounts, the "best view" of the law was not the primary focus of the key lawyers involved, but things worked out well in the end anyway. But it is far from clear that these two case studies are a representative sample, and, as we argue below, there is ample reason to doubt that they are. Indeed, considering a broader range of examples shows that there can be real—although extremely difficult to predict—risks in deviating from the "best view" of the law. To make informed decisions, the President needs to be informed of these risks.[34]

Bauer's article is undoubtedly provocative. Aside from any specific differences between his views and those of the "best view" advocates, there is a distinct difference in attitude. Underlying Bauer's argument is a clear skepticism about what we can expect national security lawyers and the law to accomplish in the

32. *See infra* Part III.
33. *See* Bauer, *supra* note 26, at 255.
34. *See infra* Part III.B.

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Executive Branch. His recommendations for what they should do flow from that skepticism. We think there is much to applaud in this realism and think the study of these issues would benefit from more of the empirical, historical analysis Bauer uses. But as we argue below, his emphasis on what Executive Branch lawyers and the law cannot do may lead him to underestimate and not focus enough on what they can do. One would hope that future work takes up this latter issue.

I. THE RISE OF THE NATIONAL SECURITY PRESIDENCY—AND ATTEMPTS TO CONTROL IT

Before diving into Bauer's arguments, we begin with a brief review of the rise of the modern national security Presidency and the reforms that accompanied it, including the emergence of the "best view" position to which Bauer responds. There is a vast literature on these issues, and it would be impossible to do it justice in a short piece.[35] Thus, we merely summarize some key points, and highlight some key contributions, that are relevant to Bauer's arguments.

A. THE POST-WAR PRESIDENCY

The period immediately following World War II "was a watershed for United States foreign policy."[36] American policymakers were scarred by the perceived effects of the United States' isolationism in the run-up to Pearl Harbor and wary of the threat posed by a Soviet Union that was perceived to be expansionist.[37] They responded by pursuing a strategy that would permanently change not only the Nation's relationship with the external world, but also the institutional architecture of the Executive Branch and its relationship with Congress.[38] As historian George Herring put it in his history of United States foreign relations:

> [T]he Truman administration between 1945 and 1953 turned traditional U.S. foreign policy assumptions upside down. A country accustomed to free security succumbed to a rampant insecurity through which nations across the world suddenly took on huge significance. Unilateralism gave way to multilateralism. Through the policy of containment, the Truman administration undertook a host of international commitments, launched scores of programs, and mounted a peacetime military buildup that would have been unthinkable just

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35. Bauer specifically notes the "voluminous literature" on lawyering in the Executive Branch. *See* Bauer, *supra* note 26, at 180 n.6.

36. GRIFFIN, *supra* note 1, at 53.

37. *See, e.g.*, *id*. at 62–63.

38. There is a vast literature on the dramatic changes to United States foreign policy that took place in the immediate aftermath of World War II. *See, e.g.*, *id*. at 52–98; HERRING, *supra* note 4, at 595–650; JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR 53–124 (2005).

Fn39 ten years earlier. The age of American globalism was under way.[39]

Of particular note, the United States did not fully demobilize after World War II, as was the pattern after previous wars. Rather, the United States "maintained a multimillion-person peacetime standing army for the remainder of the Cold War" and "established new institutions—including the Office of the Secretary of Defense, the Joint Chiefs of Staff, and the National Security Council—to manage the peacetime military bureaucracy."[40] Harry Truman was the first President with these institutions at his disposal. With his Korea decision, he quickly laid "down a marker" for how the President could exercise his war powers in the "new circumstances of the Cold War."[41]

Scholars still debate the constitutionality of Truman's decision, with defenders pointing to numerous prior instances in which Presidents used force without congressional approval and critics describing those instances as "limited action[s] to suppress pirates or to protect American citizens in conditions of local disorder" and certainly not as "sustained and major war against a sovereign state."[42] Putting the constitutionality question aside, it is clear that Truman was able to make the decision for two reasons: the unprecedentedly large standing army available to him, and the overwhelming popular support that stemmed from the perception that North Korea's actions were a direct challenge to the postwar order the United States had taken the lead in developing.[43] Truman's decision exemplified, at the very least, a practical "expansion[] in the constitutional powers of the

39. HERRING, *supra* note 4, at 595; *see also id*. at 650 ("Successes and failures aside, the Truman administration in the short period of seven years carried out a veritable revolution in U.S. foreign policy. It altered the assumptions behind national security policies, launched a wide range of global programs and commitments, and built new institutions to manage the nation's burgeoning international activities.").

40. Jack Goldsmith, *The Accountable President*, NEW REPUBLIC (Jan. 31, 2010), https://newrepublic.com/article/72810/the-accountable-presidency [https://perma.cc/4G5G-TY2D].

41. GRIFFIN, *supra* note 1, at 73.

42. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 133 (2004). The sources cited at note 27 provide an introduction to the vast literature on the President's authority to use force without congressional authorization. *Supra* text accompanying note 27. Much of this literature directly addresses President Truman's Korea decision, with different commentators expressing different views. *Compare, e.g.*, ACHESON, *supra* note 1, at 414 (stating that "[t]here has never, I believe, been any serious doubt—in the sense of non-politically inspired doubt—of the President's constitutional authority to do what he did") *and* JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 336–42 (2011) (arguing that Truman had the authority to wage the Korean War without congressional authorization) *with* ELY, *supra* note 27, at 11 (arguing that President Truman's Korea decision was based on "a constitutional reading that had from the dawn of the republic been recognized as erroneous") *and* Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 37 (1995) (arguing that "President Truman's unilateral use of armed force in Korea violated the U.S. Constitution").

43. *See, e.g.*, GRIFFIN, *supra* note 1, at 74 (noting that "Truman could not have been successful were it not for the new institutional capacities the executive branch had acquired in World War II"); SCHLESINGER, *supra* note 42, at 135 (stating that "Truman did not at first receive much constitutional criticism over Korea" because "American troops after all were defending international virtue against the communist hordes and doing so at the behest and with the blessing of the United Nations"); GADDIS, *supra* note 38, at 107 (noting that "Korea quickly became a symbol of resolve" in the Cold War "regardless of its military-strategic significance").

Fn44 Fn45 president."[44] As such, the decision was a "fateful moment" that established an important precedent for the increasingly powerful post-World War II national security Presidency.[45]

Fn46 Fn47 Fn48 As the Cold War progressed and the Soviet Union became a nuclear state, the powers of the Presidency expanded ever further.[46] Strategic deterrence required that the United States have the ability to respond quickly to a Soviet first strike, and such an immediate response would have to be directed by the President.[47] Unsurprisingly, "the placement of a nation-destroying weapon in the President's hands contributed a lot to the rise of presidential power."[48]

Fn49 The resulting pillars of the modern national security Presidency remain in place to this day. The Nation continues to have a web of global commitments, and the President continues to have the lead in managing these commitments. The President also continues to have at his disposal a large standing army, an extensive nuclear arsenal, and power to use force, either overtly or covertly, to advance the Nation's interests without prior authorization.[49]

B. CONTROVERSIES AND REFORMS

Fn50 Fn51 The resulting and dramatic rise in presidential power did not go unnoticed or unchallenged. Congress has intermittently challenged the post-World War II order[50] and the Supreme Court has occasionally, albeit prominently, ruled against national security claims made by the President.[51] Moreover, waning public trust

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44. Goldsmith, *supra* note 40; *see also* GRIFFIN, *supra* note 1, at 73–74 ("Truman was implementing the strategy of containment by creating a new power for himself and for future Presidents with respect to the use of military force.").

