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ARTICLES

Advising Presidents: Robert H. Jackson and the Problem of Dirty Hands

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ABSTRACT

Not so long ago, legal advice given to President George W. Bush regarding torture sparked considerable controversy, and discussions were frequently distorted by rancorous partisanship. This essay uses advice given to President Franklin Roosevelt by Attorney General, later Justice, Robert Jackson as a laboratory for exploring the ethical dimensions of the advisory relationship between government attorneys and the President. In particular, this essay examines the President's unilateral decision in 1940 to transfer fifty destroyers to Great Britain. That Destroyers Deal is distant in time and now relatively uncontroversial. Today, everyone agrees with the substantive policy of helping the British against Nazi Germany, and we have all but forgotten the partisan divide between Roosevelt and the Republicans. The parallax between torture today and helping the British in 1940 enables us to factor partisanship and substantive policy more or less out of our judgment.

To facilitate the Destroyers Deal, Jackson wrote a legal opinion for the President that Jackson knew was contrary to law. I have concluded that Jackson did the right thing, and this essay explains why. In particular, I draw upon but modify Michael Walzer's well-known exploration of the problem of dirty hands. The latter part of the essay applies the lessons gleaned from Jackson's experience to the advice regarding torture that President Bush received from his attorneys. On balance, I conclude that President Bush's lawyers did the wrong thing, but I explain why others might disagree.¹

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1. See *infra* notes 110–157 and accompanying text.

I. INTRODUCTION

In recent years, legal advisory opinions rendered during the administration of President George W. Bush have sparked heated controversy.² Unfortunately, many contemporary discussions of the advisory relationship between the President and his attorneys are distorted by intense and sometimes rancorous partisanship. This essay uses the relationship between Attorney General Robert H. Jackson and President Franklin D. Roosevelt to explore some ethical dimensions of the process of advising Presidents. In particular, the essay considers President Roosevelt's 1940 decision to assist Great Britain in its struggle against Nazi Germany by transferring fifty old destroyers to the British in exchange for base rights in the western Atlantic Ocean.³ To facilitate the Destroyers Deal, Jackson advised that the President had unilateral authority to accomplish the exchange; however, in a crucial part of the opinion, Jackson gave legal advice that he knew was contrary to law. Today, the Destroyers Deal is relatively distant in time and quite uncontroversial. Everyone now agrees that the President acted wisely. The differences between then and now enable us to factor partisanship and substantive policy more or less out of our judgments. After considering Jackson's 1940 legal advice to the President,⁴ the essay attempts a balanced ethical analysis of the Bush II Administration's torture memorandum.⁵

Towards the end of a distinguished career, Jackson thoughtfully described the Attorney General's special position in the executive branch:

I think the Attorney General has a dual position. He is the lawyer for the President. He is also, in a sense, laying down the law for the government as a judge might. I don't think he is quite as free to advocate an untenable position because it happens to be his client's position as he would be if he were in private practice. He has a responsibility to others than the President. He is the legal officer of the United States.⁶

Another respected Attorney General has voiced similar thoughts.⁷

Jackson's brief but nuanced description of the Attorney General's role makes sense in theory, but any realistic study of the advisory relationship between a

2. See, e.g., HAROLD BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009); DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* ch. 5 (2007); Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 *STAN. L. REV.* 409 (2010); W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 *LEGAL ETHICS* 107 (2009).

3. See William Casto, *Advising Presidents: Robert H. Jackson and the Destroyers-for-Bases Deal*, 52 *AM. J. LEGAL HIST.* 1 (2012).

4. See *infra* notes 9–109 and accompanying text.

5. See *infra* Part V.

6. Casto, *supra* note 3 at 116–17 (quoting Reminiscences of Robert H. Jackson, Columbia University Oral History Research Office (1955)).

7. See, e.g., NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990*, at 153–54 (1992) (quoting former Attorney General Griffin Bell).

President and the President's legal advisers should be based upon actual practice—not theory. An experienced and thoughtful observer of public life once wrote, “it seems best to me to go straight to the actual truth of things rather than to dwell in dreams.”⁸ The present essay is an effort to concentrate on actual practice rather than to dwell on theory.

A recently published article presented an exhaustive—some might say exhausting—exploration of Jackson's 1940 advice to President Roosevelt about his authority to transfer fifty destroyers to Great Britain.⁹ The study casts some light on Jackson's advice that an Attorney General is not “quite as free to advocate an untenable position . . . as he would be if he were in private practice.” For example, in one part of the destroyers opinion, Jackson advanced an analysis that he confessed was “hairsplitting.”¹⁰ More significantly, in another part of the opinion, he gave legal advice that he knew was contrary to law.

Some will dispute the conclusion that Jackson knowingly gave erroneous legal advice. There is a strand of jurisprudence that tacitly suggests that no legal analysis can be wrong.¹¹ Thus after a long career as a law professor, Kingman Brewster concluded, “That every proposition is arguable.”¹² The paradox—but not the ethical analysis—presented in this essay has little significance for those who believe that a legal analysis cannot be wrong. In the author's experience, however, many attorneys—surely most—believe that some legal analyses are clearly wrong. There is no evidence that Jackson subscribed to jurisprudential nihilism. When he wrote his opinion in 1940, he knew he was wrong.

Judging a person's intentions or what a person believes can be fraught with difficulties, and when the judgment concerns events over a half century old, the difficulties are multiplied. Yet we make judgments about others every day, and so it is in the case of Jackson's opinion. Certainly, Jackson never affirmatively stated that he knowingly rendered erroneous legal advice. Nevertheless, there is a wealth of circumstantial evidence indicating that Jackson was wrong and that he knew so.¹³

In the summer of 1940, the United States was a neutral country, and President Roosevelt had to decide whether to support Great Britain in its struggle against a

8. MILES J. UNGER, *MACHIAVELLI: A BIOGRAPHY* 215 (2011) (quoting NICCOLO MACHIAVELLI, *THE PRINCE* XV).

9. Casto, *supra* note 3.

10. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers [hereinafter Acquisition Opinion], 39 Op. Att'y Gen. 484, 495 (1940) (quoting Hersch Lauterpacht).

11. See, for example, the insightful comments in Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENT. 431 (2009).

12. LUBAN, *supra* note 2, at 192 (quoting Brewster); see also ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* 27 (1974), in which the State Department's Legal Adviser during the Crisis discusses the lawfulness of President Kennedy's decision to blockade Cuba and states that, “[i]n principle, under the conventions of the American legal system, no lawyer or collection of lawyers can give a definitive opinion as to the legality of conduct in advance.” *Id.*

13. See *infra* notes 18–33 and accompanying text; Casto, *supra* note 3, at 85–93, 124–31.

triumphant Nazi Germany. By August, Britain stood alone against the Nazis with only the English Channel protecting the beleaguered British from doom. Britain desperately needed destroyers to forestall an invasion, and destroyers were in short supply. Prime Minister Winston Churchill pleaded with President Roosevelt for the transfer of fifty old American destroyers originally launched at the end of World War I. The situation was complicated because many Americans wished the country to remain neutral and avoid becoming embroiled in the European War. Nevertheless, the President resolved to support the British by trading the destroyers for base rights in the western Atlantic and the Caribbean.