45. SCHLESINGER, *supra* note 42, at 132; *see also, e.g.*, Fisher, *supra* note 42, at 21 ("President Harry Truman's commitment of U.S. troops to Korea in June 1950 still stands as the single most important precedent for the executive use of military force without congressional authority.").

46. *See, e.g.*, GARRY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE (2010).

47. *See, e.g.*, Philip Bobbitt, *War Powers: An Essay on John Hart Ely's "War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath,"* 92 MICH. L. REV. 1364, 1381–83 (1994) (laying out the argument for why, as a prudential matter, the need for deterrence during the nuclear age requires the President to be able to use force without specific congressional authorization).

48. Goldsmith, *supra* note 40.

49. *See, e.g.*, GRIFFIN, *supra* note 1, at 96–97 (discussing the key elements of the post-World War II order).

50. For discussions of congressional pushback in the immediate aftermath of World War II, during the Truman and Eisenhower Administrations, see, e.g., SCHLESINGER, *supra* note 42, at 163 (noting that Presidents have faced "an intermittently, if often irresponsibly, aggressive legislature" as they have accumulated power during the post-World War II period); GRIFFIN, *supra* note 1, at 88 (noting that the increase in Presidential power during the Truman administration occurred in tandem with "the unremitting assaults on the administration by members of Congress"). Congress took even more consequential action during subsequent administrations in the wake of Executive Branch national security scandals. *See infra* text accompanying notes 54–78.

51. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 794–95 (2008) (holding that detainees held at Guantanamo Bay had a constitutional right to the writ of habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557, 622, 625 (2006) (holding that the military commissions being used at the time violated the Uniform Code of Military Justice and the Geneva Conventions); Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (holding that United States' citizens held in military detention have due process rights and must have the opportunity to

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Fn52 in the Executive Branch following various controversies[52] led to certain strings being attached to the Presidency's powers over time. These controversies—including the Vietnam War; Watergate-era revelations over certain domestic intelligence activities; the Iran-Contra Affair; and the Bush Administration's initial detention and interrogation policies—prompted intense push-back and a cycle
Fn53 of reforms designed to increase accountability and check Presidential power.[53]

To be sure, there was often an ideological slant to these issues. Conservatives initially challenged and liberals initially defended President Truman's broad claims of presidential power, but the roles largely reversed following the 1970s
Fn54 and, especially, following the terrorist attacks of September 11, 2001.[54] Unsurprisingly, the debate has often mirrored broader political trends: the role reversal in the 1970s occurred as conservatives increasingly came to occupy the Presidency, and the liberal opposition to a strong executive weakened during the Clinton and Obama Presidencies. Nonetheless, the period since World War II has indisputably seen a proliferation in Presidential accountability mechanisms. Consider the following examples, compiled by Jack Goldsmith:

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challenge their detention before an impartial authority); United States v. U.S. District Court, 407 U.S. 297, 320–21 (1972) (holding that domestic warrantless wiretaps targeting a domestic threat violated the Fourth Amendment); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (allowing the *New York Times* and *Washington Post* to publish the then-classified Pentagon Paper over the objections of the Executive Branch); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 589 (1952) (rejecting President Truman's attempt to seize steel mills to prevent a strike during the Korean War).

52. *See, e.g.*, Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1383 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010)) (noting that, "[i]n the aftermath of the presidentially led Vietnam War, increased U.S. participation in wars of choice rather than of necessity, and President Nixon's domestic abuses of the office, liberals (in particular) developed anxiety and ambivalence about the powers of the presidency"); Cass R. Sunstein & Jack Goldsmith, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 281 (2002) (arguing that "before Vietnam, before the revelations of Hoover's domestic espionage, and before Watergate, . . . there was a time when the press, Congress, and intellectuals had a much higher regard for the Executive branch and the military").

53. A full discussion of the reforms prompted by these events is beyond the scope of this article, but we provide here some of the key legislative reforms. For example, the main legislative action taken in response to the Vietnam War was the enactment, over President Nixon's veto, of the War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2006). Concerns about domestic surveillance prompted the enactment of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.). Other key Watergate-era reforms included the enactment of the Freedom of Information Act, 5 U.S.C. § 552 (2006 & Supp. 2010). Iran-Contra prompted Congress to make changes to the approval and reporting of covert action in the Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429, and controversies over detention and interrogation led to a number of pieces of legislation, including the Detainee Treatment Act of 2005, 42 U.S.C. §§ 2000dd–2000dd-02.

54. *See, e.g.*, Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2074–75 (2009) (noting that "American progressives had already spent the better part of the twentieth century relaxing constraints on the American executive" and that "conservatives of the 1950s and 1960s were formalists who shunned the progressives' pragmatism and upheld constitutional arrangements that the shift to presidential government threatened," such that it is "curious that contemporary conservatives would take up advocacy of a [strong executive] that had left many of their own ideological forebears anxious and defensive"); Pildes, *supra* note 52, at 1383–84 (noting that post-Watergate concerns over Presidential power have primarily been expressed by liberal scholars).

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> Presidents used to wiretap at will in the name of national security, but now they must comply with complex criminal laws and get the approval of a secret court. Presidents used to conduct covert operations without any accountability, but now they must comply with elaborate restrictions and report all important intelligence activities to Congress in a timely way. Presidents used to have carte blanche in interpreting or ignoring international human rights law and the laws of war, but now these laws are embodied in complex regulations and criminal statutes that touch on every aspect of military and intelligence operations. Presidents used to hide information easily, but now they must take extraordinary steps to maintain records and give the public broad access to internal documents. Quasi-independent inspectors general that were viewed as unconstitutional during the Reagan revolution are now well-established auditing and investigatory thorns in the president's side.[55]

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We take no position here on whether the rise of the national security Presidency is a good thing or whether the accountability mechanisms that have grown to accompany it serve as an effective check on presidential power.[56] We emphasize the rise of this accountability architecture because legal institutions and practices have been a particular focus in its design, such that it provides critical context for Bauer's piece. Indeed, the number of lawyers in the Executive Branch exploded in the decades following Watergate,[57] as, for example, both the Church Committee and the Iran-Contra investigations prompted the strengthening of Executive Branch legal institutions.[58]

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These reforms also, at least as Bauer describes it, established the "best view" approach to which his article responds,[59] an approach "connected to a particular understanding" of government lawyering that dates from the immediate post-Watergate period.[60] Daphna Renan offers a comprehensive description of this

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55. Goldsmith, *supra* note 40. Professor Goldsmith expands on these examples in his book. *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENT AFTER 9/11 (2012) [hereinafter GOLDSMITH, POWER AND CONSTRAINT].

56. We recognize that debates on the appropriate scope of presidential power have been around since the Framing, and that scholars continue to debate them to this day. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 761–800 (2008) (discussing original understanding of the Commander-in-Chief Clause).

57. *See* GOLDSMITH, POWER AND CONSTRAINT, *supra* note 55, at 86–95 (describing the increased role of lawyers in the Intelligence Community after the mid-1970s), 125–35 (describing the same for military lawyers).