To support the destroyers-for-bases deal, Jackson advised, among other things, that the President had unilateral authority to dispose of the destroyers without formal congressional approval. In an opinion published for a national audience, Jackson had to construe three separate statutes that stood in the President's way. His three analyses ranged from brilliant to patently erroneous. The first statute, known as the Walsh Amendment, was only two months old and forbade the President from selling destroyers unless the Chief of Naval Operations "first certifi[ed] that such material is not essential to the defense of the United States."¹⁴ Jackson distinguished this statute with a brilliant legal analysis based upon the statute's language, purpose, and self-evident public policy.¹⁵ Then Jackson turned to the second statute. In the Espionage Act, dating from the end of World War I, Congress seemed to have outlawed transferring naval vessels to a belligerent country when the United States was neutral.¹⁶ Jackson blew through this road block with an analysis that he admitted was "hairsplitting."¹⁷ His treatment of the third statute is the most problematic.

An obscure provision of the United States Constitution vests the Congress with the power to dispose of government property.¹⁸ Moreover, two months before Jackson rendered his opinion, Congress enacted the Vinson Amendment, which expressly forbade the President from transferring navy vessels "except as now provided by law."¹⁹ The primary purpose of this provision was to restrict the President's authority to transfer destroyers to the British.²⁰ Notwithstanding Congress's obvious desire to restrict the President's authority, Jackson wrenched a proviso to an eighty-year-old post-Civil-War statute²¹ from its clear context and construed the ancient proviso to authorize the President to transfer any and all naval vessels to foreign powers so long as the President recorded his decision in

14. Act of June 28, 1940, 76th Cong., 3rd Sess., ch. 440, § 14 (a), 54 Stat. 676, 681.

15. See Casto, *supra* note 3, at 93-95.

16. Act of June 15, 1917, 65th Cong., 1st Sess., Ch. 30, 40 Stat. 217; see also Casto, *supra* note 3, at 63-66.

17. Acquisition Opinion, *supra* note 10, at 495; see also Casto, *supra* note 3, at 95-96.

18. U.S. CONST. art. IV, § 3, cl. 2; see also Casto, *supra* note 3, at 57.

19. Act of July 19, 1940, stet. ch. 644, § 7, 54 Stat. 780, codified at 34 U.S.C. § 493a (1940).

20. See Casto, *supra* note 3, at 38, 81, 91.

21. Act of March 3, 1882, ch. 391, § 2, 22 Stat. 196, codified at 34 U.S.C. § 492 (1940).

writing. Jackson released his opinion to the nation as part of a political campaign to garner support for the President's decision.²²

Under then accepted canons of statutory construction, Jackson's advice was erroneous.²³ Moreover, his analysis made a mockery of the two-month-old Vinson Amendment. The Amendment was enacted specifically to limit the President's authority to transfer the destroyers. Jackson dealt with this Amendment by simply ignoring it. Notwithstanding the Amendment's clear purpose, Jackson advised that the President had plenary power to transfer the destroyers as long as the deal was done in writing. In other words, Jackson in effect advised that the Vinson Amendment was a bizarre statute of frauds whose sole purpose was to preclude the President from making an oral agreement to transfer the destroyers.

Two of Jackson's trusted and capable advisers who wanted to support the President carefully considered the issue and concluded that the ancient proviso would not bear Jackson's construction. Benjamin V. Cohen is commonly viewed as the most brilliant lawyer of the New Deal.²⁴ Jackson himself described Cohen "as having the best legal brains he has ever come into contact with."²⁵ Cohen rejected Jackson's final analysis.²⁶ Newman A. Townsend²⁷ had primary responsibility within the Department of Justice for crafting attorney-general opinions, and Jackson described him as a "counselor on whom I often relied."²⁸ Townsend also rejected Jackson's final analysis.²⁹ Dean Acheson,³⁰ who was a capable attorney in private practice, and Supreme Court Justice Felix Frankfurter both fully supported the destroyers-for-bases deal, but neither man accepted Jackson's final construction.³¹ Cohen, Townsend, Frankfurter, and Acheson

22. See Robert H. Jackson, *The Exchange of Destroyers for Atlantic Bases*, in *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 97–98 (John Q. Barret ed., 2003).

23. Jackson's construction was contrary to the statute's title, its plain meaning, and the interpretive rule that statutory provisos apply only to the provision to which they are attached. See Casto, *supra* note 3, at 90.

24. See, e.g., WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN* 369 (1974) ("Ben was the best and most intelligent man in the New Deal."). See generally WILLIAM LASSER, *BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL* (2002).

25. HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES 1939–1941: THE LOWERING CLOUDS* 657 (1954) (June 22, 1941 entry quoting Jackson).

26. See Casto, *supra* note 3, at 91.

27. See William Powell, *Townsend, Newman Alexander*, in 6 *DICTIONARY OF NORTH CAROLINA BIOGRAPHY* 49–50 (W. Powell ed., 1996).

28. See Casto, *supra* note 3, at 7 n.22 (quoting Robert H. Jackson, *The Exchange Destroyers for Atlantic Bases* 26 (Sept. 22, 1952) (unpublished preliminary draft) (on file with the Library of Congress). In the final draft of this essay, Jackson described Newman as "a hard-headed, conservative, and forthright former judge." Robert H. Jackson, *The Exchange of Destroyers for Atlantic Bases*, in *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 95 (John Q. Barrett ed., 2003).

29. See Casto, *supra* note 3, at 91–92.

30. Acheson was a gifted lawyer, longtime partner in the Covington Burling law firm, and later Secretary of State in the Truman Administration. See generally DAVID S. McLELLAN, *DEAN ACHESON: THE STATE DEPARTMENT YEARS* (1976).

31. See Casto, *supra* note 3, at 125.

offered alternative statutory analyses to justify the President's unilateral authority to transfer the destroyers.³²

Finally, Jackson, agreed with Cohen's and Townsend's alternative analyses and on August 13, 1940, gave the President an informal green light for the transfer. Relying on this informal advice, the President cut the deal with Prime Minister Churchill later that same day. At that time, Jackson planned to base the President's unilateral authority upon a statute that required the Navy to determine that the vessels to be sold were "unfit for further service."³³ His dubious analysis fell apart three days later when the Chief of Naval Operations refused to make the requisite determination of unfitness.³⁴ The problem was that the destroyers were on active service, the Navy had assured Congress that the destroyers were needed for active service, and the British desperately needed the ships for immediate active service. They were in no way "unfit for further service." It was only then that Jackson adopted an erroneous construction of the ancient proviso that he, his advisers, Justice Frankfurter, and Acheson had rejected just a few days earlier.³⁵

Jackson's advice to the President regarding unilateral presidential authority to make the Destroyer Deal was different from the more common problem of an attorney who renders advice based upon a legal analysis that the attorney knows is weak. His concededly "hairsplitting" analysis of the Espionage Act falls in this latter category. In contrast, his analysis of unilateral authority was wrong, and he knew it was wrong. There are few known instances in our nation's history when high-level government lawyers apparently have taken this extreme step.³⁶ This paucity of known precedent probably stems from understandable attempts to cover up the wrongdoing and from the fact that Presidents seldom face situations in which they decide to act unlawfully.

Although Jackson's legal advice was erroneous, I have concluded that he did the right thing. In some circumstances, a government attorney is morally obligated to render an important opinion that the attorney believes or knows is erroneous. Jackson's advice regarding the Destroyers Deal is a good example. In this essay, I explain my conclusion.

32. Before Jackson wrote his formal opinion, Cohen, Townsend, and Acheson wrote two internal memoranda and one public op-ed piece that offered alternative bases for the President's unilateral authority. See Casto, *supra* note 3, at 51–67 (Cohen); *id.* at 80–81 (Townsend); *id.* at 71–76 (op-ed: Acheson and Cohen). Frankfurter worked with Cohen in crafting these analyses. See *id.* at 53–54, 71–73, 80. The Chief of Naval Operations eventually torpedoed the Cohen/Townsend approach by refusing to make a crucial finding of fact. See *id.* at 86–87. Acheson and Cohen offered an alternative analysis in their op-ed, but for unknown reasons, Jackson did not use Acheson and Cohen's idea in his final opinion.

33. Act of Aug. 5, 1882, ch. 391, § 2, 22 Stat. 296, codified at 34 U.S.C. § 491 (1940).

34. See Casto, *supra* note 3, at 86–88.

35. See *id.*

36. See Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 198–99 (2010) (noting apparent misconduct by Abraham Lincoln's attorney general and the Legal Advisor to the State Department under John F. Kennedy).

II. THE PROBLEM OF DIRTY HANDS

About forty years ago, Michael Walzer described a paradox that provides a useful model for analyzing the erroneous portion of Jackson's legal advice regarding the Destroyers Deal. Walzer called his paradox "The Problem of Dirty Hands."³⁷ He pointed out that for centuries, sophisticated observers have recognized that government officials occasionally violate well-established moral precepts in order to obtain some governmental good. Thus, Machiavelli urged that to be a good governor, a prince must learn "how not to be good, and to know when it is and when it is not necessary to use this knowledge."³⁸ Similarly, Max Weber said that in government, "No ethics in the world can dodge the fact that in numerous instances the attainment of 'good' ends is bound to the fact that one must be willing to pay the price of using morally dubious means or at least dangerous ones."³⁹ Weber continued, "Whoever wants to engage in politics at all, and especially as a vocation, has to realize these ethical paradoxes."⁴⁰

Walzer's Dirty-Hands paradox involves a conflict between two types of moral obligations. All of us operate under a system of personal or individual moral obligations that guide us in our private lives. Government officials also act under a system of personal or individual moral obligations, but officials also have an obligation to the nation. A government official "acts on our behalf, even in our name."⁴¹ This responsibility entails an additional layer of representational moral obligations. A government official has "considerable responsibility for consequences and outcomes"⁴² that impact the nation as a whole. Sometimes the individual moral obligation may conflict with the representational obligation to consider the nation's welfare, and Walzer believes that it may be proper to choose the latter over the former.

Walzer's point is not merely that the end justifies the means. His key insight is that consequentialism does not provide complete answers to all ethical problems that confront government officials. He believes that there are occasions when an official's action is simultaneously moral and immoral. To use Machiavelli's words, the official on these occasions must learn how not to be good.⁴³ Walzer views the official's moral dilemma as literally paradoxical. As an example, Walzer posits the now familiar ticking bomb hypothetical. A politician "is asked to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings around the city,

37. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973).

38. NICCOLO MACHIAVELLI, *THE PRINCE*, ch. XV.

39. MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 121 (H. Gerth & Wright Mills eds., trans., 1946).

40. *Id.* at 125.

41. Walzer, *supra* note 37, at 162.

42. *Id.* at 161.

43. *See supra* note 38 and accompanying text.

set to go off within the next twenty-four hours.”⁴⁴ Of course, this hypothetical is an outlier. In real life, as opposed to fiction⁴⁵ and philosophical speculation, the ticking-bomb scenario almost never happens.⁴⁶ Nevertheless, Walzer provides a valuable model that recognizes that in some situations an official’s decision may be simultaneously right and wrong. We will see that Jackson’s erroneous advice regarding the Destroyers Deal was simultaneously right and wrong.

Some have argued that Walzer’s problem of dirty hands is no problem at all because there can be no such dilemma or paradox.⁴⁷ Rather, a politician who violates a powerful moral precept in order to achieve some public good is simply choosing the lesser of two evils. Although this objection makes some theoretical sense, it is not realistic. In an ideal analytical world, the comparative good to be achieved by torturing or not torturing can be minutely weighed and balanced, but human beings do not live in an ideal world. We are notoriously sloppy, inconsistent, and irrational. In our messy world, we can actually believe, and be correct in believing, that a particular action is at the same time both morally right and morally wrong. To the extent that we are concerned with ethical decision-making in the real world rather than precise and logical theoretical analysis, we may assume that there really is a paradox.

A valuable aspect of the dirty-hands problem is the distinction between what Max Weber called an “ethic of absolute ends [and] an ethic of responsibility.”⁴⁸ An absolutist (in philosophy, they are usually called deontologists) will regard a particular moral precept as an absolute rule that under no circumstance should be violated. Regardless of the net good that can be attained, an absolutist might refuse to torture a fellow human being. A different official might agree that torturing is wrong but also might consider an ethic of responsibility in which the official acts not just individually but also for the nation. The latter official might choose torture. Walzer posits that the latter official is in the middle of a dilemma or paradox that cannot be resolved by a precise consequentialist balancing of outcomes.

44. Walzer, *supra* note 37, at 167.

45. Walzer probably drew his ticking-bomb scenario from a 1960 French novel about the revolt in Algeria. See generally JEAN LARTÉGUY, *LES CENTURIONS* (1960). The movie *DIRTY HARRY* (Warner Bros. 1971) presents a classic ticking-bomb scenario that does not involve a ticking bomb.

46. See John Kleinig, *Torture and Political Morality*, in *POLITICS AND MORALITY* 209, 219–20 (Igor Primoratz ed., 2007). Professor David Luban and others have pointed to a number of ambiguities lurking beneath the surface of the ticking-bomb hypothetical. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440–45 (2005).