58. *See* JOHN RIZZO, COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA 44–45 (2014) (discussing how the Church Committee recommended adding more lawyers to the General Counsel's Office at the Central Intelligence Agency); *The Reagan White House; Transcript of Reagan's Speech: I Take Full Responsibility for My Actions*, N.Y. TIMES (Mar. 5, 1987), http://www.nytimes.com/1987/03/05/us/reagan-white-house-transcript-reagan-s-speech-take-full-responsibilty-for-my.html?pagewanted=all [https://perma.cc/RBS7-SZYE] (providing the text of an announcement made by President Reagan in the wake of the Iran-Contra Affair that he had "created the post of NSC Legal Adviser to assure a greater sensitivity to matters of law").

59. *See supra* text accompanying note 28.

60. Bauer, *supra* note 26, at 180.

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period when President Carter and his Attorney General, Griffin Bell, "sought to use the institutions of formal legal review" at the Department of Justice's Office of Legal Counsel (OLC) to "rebuild trust in presidential governance."[61] As a procedural matter, the Carter/Bell vision emphasized the importance of OLC as a centralized legal expositor; that OLC was to remain relatively removed from the "pressures of the White House complex or the operational agencies"; and that OLC should, to the maximum extent possible, issue its advice through formal, written opinions binding on the Executive.[62] Substantively, OLC's job was to identify, free from partisan political pressures, the "best view" of the law.[63]

To be sure, the Carter/Bell reforms were not wholly novel: since the Judiciary Act of 1789 granted them the power to do so, Attorney Generals have been writing legal opinions on difficult questions of law at the request of Presidents and other senior Executive Branch officials.[64] This authority has also been delegated since at least 1933 to OLC or its institutional predecessors.[65] But before Carter and Bell worked to centralize legal review in OLC, Executive Branch legal review had been less formal, producing far fewer opinions of the sort typically produced by OLC, and more reliant on the expertise of lawyers throughout the Administration.[66]

Moreover, as Renan describes it, the Carter/Bell model had a "brief heyday."[67] Although Presidents after Carter continued to ask OLC for legal opinions on matters of importance, the number of formal OLC opinions has decreased over time and other, more informal, institutional arrangements have been developed for advising policymakers in certain circumstances.[68] For example, first-hand accounts discuss how the George H.W. Bush, Clinton, and George W. Bush Administrations used an "interagency lawyers group" to review certain legal issues.[69] The ways in which certain officials circumvented this "lawyers group" during the first term of the latter Bush Administration led outgoing Bush Administration officials to stress the importance of interagency legal review to

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61. Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 809 (2017).

62. *See id.* at 816–30 (noting, among other things, that "the number of OLC opinions rose dramatically during the Carter administration, and this was a deliberate design of Bell's").

63. *See id.* at 830.

64. *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (codified as amended at 28 U.S.C. §§ 511–13 (2012)).

65. *See* Renan, *supra* note 61, at 819.

66. Examples of this include Bauer's two case studies, with the Cuban Missile Crisis being a prime example of the distributed model. *See* Bauer, *supra* note 26, at 182–208. Of course, Truman's decision to go to war in Korea is in some ways the ultimate example of informality. *See supra* text accompanying notes 1– 25.

67. 67. *See* Renan, *supra* note 61, at 817.

68. *See id.* at 819–20.

69. John Bellinger, *Charlie Savage and the NSC Lawyers Group*, LAWFARE (Nov. 8, 2015), https://www.lawfareblog.com/charlie-savage-and-nsc-lawyers-group [https://perma.cc/6L48-SAYK]; *see also* Renan, *supra* note 61, at 837.

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Fn70 incoming Obama Administration officials.[70] The Obama Administration thus emphasized the importance of using the so-called lawyers group to develop coordinated legal advice for policymakers.[71] Fn71

Independent of the procedural question of how legal advice should be generated within the Executive Branch is the substantive question of what standards lawyers should apply in determining its content. This question received renewed attention amidst controversy over legal advice provided in the immediate aftermath of the terrorist attacks of September 11, 2001—particularly the preparation of the 2002 legal memorandum in which OLC advised on the meaning of the federal statute that criminalized torture.[72] (The focus on substantive standards is unsurprising, because the procedure used to provide the most controversial advice was virtually identical to the Carter/Bell model.[73]) In response to the 2002 memorandum, a group of nineteen former OLC lawyers drafted a statement of best practices, which emphasized that OLC should provide "advice based on its best understanding of what the law requires," rather than "craft[ing] merely plausible legal arguments to support their clients' desired actions."[74] OLC later officially issued a memorandum laying out best practices for the Office that contained a similar standard, instructing its lawyers to provide "an accurate and honest appraisal of applicable law"[75]—in other words, to find the "best view" of the law.

Since that time, scholarship has returned its focus to the procedural question of how legal advice should be generated within the Executive Branch, analyzing the relative merits of a centralized OLC-centric model with a more diffuse model.[76]

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70. CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 64 (2015); Bellinger, *supra* note 69. For more details, see JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 66–68 (2009).

71. *See* SAVAGE, *supra* note 70, at 64–67 (discussing at length how the Obama Administration embraced the "lawyers group"). *But see* Bellinger, *supra* note 69 (noting that the Obama Administration diverged from this model in the planning for the Osama Bin Laden raid).

72. *See, e.g.*, Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).

73. *See, e.g.*, MAYER, *supra* note 70, at 65–66.

74. *See* Johnsen, *supra* note 72, at 1603–10 (attaching as an appendix to the article the statement of best practices).

75. David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, Memorandum for Attorneys of the Office, *Re: Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010). This memorandum updated—and is similar in many relevant respects—to a 2005 memorandum issued by Steve Bradbury when he was the head of OLC. *See* John Elwood, *OLC's "Best Practices" in Giving Legal Advice*, VOLOKH CONSPIRACY (Dec. 24, 2010), http://volokh.com/2010/12/24/olcs-best-practices-in-giving-legal-advice/ [https://perma.cc/2S2J-X5NQ].

76. *See, e.g.*, Renan, *supra* note 61, at 808–13. The most dramatic example of this renewed procedural focus is THE DECLINE AND FALL OF THE AMERICAN REPUBLIC, in which Professor Ackerman argues for the creation of a Supreme Executive Tribunal of nine presidentially-nominated, Senate-confirmed "judges for the Executive Branch," each serving staggered twelve-year terms. *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 143–46 (2010) [hereinafter ACKERMAN, DECLINE AND FALL]. For a critique, see Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) [hereinafter Morrison, *Constitutional Alarmism*]. *See also* Bruce Ackerman, *Lost Inside the Beltway, Responding to Trevor W. Morrison, Constitutional Alarmism*, 124 HARV. L. REV. F. 13 (2011) (replying to Morrison) [hereinafter Ackerman, *Lost*

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This literature emphasizes that the centralized model will likely produce more formal legal advice (in the form of written opinions) and may be more institutionally shielded from political pressure. Nevertheless, privileging a sole actor in this way raises the risk that the actor will be "captured" by the President.[77] The diffuse model, in contrast, ensures that multiple perspectives are brought to bear and that relevant expertise (which may reside elsewhere than OLC) is engaged with the relevant issues, but may bring the cost of diminished formality and the potential for Presidential forum shopping.[78]

II. BAUER AND THE "BEST VIEW": A COMPARISON

Viewing Bauer's critique of the "best view" model against this backdrop clarifies his position, and also shows that it has more in common with that of the "best view" advocates than one might initially assume, particularly when viewed against the long arc of Executive Branch lawyering. It also illuminates what is actually the key area of difference between Bauer's position and the "best view" approach, a topic we explore in detail in Part III.