47. See, e.g., Kai Nielsen, *There is No Dilemma of Dirty Hands*, in *POLITICS AND MORALITY*, *supra* note 46, at 20; Howard Curzer, *Admirable Immorality, Dirty Hands, Ticking Bombs, and Torturing Innocents*, 44 S.J. OF PHIL., 31, 46 (2006); see also R.B. Brandt, *Utilitarianism and the Rules of War*, 1 PHIL. & PUB. AFF. 145 (1971); R.M. Hare, *Rules of War and Moral Reasoning*, 1 PHIL. & PUB. AFF. 166 (1971).

48. WEBER, *supra* note 39, at 120.

A. ADAPTING WALZER'S MODEL TO JACKSON'S DILEMMA

Walzer's model is not an exact fit for Jackson's situation because the dilemma confronting Jackson is significantly different from Walzer's moral paradox. Walzer's paradox-plagued official is beset by conflicting moral dictates that coexist in a general moral system. In a moral sense, the official is damned if he does and damned if he doesn't. Jackson, however, was not confronted by inconsistent moral dictates. He was bedeviled by a conflict between the dictate of fidelity to law and the moral dictate to defend the United States, Great Britain, and indeed, western civilization against Nazi Germany. There is no internal inconsistency between fidelity to law and betraying that fidelity in order to achieve a moral good. Law and morality operate in two independent (albeit clearly related) spheres.⁴⁹ Laws are a function of lawmaking authority, and morality deals with what is right and what is wrong. The two systems frequently are in unison but sometimes not. In the realm of moral decision-making, the mere existence of a law cannot possibly establish a law's moral status or value. Some laws are notoriously immoral, and many are morally neutral or amoral. At least their moral purpose is so seriously attenuated that they may be classified as amoral. What is the moral distinction between a 55 and a 60 MPH speed limit? Where is the morality in Article Five (Letters of Credit) of the Uniform Commercial Code?

Where is the moral imperative in a law that establishes procedures for the sale of naval vessels?⁵⁰ Of course, if the law regarding the disposal of vessels had been enacted to stave off the United States' entry into a bloody European war, the law would have had a clear moral purpose. But the particular statute that Jackson grossly misconstrued was a simple housekeeping rule enacted in the late 1860s to deal with the Navy's surplus of vessels after the Civil War.⁵¹ The more recent statutes enacted in the summer of 1940 were presented as national security measures designed to ensure that Navy vessels fit for active duty would not be sold for cash.⁵² A straight sale of the vessels would have significantly reduced the Navy's size in exchange for a relatively minor amount of money. In contrast, the

49. The independence of law and morality is blurred when legal rules expressly refer to moral principles. For example, the entire notion of equitable remedies in the United States has involved the courts in a centuries-old exploration of what is fair under the circumstances of a particular case.

50. Suffice it to say that moral—as opposed to legal—absolutists reserve their absolutism for “grave violations of common morality.” ALAN DONAGAN, *THE THEORY OF MORALITY* 184 (1997); accord G.E.M. ANSCOMBE, *ETHICS, RELIGION AND POLITICS* ch. 6 (1981) (murder).

51. See Casto, *supra* note 3, at 89 n.495 and accompanying text.

52. In an article discussing the Vinson Amendment and plans to expand the Navy, *The New York Times* reported, “It appeared that all thought of intervention in the European war had disappeared overnight in favor of strengthening lines closer to home.” Harold B. Hinton, *For 2-Ocean Navy*, N.Y. TIMES, June 19, 1940, at 1; see also *Mosquito Boats sent to Britain*, CHESTER TIMES, June 19, 1940, at 4 (Rep. Mans: “Why go ahead and authorize expansion of the Navy if we are going to sell it to Great Britain.”); Chesly Manly, *Britain gets 20 U.S. Naval Craft*, CHI. DAILY TRIB., June 19, 1940, at 1 (Vinson Amendment explained on the basis that “the navy is opposed to releasing any of its ships to foreign countries”). Before going forward with the deal, President

Destroyers Deal gave the United States an array of important bases in the Caribbean and the western North Atlantic. Viewed in terms of national security, virtually everyone believed that the net result of the trade for base rights significantly enhanced the country's national security.⁵³

At the heart of the problem of dirty hands is an assumption that on occasion a government official will be called upon to choose between two powerful but conflicting moral precepts. In Jackson's situation, however, the moral conflict was not nearly so compelling and dramatic. President Roosevelt believed that the fate of Europe and the national security of the United States lay in the balance. Given the President's position in the constitutional order and Jackson's immense respect for and trust in Roosevelt's judgment, Jackson cannot be faulted for deferring to the President's judgment regarding the good to be achieved. On the other side of the scales of moral justice, lay the knowing violation of a quite obscure, technical rule of federal contract law with no apparent moral content.

Although Jackson was morally justified in betraying his fidelity to law, he was not legally justified. Using dirty-hands terminology, a "legal absolutist" would say that Jackson had to abide by the law and rule that the deal was illegal.⁵⁴ I have known and respected legal absolutists who are immensely capable and mature individuals with extensive experience in advising government officials. These absolutists tell me that they would never offer a legal opinion that they think is erroneous. As a matter of strict legal analysis, an absolutist conclusion makes sense. But when the analysis shifts from legal rules to moral choices, the absolutist position becomes, in my judgment, quite nonsensical. One may conclude that Jackson's intentional misconstruction of the law was simultaneously right and wrong.

Some might argue that when Jackson gave his opinion, he was not simply counseling a technical violation of federal contract law. Rather, his opinion flouted some of our society's more fundamental values. First on the list comes the bedrock principle of the rule of law. The principle has been variously defined,⁵⁵ but at its core is the concept that we all should comply with valid laws created to regulate society. If government officers do not consider themselves bound by the

Roosevelt obtained approval from Representative Vinson, who chaired the House Naval Affairs Committee and who drafted the Vinson Amendment. See Casto, *supra* note 3, at 115.

The Walsh Amendment, which also restricted the Navy's disposal authority, was also presented as a national security measure. See *id.* at 94. While some who voted for the Vinson and Walsh Amendments were probably motivated by isolationism, the amendments were presented as national security measures. The amendments might not have been passed if they had been presented as isolationist measures.

53. *Id.*, at 101.

54. See, e.g., Wendel, *Torture Memos*, *supra* note 2, at 121–22 (condemning Jackson's failure to provide accurate legal advice); see also *infra* notes 73–76 and accompanying text.

55. See Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 118–19 (2009).

law, why should anyone else? The rule of law is one of the glues that holds our society together.⁵⁶

Close behind the rule of law comes the principle of separation of powers. These two principles are closely related but subtly different. The rule of law is a general principle applicable to all laws created to regulate society. In contrast, the aspect of separation of powers that Jackson's opinion implicated involved the Constitution's allocation of authority among the three branches of government. He was doing more than counseling a violation of a law. He was counseling violation of a fundamental constitutional principle. Congress makes the laws, and the President is supposed to enforce them.

Without in any way denigrating the importance of separation of powers and the rule of law, these two fundamental ideals do not create seamless webs of practice. An occasional infraction of either ideal does not rend the entire fabric. Laws are routinely violated in our society in situations where the aggrieved party lacks resources to enforce the law. Likewise, laws are routinely under-enforced due to a lack of resources or for other reasons. We, as a society, accept these well-known deviations and others but do not see them as seriously jeopardizing the bedrock ideal of the rule of law. We also accept many significant incursions into the separation of powers. The ideal has always been viewed as a malleable political principle rather than an absolute doctrine.⁵⁷ For example, the existence of political parties has significantly attenuated the separation of powers between the Congress and the President. In an influential opinion that Jackson penned as a Supreme Court justice, he noted that "[p]arty loyalties and interests, sometimes more binding than law, extend [the President's] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution."⁵⁸

Notwithstanding well-known and accepted practices that attenuate the related values of rule of law and separation of powers, these ideals retain their fundamental significance. They are, however, important considerations and not absolute rules. They cannot support an absolutist position with respect to an attorney's moral duty to follow the law. Therefore, as a matter of moral decision-making, Jackson's duty to follow the law should be considered an

56. In a powerful defense of fidelity to law, Professor Bradley Wendel notes that laws are one of the means that law-making institutions use to mediate a society's moral disagreements. *See generally* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005). We all have something akin to a social contract to entrust lawmakers with a final authority to frame rules regarding what is right and what is wrong. Professor Wendel frames his argument in the context of the Bush II Administration's decision to adopt torture as a tool for furthering executive policy. Bradley's powerful defense becomes severely attenuated when legal rules that have virtually no independent moral content are involved. His defense also collapses when the scope of a particular law is unclear.

57. *See* JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 3.5 (8th ed. 2010).

58. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

important consideration but not an absolute, moral juggernaut. Of course, this analysis only makes sense to a consequentialist. A legal absolutist would reject it.

Some might argue that, in addition to being lawless, Jackson's opinion was a direct assault on the principle of separation of powers. Under the Constitution's allocation of authority, the President is supposed to abide by an act of Congress. That summer of 1940, Congress enacted the Vinson Amendment, which was specifically intended to limit the President's authority to sell destroyers to the British.⁵⁹ The President seemed to overturn a policy set by Congress just a month earlier. Perhaps so, but there is a distinct odor of formalism to this claim. The same month that Jackson rendered his opinion, Dean Acheson and Benjamin Cohen wrote an elaborate and influential op-ed in support of transferring destroyers to the British, and they advanced an innovative analysis regarding the President's unilateral authority.⁶⁰ They prefaced their analysis by assuring their readers that "we would not suggest executive action without congressional approval if we believed that a majority of the Congress was opposed to such action."⁶¹ This professed belief about what a congressional majority might think is difficult to fit into a traditional legal analysis. Nevertheless if the belief was accurate, the charge of flouting Congress's judgment loses much of its political substance.

A cynic might dismiss Acheson's and Cohen's preface as mere self-serving window dressing. Nevertheless, they seem to have been right. As part of the decision-making process, President Roosevelt diligently consulted national political leaders from both parties.⁶² That year Roosevelt was running for his third term, and he reached out to the Republican presidential and vice presidential candidates, who informally approved the deal.⁶³ He also consulted with many members of Congress, including the Senate Minority Leader, the House Minority Leader, and the chairmen of the House and Senate Naval Affairs Committees.⁶⁴ Many of the senators and representatives approved the President's decision to transfer the destroyers without formal congressional approval. A number of others told the President that they would not support the transfer in a formal congressional vote but that they had no objection to the President accomplishing the transfer on his own. These consultations cannot rise to the status of a legal argument, but they suggest that as a matter of political analysis the President was not really flouting the Congress's judgment.

59. See *supra* notes 18–20 and accompanying text.

60. Jackson elected not to use this argument. See Casto, *supra* note 3, at 80–81, 85–93.

61. Dean Acheson et al., *No Legal Bar Seen to Transfer of Destroyers*, N.Y. TIMES, Aug. 11, 1940, at 8; see Casto, *supra* note 3, at 71–79.

62. See Casto, *supra* note 3, at 70, 114–15.

63. See *id.* at 114.

64. See *id.* at 70, 114–15.

To repeat: the separation of powers implications of Jackson's erroneous counsel were more a matter of form than of substance. The same month that Jackson penned his destroyers opinion, Dean Acheson also struggled with the problem of presidential authority to aid Britain. Acheson consciously refused to exalt form over substance.⁶⁵ He explained in private that:

I have very little patience with people who insist upon glorifying forms on the theory that any other course is going to destroy our institutions. The danger to them seems not in resolving legal doubts in accordance with the national interest but in refusing to act when action is imperative.⁶⁶

In contrast to the separation of powers, the rule of law was directly implicated in Jackson's decision to ignore the law. The ancient proviso that he cited in his opinion simply did not empower the President to sell off the nation's navy. Nevertheless, a few factors significantly attenuated the impact of Jackson's assault on the rule of law. He was, after all, counseling fairly technical misconduct. Moreover, he immediately released his opinion to the nation and thereby subjected it to the powerful constraints of the political process. This aspect of Jackson's conduct is similar to civil disobedience.⁶⁷ In addition, the Destroyers Deal was a one-time transaction. Jackson was not counseling a general course of lawlessness. Finally, the ideal of rule of law has never been an absolute concept. The law, itself, has a number of escape devices designed to mitigate the punishment for admittedly illegal conduct.⁶⁸

B. OTHER ANALYSES OF DIRTY HANDS AND THE LEGAL PROFESSION

Walzer's analysis has not gone unnoticed within the legal community—at least within the community of legal scholars. Because attorneys—like government officials—represent others, attorneys act within a system of representational moral obligations that we loosely label professional responsibility. A number of thoughtful analyses have used Walzer's analysis to examine conflicts between obligations of professionalism and individual moral obligations unrelated to professionalism.⁶⁹ Although these analyses invoke the language of dirty hands, they tend to reject or ignore Walzer's paradox. Attorneys are fundamentally

65. See *id.* at 78–79, 102.

66. Letter from Dean Acheson to John McCloy (Sept. 26, 1940) (on file with Yale University) Dean Acheson Papers, Box 21, Yale University, quoted in MCLELLAN, *supra* note 30, at 41 (1976); see also Dean Acheson, *Ethics in International Relations Today*, in THE VIET-NAM READER 13, 13–15 (M. Raskin & B. Fall eds., 1965).