A. SUBSTANCE: THE "BEST VIEW" OF THE LAW

1. BAUER'S POSITION

Bauer's critique takes up both the substantive and the procedural aspects of the "best view" position. With respect to the substantive standard, Bauer argues that lawyers in crisis settings do not hold themselves to a "best view" standard, nor should we expect them to:

> There may sometimes be a "best view," but not always, and even where there is, it may be only barely the best. Or it may be the best as far as some fine lawyers are concerned, and not so much in the view of others: Often, what seems to be a disagreement over law may be primarily a difference over policy.[79]

Clients in crises, moreover, do not *want* their lawyers to focus on solely the "best view" of the law; indeed, Bauer notes that policymakers in the examples he canvassed did not "perceiv[e] 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."[80] Rather, Bauer argues, the President will expect lawyers to develop a legally defensible path to his desired policy objectives.[81]

Inside the Beltway]; Trevor Morrison, *Libya, 'Hostilities,' the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011) (replying to Ackerman's reply).

77. *See, e.g.*, Renan, *supra* note 61, at 886.
78. *See, e.g.*, *id.* at 838–39.
79. Bauer, *supra* note 26, at 182.
80. *Id.* at 256.
81. *Id.*

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Bauer contends that this is as it should be. National security lawyers holding themselves to a "best view" standard, he argues, would represent a "theoretically unjustified constraint on the range of legal options that a president's legal advisers should be expected to offer."[82] Implicit in the statement is a critical premise—the President, and the President alone, has the authority and responsibility to decide between available legal interpretations.

2. ANALYSIS

As a threshold matter, we note that Bauer does not delve into a number of interpretive theory questions that surround the "best view" approach. Lawyers employing differing interpretive approaches will inevitably disagree on what the "best view" is. Many, if not most, questions of executive power amidst crises are also either legally or practically non-justiciable, such that there is no clear, ultimate arbiter of the "best view." Bauer—understandably, we think—sets these questions aside and simply portrays the "best view" as an idealized vision of what the law requires, largely removed from the President's policy imperatives. He then contrasts this vision with an approach that is focused on developing a "reasonable, good faith" defense for those imperatives. His approach is similar to how OLC defines the "best view," contrasting an "accurate and honest appraisal of applicable law" with "an advocate's defense of the contemplated action or position proposed by an agency or the Administration."[83]

We think this explanation of the "best view" is sufficient for understanding and assessing the merits of Bauer's proposal. Whatever interpretive lodestar one uses—i.e., whether one is a pragmatist or originalist and whether or not one thinks an Executive Branch lawyer's job is to determine what the Supreme Court would do if confronted with the issue—one would certainly approach an issue differently if they are aiming to uncover the "best view" of the law, as opposed to a "reasonable, good faith" defense of the President's policy proposal.

Moreover, as Bauer recognizes, there are more fundamental challenges to finding the "best view," rooted in the indeterminacy of law. One need not be a critical legal theorist or accept a strong indeterminacy thesis to recognize that law, like the language in which it is articulated, can be ambiguous.[84] Some applications or interpretations may be clearly wrong, but, however one understands the "best view," a range of alternatives can vie for the label "best."

Indeed, legal indeterminacy is particularly prevalent in the context of national security crises. Such crises often involve difficult separation of powers issues that require interpretation and synthesis of the constitutional War Powers of the President and the Congress. These and other implicated issues benefit from

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82. *Id.* at 175.

83. *See* Barron, *supra* note 75, at 1.

84. Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

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comparatively little black letter law, and courts tend either to avoid getting involved or to decide cases on the narrowest grounds possible. Justice Jackson's famous *Youngstown* concurrence perhaps put it best in describing the separation of powers issue at the heart of that case, which was an issue of similar indeterminacy to those that frequently arise in national security crises:

> A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.[85]

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In most contexts of lawyering, we encourage lawyers to present clients with a range of available options—reasonable, good faith arguments to support a client's position—and we recognize that the client has the ultimate authority to choose from among those options. Indeed, ethics codes and relevant laws governing lawyers recognize that lawyers may sometimes be in the position to make policy choices that are rightfully left to their clients and mitigate the risk of them doing so in various ways.[86]

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The President is no ordinary client, to be sure. The lawyers in his administration have a duty not to him personally, but to him in his Constitutional role.[87] Moreover, he is the Chief Executive and Chief Law Enforcement Officer of the United States, which means that his legal decisions—and how he makes them—can have far-reaching implications for the rule of law. The "best view" approach to which Bauer is reacting emerged in the post-Watergate era, after all, and was reinvigorated following the so-called torture memos in the wake of 9/11. It is thus reasonable for some scholars and commentators to view a departure from this approach as an implicit approval of the problematic lawyering that triggered its development in the first place—a license for lawyers to relax their standards of

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85. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

86. Thus, for example, we grant the lawyer authority over the means while the client retains authority over the ends; we focus on empowering clients within the relationship; and we criticize lawyers who overreach in determining the goals and objectives of a representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2016); Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 127–28 (2010); Katherine R. Kruse, *The Promise of Client-Centered Professional Norms, Symposium: Restorative Justice and Attorney Discipline*, 12 NEV. L.J. 341, 346 (2012); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 53 (1978).

87. *See* 5 U.S.C. § 3331 (laying out the oath taken by Executive Branch officials, which requires them to "solemnly swear (or affirm) that [they] will support and defend the Constitution of the United States against all enemies, foreign and domestic" and that they "will bear true faith and allegiance to the same").

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legal interpretation in ways that permit impermissible ends, and a move that will undermine public confidence in government lawyers. Thus, we must be careful about simply juxtaposing typical lawyering approaches to national security crises: as discussed in more detail below, there very well may be good reasons to develop Executive Branch institutional processes and structures that advantage the "best view" of the law, even if such processes and structures would not typically be used in other contexts.

But even given these differences, the core of Bauer's point is surely correct: just as routine clients have the ability to choose between legally available options during normal times, the President—who has the ultimate constitutional authority and responsibility to defend the Nation[88]—must have the flexibility during a national security crisis to pursue a course of action that is legally available, even if it is not characterized as the "best view" of the law. As Bauer notes, having lawyers pick and bind the President to a "best" legal interpretation risks asking them to make a policy choice veiled as a legal claim—a choice that, at the end of the day, is really the President's.[89]

We therefore agree with Bauer's core claim: The President should not be bound by the "best view" of the law. Importantly, however, we question whether those who advocate for the "best view" approach—or at least the majority of them—would disagree with this proposition. As Bauer recognizes, those who talk about the "best view" of the law are not doing so in a platonic sense. Rather, they are talking about the "best view" from the Executive Branch's perspective.[90] These advocates also generally recognize that the national security lawyer's role is to propose alternative courses of action, if any such courses are available.[91] Here is how the OLC Statement of Best Practices puts it:

> Because OLC is part of the Executive Branch, its analyses may also reflect the institutional traditions and competencies of that branch of Government. For example, OLC opinions should consider and ordinarily give great weight to any relevant past opinions of the Attorneys General and [OLC] . . . . OLC's analysis may appropriately reflect the fact that its responsibilities also include

88. *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057 (2012).

89. *See, e.g.*, W. Bradley Wendel, *Sally Yates, Ronald Dworkin, and the Best View of the Law*, 115 MICH. L. REV. ONLINE 78, 81–82 (2017) ("The president retains the final authority regarding questions of executive branch legal interpretation; but to carry out his obligations under the Take Care Clause of the Constitution, the president needs fair, reliable, well-reasoned advice."); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987) ("That analysis, in turn, demonstrates that an agency attorney acts unethically when she substitutes her individual moral judgment for that of a political process which is generally accepted as legitimate.").