67. See RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 85–87 (2006). Others disagree with Judge Posner. See Walzer, *supra* note 37, at 178–79; Bradley Wendel, *Executive Branch Lawyers in a Time of Terror*, 31 DALHOUSIE L. J. 247 (2008).

68. See *infra* Part IV.

69. See, e.g., DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 317–40 (1988); W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 168–75 (2010); Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219 (1995).

problem-solvers, and a paradox is anathema to them. There is a pronounced tendency to elide the paradox and advance a sophisticated analysis that resolves the apparent conflict. These analyses implicitly deny the possibility that an attorney's action could be simultaneously right and wrong. In addition and more significantly, these thoughtful analyses do not really address the dilemma that confronted Jackson. They do not address the stress between fidelity to law and extralegal goals. Instead, they are primarily concerned with resolving competing ethical considerations.

Insofar as Jackson's dilemma is concerned, the most relevant lawyerly discussions of the problem of dirty hands have been written in the context of torture. Professor Philip Bobbitt uses the imagery of dirty hands, but he essentially rejects Walzer's paradoxical insight that an official's conduct might be simultaneously right and wrong. Bobbitt's treatment of the problem of dirty hands implicitly assumes that there is no paradox. He is a thoroughgoing consequentialist. Like philosophers who have rejected Walzer's paradox, Bobbitt believes that an official who chooses the lesser of two evils has reached the ethically correct solution. His analysis amounts to an extended essay on the complicated weighing and balancing of many consequentialist considerations.⁷⁰

Professor Bobbitt flirts with the problem of an official who acts unlawfully in order to obtain some government good. He notes that "Machiavelli's insight—that officials must disregard their personal moral codes in carrying out the duties of the State—is seldom assessed within the context of law."⁷¹ Unfortunately, however, he restricts his brief analysis to two outliers.

First, he discusses torture in the ticking bomb scenario.⁷² Bobbitt does not see any ethical problem because he is a consequentialist. He counsels that in this situation, an official must violate any law against torture "because the consequentialist calculus of obeying the law is so clear and so absolutely negative."⁷³ Bobbitt agrees, however, for all the usual reasons that the ticking bomb scenario is an outlier that seldom happens.⁷⁴

Bobbitt turns from the ticking bomb to a brief discussion of Abraham Lincoln's suspension of the writ of habeas corpus at the beginning of the Civil War. Bobbitt quotes Lincoln's words:

To state the question more directly, are all the laws, *but one*, to go unexecuted and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be

70. PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 365 (2008).

71. *Id.* at 365.

72. *Id.* at 361–64.

73. *Id.* at 365.

74. *Id.* at 362–63.

overthrown, when it was believed that disregarding the single law, would tend to preserve it?⁷⁵

Machiavelli and Winston Churchill used the same reasoning to justify unlawful action when the existence of their republics was threatened.⁷⁶

Bobbitt seems to posit the need to combat existential threats as a fundamental axiom in devising a strategy for fighting what he calls the “long war” against terrorism, but Lincoln’s wise words are not particularly helpful with respect to terrorism. The problem of an existentialist threat proves either too little or too much. Lincoln faced a direct and credible assault on the United States’ constitutional order. When Winston Churchill made a similar point in 1940, Great Britain was in a death match with Nazi Germany. Likewise, Machiavelli addressed the extinction of Florence’s constitutional status as a republic. Our long war with terrorism is replete with death, horror, and destruction, but it is a stretch to say that terrorism actually poses an existentialist threat.⁷⁷

When Machiavelli, Lincoln, and Churchill invoked the axiom of an existential threat, they meant an immediate, direct, and credible threat to the fundamental constitutional order of their respective republics. Can the same be said of terrorism? Does anyone really believe that terrorists seek to alter our republic’s constitutional order? Terrorism involves an appalling and horrible destruction of life, limb, and property, but no more so than some other threats. We have been fighting a “war” on drugs for decades and that war is against a threat that is more

75. *Id.* at 366 (quoting Lincoln).

76. In the *Discourses*, Machiavelli took Pietro Soderini, Gonfalonier of Florence, to task for Soderini’s failed defense of the Florentine republic. NICCOLO MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 405 (M. Lerner ed., 1950). When the enemy was almost at the gates, Soderini refused to act because “boldly to strike down his adversaries and all opposition would oblige him to assume extraordinary authority, and even legally destroy civil equality.” *Id.* Machiavelli continued, “This respect for the laws was most praiseworthy and wise on the part of Soderini. Still one should never allow an evil to run out of respect for the law, especially when the law itself might easily be destroyed by the evil.” *Id.* at 405–06.

Churchill believed that international law should be violated in order to check Nazi aggression:

Our defeat would mean an age of barbarian violence, and would be fatal not only to ourselves, but to the independent life of every small country of Europe. . . [W]e have a right, and, indeed, are bound in duty, to abrogate for a space some of the Conventions of the very law we seek to consolidate and affirm.

MARTIN GILBERT, *WINSTON S. CHURCHILL – FINEST HOUR 1939–1941*, at 106 (1983) (quoting Churchill).

Similarly, former Secretary of State Dean Acheson, who participated in the Kennedy Administration’s initial policy decisions regarding the Cuban Missile Crisis, forcefully defended the Administration’s decision to blockade Cuba. Acheson was a sophisticated and highly respected lawyer, and he argued that in this kind of crisis, law becomes irrelevant.

I must conclude that the propriety of the Cuban quarantine is not a legal issue. . . . I cannot believe that there are principles of law that say we must accept destruction of our way of life. . . . No law can destroy the state creating the law. The survival of states is not a matter of law.

Remarks by the Honorable Dean Acheson, 57 AM. SOC’Y INT’L L. PROC. 13, 14 (1963).

77. See Sanford Levinson, *Contemplating Torture: An Introduction*, in *TORTURE: A COLLECTION* 23, 32 (S. Levinson ed., 2004).

appalling and destructive than terrorism. Is the threat of drug abuse an existential threat?

The basic problem with the axiom of existential threat is that it involves an outlier that seldom occurs. On those rare occasions when such a threat appears, the stakes are so high that the solution is obvious. Of course, the law should be broken in order to save the republic. But most problems involving the rendering of legal advice simply do not involve such dire threats. In particular, it is not clear that President Roosevelt was dealing with an existential threat in the summer of 1940.

Professor Bobbitt's thoughtful book explores in detail how he believes that a thoroughgoing consequentialist should address the problem of torture. He uses the phrase "dirty hands" but does not address the paradox of dirty hands. More significantly, he writes about how a good government official should act. He does not write about how an attorney adviser should advise.

Unlike Professor Bobbitt, Professor Bradley Wendel does address the problem of how an attorney adviser should advise. Professor Wendel is quite familiar with the problem of dirty hands,⁷⁸ but he appears to be a legal absolutist. Regardless of the consequences, he urges that a lawyer must give an accurate opinion as to the legality of a proposed project.