90. *See, e.g.*, Morrison, *Constitutional Alarmism*, *supra* note 76, at 1747–48; Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1327–28 (2000) (arguing that OLC should assume a "quasi-judicial" role when providing advice to bind the Executive Branch, but noting that "the public may elect a President based, in part, on his view of the law, and that view should appropriately influence legal interpretation in that President's administration").

91. *See, e.g.*, Johnsen, *supra* note 72, at 1601; Morrison, *Constitutional Alarmism*, *supra* note 76, at 1715; Moss, *supra* note 90, at 1329–30.

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> facilitating the work of the Executive Branch and the objectives of the President, consistent with the law. As a result, unlike a court, OLC will, where possible and appropriate, seek to recommend lawful alternatives to Executive Branch proposals that it decides would be unlawful.[92]

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More significantly, we are unaware of anyone taking the position that the President should be precluded from considering or following options that entail something less than the "best view" of the law. There are, of course, important questions about the process by which the Executive Branch develops legal advice and whether Executive Branch lawyers should seek to identify and present to the President the "best view" of the law—an issue we address below. But notwithstanding divergence of views on these questions, even the strongest advocates of the "best view" position argue that the President *must* have the ability to pursue other legally available alternatives. To say otherwise—to allow a sub-Presidential Executive Branch actor to bind the President to a particular legal interpretation—would be flatly unconstitutional.[93] Here's how Professor Trevor Morrison puts it:

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> Although the President's oath of office obliges him to uphold the Constitution, and although the Constitution provides that "he shall take care that the Laws be faithfully executed, he would not necessarily violate these duties by pursuing policies he thinks are constitutionally *defensible*, even if he has not determined they are consistent with his best view of the law. The traditions of the executive branch reflect a judgment that there is value in having at least one office—OLC—devoted to providing legal advice based on its best view of the law. But that does not make such advice constitutionally mandatory, and it certainly does not mean the President must adhere to [OLC's] best view of the law in order to fulfill his constitutional responsibilities.[94]

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At the end of the day, therefore, the space between Bauer and the "best view" advocates on the appropriate substantive standard may be less than might appear at first glance.

B. PROCEDURE: LAWYERS REMOVED FROM POLITICS

1. BAUER'S POSITION

If the substantive aspect of Bauer's approach does not bear the weight of the distinction between his position and that of the "best view" advocates, perhaps his procedural argument does.

Here, Bauer critiques the view that OLC lawyers are best equipped to provide legal advice during national security crises. He argues that "establishing distance"

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92. Barron, *supra* note 75, at 2.

93. *See* Ackerman, *Lost Inside the Beltway*, *supra* note 76, at 28. It is also worth noting that OLC cannot bind the Attorney General. *See* Morrison, *Constitutional Alarmism*, *supra* note 76, at 1711.

94. Morrison, *Constitutional Alarmism*, *supra* note 76, at 1747–48 (internal citations omitted).

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between lawyers and the policy process is "disruptive to the national security legal decision-making process" and "may subtly or more directly operate to remove control of the policy from the control of the policymakers."[95] Instead, he argues for an integrated and transparent process, led by an appropriate senior government lawyer (presumably, although not necessarily, the White House Counsel), who is responsible for coordinating the legal view of lawyers throughout the Administration, including OLC, and ensuring that open and regular dialogue continues between lawyers and policymakers.[96]

2. ANALYSIS

Here, too, we agree with key aspects of Bauer's proposal: that the legal review process should be well-integrated with policy development to ensure timely and relevant advice, and that OLC should participate in that process, with a senior government lawyer elevating any areas of disagreement to the President for decision. If this is not the process—if the provision of legal advice is siloed and separated from the policy process—the risk is too great that the advice will be practically irrelevant. After all, the most thorough and elegantly crafted legal advice is not very useful if it is provided after a crisis has passed or in reference to a policy proposal that has been discarded or amended in material ways.

But here, too, we question how much distance there is between this position and the "best view" approach. "Best view" advocates typically focus on how OLC carries out its institutional responsibilities, and do not dictate how OLC is situated within the broader Executive Branch legal architecture.[97] Indeed, the quote provided earlier from Professor Morrison explicitly talks about having "one office—OLC—devoted to providing legal advice based on its best view of the law," implying that Morrison would be comfortable with other offices performing different functions alongside OLC.[98] Another "best view" advocate explicitly states that "not all lawyers who work in the executive branch perform the same roles, and not all need—or should—approach [legal questions] from the same perspective."[99] Rather, this advocate continues, "[i]t is appropriate and worthwhile to have some lawyers in government who, for example, are charged with nothing more than thinking creatively, testing assumptions, and ensuring that other executive branch lawyers do not needlessly hinder the effectuation of executive branch policy."[100] Thus, even while these advocates are arguing that OLC should be focused on determining the "best view" of the law, their positions

95. Bauer, *supra* note 26, at 256.
96. *Id.* at 256–257.
97. The primary exception to this is Ackerman's proposal to establish a Supreme Court of the Executive Branch. *See* ACKERMAN, DECLINE AND FALL, *supra* note 76. As noted earlier, other advocates of the "best view" approach have taken issue with Ackerman's proposal.
98. *See supra* text accompanying note 89.
99. Moss, *supra* note 90, at 1305.
100. *Id.*

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do not appear to preclude the Executive Branch from, in appropriate circumstances, addressing legal questions in ways other than through a politically-insulated OLC providing legal advice, such as through an "interagency lawyers group" model.[101]

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Meanwhile, Bauer attempts to address the major procedural concern of most "best view" advocates by contemplating a role for OLC in his interagency decision-making process. Although all recognize that OLC only provides legal advice when asked to do so, "best view" advocates have noted that Executive Branch officials "may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality."[102] Bauer's inclusion of OLC in his interagency legal process thus ensures, at the very least, that OLC is aware of the key questions the Executive Branch is considering.

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This brings us to where the rubber really hits the road procedurally. The long-standing consensus, clearly supported by "best view" advocates, is that OLC's advice is authoritative and binding within the Executive Branch (absent the President or Attorney General overruling OLC).[103] Thus, "best view" advocates would likely be comfortable using Bauer's interagency legal process to the extent that, but only to the extent that, OLC's contribution presumptively binds the other participants, at least on those legal issues that fall within OLC's traditional purview.[104] Bauer, in contrast, takes issue with the fact that OLC's views are generally granted "primacy" or treated as the "last word" on an issue.

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This is a real difference, and one worth unpacking, both to understand its true implications and to uncover precisely what about OLC "primacy" Bauer finds objectionable. To begin, the debate about the "primacy" of OLC advice does not necessarily dictate *who* will be working on an issue: "best view" advocates recognize that other Administration lawyers will be working on the exact same issues as OLC; indeed, these advocates recommend that OLC seek the view of these lawyers whenever they can before providing advice.[105] Given this, as a practical

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101. Indeed, numerous "best view" advocates, including those who originally signed the proposed OLC best practices, served in the Obama Administration without, as far as we know, expressing any serious concern about the Administration's use of such a model.

102. *See* Johnsen, *supra* note 72, at 1609 (discussing proposed OLC guidelines).

103. *See* Barron, *supra* note 75, at 1; Johnsen, *supra* note 72, at 1603; Morrison, *Constitutional Alarmism*, *supra* note 76, at 1711.

104. As Professor Morrison has noted, it is difficult to define in the "abstract" which legal issues fall within this category. *See* Morrison, *Constitutional Alarmism*, *supra* note 76, at 1732–33. Certain questions typically are, and should be, answered by agency General Counsels, who possess significant experience and expertise handling issues within their domains. "Best view" advocates have generally said that OLC should be consulted on "all major executive branch initiatives and activities that raise significant legal questions," see Johnsen, *supra* note 72, at 1610, while Professor Morrison has more specifically stated that OLC should be asked to pass on: "(1) legal issues that OLC has a history of addressing and on which it therefore has an accumulated jurisprudence and expertise; (2) significant issues of executive power; and (3) programs or policies likely to trigger substantial public attention and/or controversy." *See* Morrison, *Constitutional Alarmism*, *supra* note 76, at 1733.

105. *See* Morrison, *Constitutional Alarmism*, *supra* note 76, at 1710; Johnsen, *supra* note 72, at 1609. The official memorandum written by then-Acting Assistant Attorney General David Barron requires this for formal opinion writing. *See* Barron, *supra* note 75.

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matter, the disagreement over "primacy" should not have a dramatic impact in situations where all lawyers, including OLC, agree.

Bauer's objections to the traditional OLC "primacy" must therefore stem from situations where OLC's views diverge from those of other Administration lawyers. But would Bauer's proposal produce any dramatic shift in *how* the Executive Branch answers legal questions? As discussed earlier, all agree that OLC's advice can bind neither the President nor the Attorney General. All also agree that in the ordinary course, Administration lawyers will almost certainly accept OLC's analysis (Bauer himself argues the general presumption of OLC "primacy" *should* hold). In contrast, in high leverage situations, such as the national security crises about which Bauer writes, Executive Branch lawyers or their clients may very well elevate legal disagreement to the President (or Attorney General). In such situations, regardless of whether OLC's views are presumptively binding or not, someone will presumably need to prepare and provide to the President the relevant views, with the costs and benefits of each position. Based on its institutional position, this will likely (although not necessarily) be the White House Counsel's Office (which has historically included the National Security Council Legal Adviser). This is Bauer's proposed approach, which appears to be quite close to the "interagency lawyers group" model employed by the Obama Administration, and which would appear to work regardless of whether OLC's views are granted "primacy."

So, what, if not the process for making decisions, is motivating Bauer's rejection of the traditional view of OLC "primacy"? As laid out in more detail below, it appears to be an aversion to presenting the President with a presumptively binding "best view" of the law, for fear that doing so might constrict his decision space. This is a real and important difference; indeed, in our view, it is the major difference between Bauer's position and that of the "best view" advocates. We thus discuss it in detail below, in Part III.

C. SUMMARY

Before moving to the key area of disagreement, we believe it helpful to summarize the surprising amount of overlap between Bauer's position and that of the "best view" advocates. As noted above, we agree with Bauer on fundamental aspects of his proposal: that, particularly during crisis situations that can raise existential concerns, the President can decide to pursue a course of action that is legally available, even if it is not supported by the "best view" of the law; that the legal review process should be well-integrated with policy development so that the advice it provides is timely and relevant; and that OLC should play an appropriate role in that process, with a senior government lawyer, likely the White House Counsel, elevating any areas of disagreement to the President for decision. As we have argued, we believe that the "best view" advocates, or at least the majority, generally agree with these propositions as well.

To be sure, there can be variations to how the Executive Branch conducts its legal review, even within these areas of overlap. For example, there may be differences of opinion, even among commentators who support the "best view" approach, on how legal advice is delivered in the Executive Branch. These commentators may diverge on who is responsible for briefing the President on his lawyers' legal analysis, such as whether it should be the Attorney General, the Assistant Attorney General in charge of OLC, the White House Counsel, or another lawyer. They may also differ on whether formal written opinions should be produced,[106] and on how and the extent to which the Executive Branch should be transparent.[107] In addition and as already noted, those who support a version of the "best view" approach can have very different views on how insulated OLC (or whatever office is responsible for providing the "best view") is from political or operational pressure. These differences may be very important in practice, and we take no position among them.

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But whatever intramural disputes Bauer has with the "best view" advocates—and there are clearly differences of emphasis and tone, and at least one major substantive difference, discussed in the next section—or that the "best view" advocates have amongst themselves, those disputes pale in comparison to the differences between the world today and the world that existed when Truman decided to go to war in Korea. Given this, Bauer's article is perhaps best seen not as a critique of the role Executive Branch lawyers play in the accountability architecture that has developed over the last half century, but rather, as an endorsement of it. In Bauer's world, and in that of the best view advocates, lawyers are always at the table. That has not always been the case.

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106. Consistent with the fact that OLC only provides legal advice when asked, it also only produces a written opinion if it is asked for one. Consequently, as an acting head of OLC has said recently, the "vast majority" of OLC's advice is "provided informally." Letter from Jason Chaffetz and Ranking Member Elijah E. Cummings, House Comm. on Oversight and Gov't Reform, to Loretta E. Lynch, Att'y Gen. 1 (Mar. 14, 2016). Professor Renan has thus suggested that it "might be worthwhile to explore how best to institutionalize . . . legal judgment through a more formal decisional mechanism than currently exists." *See* Renan, *supra* note 61, at 901.

107. Bauer emphasizes that his "revamped legal advisory structure would be subject to a key requirement: thoroughgoing transparency that compels the Administration to disclose structure of the legal advisory process and the basis for its legal conclusion," see Bauer, *supra* note 26, at 182, and numerous other commentators also emphasize that transparency is the "indispensable" check on Executive Branch lawyering. *See, e.g.*, 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. Kleineman eds., 2013). But there are many different ways for the Executive Branch to be public about its legal interpretations—for example, the Obama Administration delivered a number of speeches, see KENNETH ANDERSON & BENJAMIN WITTES, SPEAKING THE LAW: THE OBAMA ADMINISTRATION'S ADDRESSES ON NATIONAL SECURITY LAW (2015), and prepared reports, see THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2016). Many believe that such *ad hoc* and managed disclosures such as speeches and reports are insufficient and that different disclosure mechanisms should be used (perhaps including the release of any legal opinions that were prepared), although classification and privilege issues may complicate such disclosures. *See* Renan, *supra* note 61, at 886–92, 896–902.

III. BAUER AND THE "BEST VIEW": THE MAIN (AND IMPORTANT) AREA OF DIFFERENCE

Despite the perhaps surprising agreement between Bauer and the "best view" advocates, we believe there is one area in which they sharply disagree: whether the President should be informed of a presumptively binding "best view" of the law, even if he is ultimately free to choose another legally available option. Indeed, although he never explicitly says so, Bauer appears to take the position that the Executive Branch lawyers working on an issue, or at least some subset thereof, should not even have as an initial goal determining what the "best view" of the law is. To that end, Bauer argues that "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."[108] One can thus reasonably read Bauer's article as arguing that Executive Branch lawyers should not even endeavor to determine, and inform the President of, the "best view" of the law. If this is Bauer's position, we disagree.

A. "LOOKING OVER A CROWD AND PICKING OUT YOUR FRIENDS"[109]

Bauer's views on this issue may stem from his methodology, which rests heavily on two detailed case studies—the Cuban Missile Crisis and the bases-for-destroyers deal. To be sure, these are two famous and important cases where legendary lawyers—in the bases-for-destroyers deal, Attorney General, Supreme Court Justice, and Nuremberg prosecutor Robert Jackson; and in the Cuban Missile Crisis, famed international law scholar and State Department Legal Adviser, Abram Chayes—struggled with difficult legal issues presented by national security challenges.[110] And Bauer is certainly right that in both cases, the "best view" of the law was not the primary focus of the key implicated lawyers. And yet there is "decisive" support if not "consensus" for the outcomes of the policies that those lawyers' facilitated.[111] Thus, even while some still question the technical legal analysis prepared by Jackson and Chayes, the consensus is that they did the "pragmatic" and right thing.