Professor Wendel specifically believes that Jackson's conduct in the Destroyers Deal violated the absolutist requirement that attorneys must "provide candid legal advice from a standpoint independent of their client's interests, to interpret the law in good faith, and to refrain from counseling or assisting unlawful actions by their clients,"⁷⁹ but perhaps he is wrong. He assumes that Jackson's formal written opinion accurately describes the advice that Jackson actually gave the President. We will see that when the political stakes are sufficiently high, government attorneys may give frank legal advice in private and a significantly edited version of their advice for public consumption.⁸⁰ When this duality occurs, an attorney's violation of Professor Wendel's absolutist standard becomes significantly blurred.

Professor Wendel draws a valuable distinction between an attorney's legal advice and the President's subsequent action. Although an attorney must provide the President accurate advice, the President is not obliged to follow that advice:

78. Like other legal ethicists, he examines the problem primarily in the context of a conflict between an attorney's representational obligations and nonprofessional personal obligations. WENDEL, *supra* note 69, 168-75. In his mind, the representational obligations must prevail. *Id.* at 175. Nevertheless, he recognizes that an attorney may find herself in the middle of a paradox. *Id.* at 171-72. For him, the solution to the problem is to override nonprofessional moral obligations and perform acts of expiation to assuage the attorney's guilt. *Id.* at 172-75.

79. Wendel, *supra* note 2, at 111. Professor Wendel specifically addresses Jackson's destroyers opinion and concludes that notwithstanding the high national-security stakes, Jackson should have advised the president that the deal was unlawful. *Id.* at 121-22.

80. See *infra* Part V.B.

“A good President may in some cases, be willing to take aggressive action to protect national security, without worrying too much about the law.”⁸¹ This distinction makes sense. In making a difficult decision, the President needs, above all else, to have an accurate understanding of all the variables. If the President decides to take action that is illegal or of doubtful legality, the President needs to know that she is breaking or bending the law.

III. USURPING PRESIDENTIAL RESPONSIBILITY

Former Attorney General Elliot Richardson believed that in the Destroyers Deal, the President “needed somebody to defend his action.” Richardson speculated that “Jackson was like a general counsel of a corporation who says to the CEO, ‘This is not free of doubt, boss, and we may get taken to court, but I think we have a strong foundation of justification for taking this position.’”⁸² Presumably Jackson had a private conversation along these lines when he met with the President and discussed his concededly “hairsplitting” analysis of the Espionage Act. Jackson told his biographer that when he advised a client on close questions of law, “I would tell my client what his chances were, what his risk was, and support him as best as I could. That is what I did with the Administration.”⁸³ Attorney General Griffin Bell took much the same approach.⁸⁴

One wonders, however, what Jackson told the President about his knowingly erroneous construction of the ancient proviso. In this regard, it is important to remember that Jackson was not the ultimate arbiter of the Destroyers Deal. That was President Roosevelt’s responsibility. Roosevelt had to weigh and balance a daunting array of considerations including whether the Deal was lawful. In other words, the President also was confronted with the problem of dirty hands. After all, the Constitution provides that “he shall take Care that the Laws be faithfully executed.”⁸⁵

As a counselor on legal matters, Jackson had an obligation to let the President know that there was no unilateral executive authority to trade the destroyers to the British but that Jackson would support the President with an erroneous legal opinion. If the President is going to violate his constitutional duty to “take Care that the Laws be faithfully executed,” surely the President should be so informed

81. Wendel, *supra* note 2, at 122. Professor Wendel quotes Professor Jack Goldsmith for the same proposition. *Id.* at 122 (quoting JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 203 (2007)).

82. BAKER, *supra* note 7, at 32 (1992) (quoting Richardson).

83. EUGENE C. GERHART, *AMERICA’S ADVOCATE: ROBERT H. JACKSON* 222 (1958) (quoting Jackson).

84. When President Carter wanted to use federal funds to pay teachers at Catholic schools, Bell strenuously objected that the plan was unconstitutional. Nevertheless, after the president overrode Bell’s advice, the Justice Department, with Bell’s apparent approval, defended the program in court. See GRIFFIN BELL & RONALD OSTROW, *TAKING CARE OF THE LAW* 24–28 (1986); Griffin Bell, *Office of Attorney General’s Client Relationship*, 36 *BUS. LAW.* 791, 796 (1981).

85. U.S. CONST. art. II, § 3.

by his chief legal adviser. To do otherwise would be to insulate the President from the problem of dirty hands. Decisions like this should be made by the President and not by a counselor who lacks the President's ultimate responsibility, judgment, knowledge, and policy making authority.

At times, Jackson's reflections in later years on his approach to advising the President seem inconsistent with his actual practice. "An Attorney General," he explained, "is part of a team, and ought to work with the team as far as he can. That doesn't mean he should distort the law, or anything of that sort, but he is the advocate of the administration, and necessarily partisan."⁸⁶ He justified his "necessarily partisan" attitude by insisting that "[w]e depend on the adversary system and the Attorney General is adverse to anyone who's adverse to the administration."⁸⁷ At first glance, his description is quite at odds with the gross distortion of law in his destroyers opinion. Moreover, his allusion to the "adversary system" comes across as a glib but quite irrelevant misdescription of the advisory process. The legitimacy of the adversary system depends upon opposing counsel and a neutral court to render disinterested judgments. These procedural safeguards do not exist in the privacy of the Oval Office, and Jackson rendered his destroyers opinion with an understanding that lack of standing would foreclose judicial review.⁸⁸

Notwithstanding the apparent inconsistency between Jackson's actual practice and his later recollections, the two can be reconciled. Perhaps he saw a distinction between legal advice given in private and more formal advice published to the nation at large. Although he never explicitly drew this distinction,⁸⁹ it is nevertheless implicit in his writings and recollections. He told his biographer that in private, "I would tell my client [i.e., "the Administration"] what his chances were, what his risk was, and support him as best as I could."⁹⁰ In the famed *Steel Seizure Case*,⁹¹ he wrote that he viewed his public pronouncements as Attorney General in an entirely different light. In that case, he had to address one of his public statements as Attorney General in which he had insisted that the President had a broad constitutional power to seize private industrial facilities.⁹² As a Supreme Court Justice, he rejected his prior public opinion as self-serving, partisan advocacy. He frankly explained that "a judge cannot accept *self-serving*

86. Casto, *supra* note 3, at 130 (quoting Reminiscences of Robert H. Jackson, Columbia University Oral History Research Office (1955)).

87. *Id.*

88. *See id.*, at 121–22.

89. Shortly before Jackson's death, he wrote an unpublished law review article describing in some detail the Destroyers Deal. In this article, he did not mention the possibility that his private advice to the president may have differed significantly from his formal, public opinion. The article's final draft is reprinted in *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT*, *supra* note 28, at 82–103. A number of preliminary drafts are available in the Jackson papers in the Library of Congress. *See Casto, supra* note 3 at 3 n.6.