Based on these case studies, it certainly seems fair to question whether the "best view" of the law is always the right answer for the President. But drawing conclusions based on two examples—particularly a conclusion that would seem to move away from the seemingly intuitive proposition that there is some value to

108. Bauer, *supra* note 26, at 255.

109. Attributed to Judge Harold Leventhal, this famous quote is often used to describe the tendency of advocates to use only the pieces of a complicated and ambiguous legislative record that support their position. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

110. *See* Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 198–99 (2010) (discussing the two cases in a speech on government lawyering).

111. Bauer, *supra* note 26, at 238.

knowing what most or many lawyers might understand to be the "best view" of the relevant law—leaves one to wonder what a broader analysis might demonstrate.

For example, would different conclusions come from a careful analysis of Watergate-era domestic surveillance activities and President Nixon's decision to bomb Cambodian sanctuaries (the latter of which was famously defended in memoranda written by the then head of OLC, William Rehnquist)?[112] These events, among others, led President Carter and Attorney General Bell to emphasize the "best view" model, not the Cuban Missile Crisis or the bases-for-destroyers deal.

Or what about the lawyering that surrounded the adoption of a series of aggressive counterterrorism polices after 9/11, including the preparation of the 2002 legal memorandum in which OLC advised on the meaning of the federal statute that criminalized torture? This was the specific case that inspired most of the recent scholarship on the "best view" and led OLC to adopt its most recent Statement of Best Practices.[113] Would a careful review of that case change Bauer's analysis?

Considering a wider range of cases seems particularly important given that Bauer's examples pre-date the rise of the modern national security presidency (the bases-for-destroyers deal) and the changes to Executive Branch lawyering that were put in place post-Watergate (the Cuban Missile Crisis). The Presidency—and, perhaps more importantly, expectations about the Presidency—have changed dramatically since 1962 (and certainly since 1940), and it is not entirely clear that lessons from that year can be directly transposed to the modern day.[114]

So how might the analysis change if we considered other prominent examples from the modern, post-World War II national security Presidency? Key examples include the Bay of Pigs; United States support for the Contras and the mining of Nicaragua's harbor, which ultimately led to a setback for the United States before the International Court of Justice;[115] the Iran-Contra affair; President Clinton's decision to use force in Kosovo without congressional authorization or a United Nations Security Council resolution;[116] and President Obama's decisions to target Anwar Aulaqi and to argue that the use

112. *See* Pres. Auth. to Permit Incursion into Communist Sanctuaries in the Cambodia-Viet. Border Area, 1 Op. OLC Supp. 313 (May 14, 1970); The Pres. and the War Power: South Viet. and the Cambodian Sanctuaries, 1 Op. OLC Supp. 321 (May 22, 1970).

113. *See generally* Johnsen, *supra* note 72.

114. *See supra* text accompanying notes 36–49.

115. *See* Nicaragua v. United States, 1986 I.C.J. 14 (1986).

116. *See* Letter to Cong. Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 Pub. Papers of William J. Clinton 459 (1999) (informing Congress, via a report provided consistent with the War Powers Resolution, that he had begun an air campaign in Kosovo).

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of force in Libya did not constitute "hostilities" triggering the War Powers Resolution's sixty-day pull-out provision.[117]

And what about the fact that even the most robust review of public case studies will likely not capture any examples where Executive Branch lawyers stopped the President from engaging in unwise or illegal action, since such examples are much less likely to be made public?[118] How, if at all, can this be factored into the analysis?

We have not performed a systematic analysis of past precedents, but even a quick review suggests a complicated picture. As noted above, Bauer's examples appear to show that deviating from the "best view" approach can produce positive outcomes. But there are also examples where, in hindsight, Presidents probably wished that lawyers had saved them from more problematic outcomes.[119] On the other side, advice provided under a "best view" approach has, at times, allowed the Executive Branch to execute its policies with limited legal controversy and, at other times, led to serious complications.[120] The results in many other cases are deeply ambiguous. For example, there was limited immediate pushback to President Truman's decision to send troops to Korea without congressional authorization,[121] but the strategic (if not legal) wisdom of the decision was increasingly called into question as the conflict turned into a stalemate and critics began to lambast "Truman's War."[122] President Truman's subsequent announcement in September 1950 that he would send 100,000 troops to Europe to support NATO, which would seem to be much less of an infringement on Congress's constitutional power to declare war than sending troops directly into combat, provoked a congressional outcry. It prompted what is known as the "Great Debate" in the Senate—a months-long argument over the wisdom of the deployment as well as

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117. *See* Memorandum for the Att'y Gen. from David J. Barron, Acting Assistant Att'y Gen., Re: Applicability of Fed. Criminal Laws and the Const. to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010), https://www.aclu.org/files/assets/2014-06-23_barron-memorandum.pdf [https://perma.cc/YW8F-6ZZZ]; *See Libya and War Powers*: *Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011), http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf [https://perma.cc/NKB7-JUEE] (statement of Harold H. Koh, Legal Adviser, U.S. Department of State) (providing a detailed account of the basis for the Obama Administration's conclusion that United States involvement in the Libya operation is consistent with both the Constitution and the War Powers Resolution).

118. *See* Morrison, *Constitutional Alarmism*, *supra* note 76, at 1715–21 (noting that "many of OLC's no's never result in written opinions").

119. The fact that Ronald Reagan specifically created the National Security Council Legal Adviser's office in response to the Iran-Contra Affairs indicates that might be one such example. *See* N.Y. TIMES, *supra* note 58.

120. *See* Renan, *supra* note 61, at 832–35 (discussing how the 2002 interrogation memos were written by an OLC that "had the singular authority to bind the executive through formal and definitive legal analysis"); *see also* Morrison, *Constitutional Alarmism*, *supra* note 76, at 1719 (acknowledging that there are examples when the Department of Justice has issued opinions "upholding presidential actions of, at best, highly questionable legality").

121. *See supra* text accompanying notes 13–15.

122. *See* ACHESON, *supra* note 1, at 415.

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the President's constitutional authority to unilaterally send troops abroad, which only ended when the Senate passed a resolution approving the deployment.[123]

B. WHEN THE "BEST VIEW" REALLY IS THE BEST VIEW

The bottom line is that it is difficult to determine the consequences of adopting different standards for legal interpretation outside of the context of a particular case. Even if there is a clear policy preference, more aggressive legal positions carry with them greater risks. These risks include the possibility that courts will intervene if they have the jurisdiction to do so; that other institutional actors, such as Congress, civil society, or international partners, will criticize the President's actions and take whatever steps they can to oversee or curtail them; that a legal position taken during exigent circumstances to address a short-term crisis will have deleterious long-term ramifications for the Presidency or our system of governance; and, ultimately, that the legal position will end up harming the President's credibility, a necessary attribute to manage national security crises going forward. These incremental risks may make the wiser solution a second-best policy option, but that determination can only be made if someone is engaged in the exercise of seeking to understand what the "best view" of the law may be and what policies it can support.

Indeed, the fact that the risks of moving away from the "best view" of the law can be traded off against the policy benefits of a particular course of action is the premise that underlies Bauer's article. Bauer states that the "best view" approach "should remain undisturbed for the vast majority" of cases, presumably because the policy benefits of deviating from the "best view" would not justify the move in the mine run of cases. But even if one agrees, as we do, that there are cases where the stakes are high enough to adopt more aggressive legal positions and that those cases are likely to occur during national security crises, there is no reason to think that it is easy to identify such cases. Nor is there reason to conclude that the existence of such a case, should it be identified, warrants immediately jettisoning any need to determine the "best view" of the law.

In our experience, government lawyers are not shrinking violets, but they are under intense pressure during national security crises. Having at least a subset of those lawyers begin with the goal of identifying the "best view" of the law, which is presumptively binding in appropriate cases, serves important institutional values. For example, it helpfully guards against Executive Branch lawyers collectively assuming too much of an advocate's position. And it maintains OLC's independence and integrity, including by making clear precisely what is happening procedurally when OLC is over-ruled. As President Carter and Attorney General Bell recognized, a strong and relatively independent OLC can both

123. *See* SCHLESINGER, *supra* note 42, at 135–40.

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further efforts to maintain the rule of law within the Executive Branch and, perhaps even more directly and importantly, encourage public trust in Presidential action.

Leaving aside these more systemic concerns, all national security crises are not created equally. Faced with what is perceived to be an existential threat—say, the Cuban Missile Crisis, or the Battle of Britain—a President may be very willing to push the legal envelope. That calculus may be very different in other life and death situations that involve the use of force but do not raise such existential concerns. The only way the President can evaluate these trade-offs and make a decision is if he understands the risks of adopting a "reasonable, good faith" legal position, including the risks of diverging from the "best view" of the law. Just as we believe it is the duty of Executive Branch lawyers to present the President with these "reasonable, good faith" options, we also believe it is their duty to inform him of the material trade-offs those options produce.

Bauer's principal concern appears to be that by identifying the "best view" of the law, Executive Branch lawyers may box the President in.[124] In particular, Bauer argues that the "rhetorical power" of the term "best view" places any Administration "at a severe disadvantage," if it enters into a public debate after having taken a different position.[125]

As a threshold matter, this concern would only arise if it becomes publicly known, or if the President fears it will become publicly known, that he rejected what his senior legal advisers thought was the "best view" of the law. But such untaken legal advice would almost certainly be privileged, and, depending on the nature of the crisis, possibly classified.

Even so, acknowledging that the President could act at a disadvantage if the public knew he had adopted a legal position other than what his advisors deemed to be the "best view," we think it is critical to recognize the extent to which the "best view" exists, to the extent it exists at all, exogenously from Executive Branch lawyers deeming it so. Indeed, in our experience, a wide range of actors—the courts, the Congress, civil society, international interlocutors, the law professoriate, concerned citizens—can and do develop their own views on the right answer to particularly salient legal questions, regardless of what the President's lawyers think. In other words, it is unclear what incremental pressure is created by the President's lawyers deciding on their own "best view" of the law, because, at the end of the day, the President will almost certainly have to defend his legal position on its merits. It is thus much better that he knows upfront what his lawyers believe to be the "best view" of the law, rather than being surprised when controversy erupts down the road.

124. As noted earlier, he asserts that the best view "is meant to crowd out the alternatives and put the executive under pressure to adopt it." Bauer, *supra* note 26, at 255.

125. *Id.*

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CONCLUSION: WHAT LAWYERS CAN DO

Taking a step back from the specific differences between Bauer and the "best view" advocates on the mechanisms and standards the Executive Branch should use to provide legal advice to the President, one is struck by the difference in attitude. "Best view" advocates believe that Executive Branch lawyers are a core part of the architecture that serves to hold the modern-day Presidency accountable,[126] but Bauer takes a decidedly more pessimistic tone. There are real limits to what Executive Branch lawyers can do, he argues, particularly during crises. It does not make sense to hold them to an "unrealistic" standard that only sets them up to fail (and to be ignored by their clients).

This is both provocative and refreshing. The laws pertaining to national security crises are often fuzzy and written in contexts far removed from when they become relevant. The President, and not any particular government lawyer (even the Attorney General or the head of OLC), is the official who ultimately decides the Executive Branch's legal position. Even if the President cares deeply about the law, he has duties other than adopting the strictly "best view" of the law, such that he may choose to adopt other legally available positions that enable him to achieve his other goals. The pressure to make these trade-offs is going to be most pronounced during national security crises, when the President knows he is likely to be judged not on legal technicalities, but rather on holistic considerations of whether he did the right thing for the country.

Bauer is thus right to recognize and emphasize that there are limits to what Executive Branch lawyers who are "in the game" can accomplish. But, in seeming to foreclose government lawyers' ability and obligation to identify a "best view" if they see it, he may adopt too narrow a conception of what Executive Branch lawyers and the law can—and do—do. Bauer recognizes, of course, that the law serves as an ultimate bond on Presidential action.[127] But in our experience, the law can do more than that. For example, the law—particularly in the national security context, where it is so often dealing with life and death—frequently tracks moral and ethical intuitions, and can therefore help policymakers take those considerations into account.[128] The law is concerned with precedent and thus can aid Executive Branch decision-making by identifying when policy options are crossing into new territory.[129] And the law can signal

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126. *See* Johnsen, *supra* note 72, at 1562.

127. *See* Bauer, *supra* note 26, at 257 (noting that "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").

128. *See, e.g.*, GOLDSMITH, POWER AND CONSTRAINT, *supra* note 55, at 138–39 (noting that lawyers are "trained to think clearly, critically, and analytically, to find weaknesses in evidence or in causal inference, and to consider the broader implications and effects of a decision," such that they are thus "typically more attuned than most to context, appearance, and political and moral implications of particular actions").

129. For example, the extensive body of Executive Branch precedents concerning whether and when the President can use force without congressional authorization allows observers to compare whether proposed

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when options should be subjected to rigorous means-ends testing.[130] But the law can only do things if Executive Branch lawyers form views about what they believe to be "better" and "best" views of the law independent of simply identifying the best defense of the President's preferred policy path.

In the end, Bauer's focus on the realities of what Executive Branch lawyers have and can reasonably accomplish is a welcome turn. The study of these issues would benefit from more of the empirical, historical analysis he uses (with a broader cross-section of cases). But one just wishes that, after Bauer has focused so much on what Executive Branch lawyers and the law cannot do, future work will focus a little more on what they can do.

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military operations have precedents or not. *See* Marty Lederman, *Syria Insta-Symposium: Marty Lederman Part I—The Constitution, the Charter, and Their Intersection*, OPINIO JURIS (Sep. 1, 2013), http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection/ [https://perma.cc/9KTQ-J5RS] (discussing whether the use of force for strictly humanitarian purposes would be consistent with past Executive Branch precedents); Stephen M. Griffin, *A Bibliography of Executive Branch War Powers Opinions Since 1950*, 87 TUL. L. REV. 649 (2013). *See also* GOLDSMITH, POWER AND CONSTRAINT, *supra* note 55, at 138 (noting that "[l]aw and lawyers also help commanders in targeting and related decisions by acquainting them with the accumulated wisdom of the past," as various legal sources "reflect accumulated experience and learning").

130. Not only would the unprecedented nature of a decision signal that it warrants greater scrutiny, but a number of legal doctrines themselves call for a careful assessment of the policy interests supporting a decision or weighing of interests. *See, e.g.*, Krass, *supra* note 27, at 6–10 (describing how Presidents may use force without congressional authorization if they determine, among other things, that doing so further "important national interests").

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