90. GERHART, *supra* note 83, at 222.

91. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

92. *See Casto, supra* note 3, at 130–31.

statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."⁹³

The distinction between private and public legal advice also can explain Jackson's suggestion that in rendering legal advice, the Attorney General acts as the President's partisan advocate in an "adversary system." In a very real sense, the drafting and public release of an advisory opinion in a controversial situation like the Destroyers Deal is an act of political advocacy and not of legal judgment. Perhaps Jackson gave the President his legal judgment, warts and all, in private. The public opinion was a political advocacy document filed in the court of public opinion. Jackson's opinion was vigorously attacked by capable and sophisticated adversaries,⁹⁴ and the court of public opinion approved the deal.⁹⁵

IV. ESCAPE DEVICES

If an attorney in Jackson's position rejects the rule of law in order to achieve a public good, what should be the consequences for the attorney? Walzer recognizes that one significant consequence will be that the official "should feel very bad."⁹⁶ Jackson was an honorable, but not perfectly honorable,⁹⁷ individual, and one can imagine that for the rest of his life, his memories of the Destroyers Deal were tinged with guilt. Individual suffering should not be dismissed as irrelevant, but personal feelings of guilt are not enough. Among other things, the consequence of an official's feelings of guilt is, as a practical matter, "limited only by *his* capacity for suffering."⁹⁸

Walzer believes that in addition to personal feelings of guilt, an official with dirty hands should be subject to punishment, "if only because it requires us at least to imagine a punishment or a penance that fits the crime and so examine closely the nature of the crime."⁹⁹ He also notes that as a practical matter, an official who decides to violate a moral precept in order to achieve a public good cannot know at the time of deciding whether the good will in fact be attained: "They override the rules without even being certain that they have found the best way to the results they hope to achieve."¹⁰⁰ Without denying the moral paradox confronting officials, Walzer believes that officials should opt for the public good. Nevertheless, "we don't want them to do that too quickly or too often."¹⁰¹

93. *Youngstown*, 343 U.S. at 647 (Jackson, J. concurring) (emphasis added). Later in the opinion, he noted, "I should not bind present judicial judgment by earlier partisan advocacy." *Id.* at 649 n.17.

94. See Casto, *supra* note 3 at 101–04.

95. See *id.* at 101.

96. Walzer, *supra* note 37, at 167.

97. As a great moral thinker once said, "He that is without sin among you, let him cast the first stone at her:" *John* 8:7 (King James).

98. Walzer, *supra* note 37, at 179 (emphasis original).

99. *Id.*

100. *Id.* at 179–80.

101. *Id.* at 180; see also BOBBITT, *supra* note 70, at 384.

Walzer's ideas on punishment fit comfortably into the common legal distinction between norms and associated remedies or punishment. Attorneys are accustomed to distinguishing between the violation of a norm and the consequences. Walzer's idea of shaping the punishment to fit the crime and examining closely the nature of the crime is quite consistent with traditional notions of punishment.

In considering the extent to which misconduct by an official should be punished, one who is to judge should consider the paradox of dirty hands. In Jackson's case he violated the norms of legal professionalism and flouted the rule of law, but as a matter of moral choice, he probably was right. If so, where is the value in punishing his professional misconduct? Will either the goals of retribution or deterrence be well served?¹⁰² If Jackson's choice was morally correct, he, in a very real sense did the right thing and does not merit significant punishment. Similarly, do we really want to deter people from taking morally correct action?

To be sure, as a matter of consequentialism, we might want to punish Jackson even if he did what was morally correct. When Admiral John Byng was executed for his failure at the Battle of Minorca, Voltaire explained that, "In this country, from time to time, we like to kill an admiral to encourage the others."¹⁰³ We might wish to punish Jackson to encourage other attorneys to follow the law in situations where the moral justification is not as clear. In addition, if attorneys know that they are subject to punishment in a dirty-hands situation, they are more likely to think very carefully about the moral good to be attained. To use Walzer's words, we do not want attorneys to flout the rule of law "too quickly or too often."¹⁰⁴ The possibility of punishment is especially important to curb the enthusiasm of a certain type of government attorney that Elliot Richardson described as "heads-up, get-ahead, go-along organization men."¹⁰⁵

When a legal rule is violated, the law provides a number of escape devices to mitigate the consequences to the wrongdoer. Third parties are always vested with a power to excuse the infraction or to tailor the remedy or punishment with an eye to the overall context of the infraction. In private matters, an individual harmed by another's wrongful conduct may elect to do nothing, negotiate with the wrongdoer for a remedy, or commence a lawsuit against the wrongdoer. Likewise in public matters, prosecutors are vested with broad discretion not to prosecute at all, to prosecute for a lesser violation, or to prosecute and leave punishment to the

102. See Neil Levy, *Punishing the Dirty*, in *POLITICS AND MORALITY*, *supra* note 46, at 38. See also Tamar Meisels, *Torture and the Problem of Dirty Hands*, 21 *CAN. J.L. & JURIS.* 149, 171-73 (2008). Other common purposes of punishment include restraint and reformation of the lawbreaker. These purposes are not relevant to punishing Jackson's transgression.

103. VOLTAIRE, *CANDIDE* ch. XXIII (1759).

104. See *supra* note 101 and accompanying text.

105. ELLIOT RICHARDSON, *THE CREATIVE BALANCE* 8 (1976).

judicial process. For example, United States Attorneys may consider a number of factors that by analogy could result in not punishing Jackson for his misconduct.¹⁰⁶ State prosecutors are viewed as appropriately exercising much the same discretion.¹⁰⁷ Similarly, the concept of jury nullification by grand¹⁰⁸ and petit juries can mitigate the punishment of the wrongdoer. There is also the pardon power. The most pertinent escape devices are the guidelines that the American Bar Association has promulgated to assist disciplinary boards tasked with imposing sanctions upon lawyers who have acted unprofessionally. These guidelines also recommend significant discretion in fitting the punishment to the crime.¹⁰⁹

V. THE TORTURE MEMORANDUM

Although the present essay and its underlying historical study concentrate upon Robert Jackson's decision to facilitate the Destroyers Deal, the essay also suggests a way to organize our thoughts about more contemporary advisory opinions. To be sure, the present essay is irrelevant to most occasions for giving legal advice because legal advice typically does not involve high political stakes and gut-wrenching moral conflicts. In the typical situation, a government client simply desires to know whether a particular course of action is legally permissible. There is no overriding government good to be attained or denied. The only significant ethical considerations are the rule of law and possibly the separation of powers.

The problem of dirty hands as modified in the present essay only arises in extraordinary situations where the law bars attainment of some truly significant government good. Jackson's destroyers opinion presented this extraordinary dilemma. Perhaps the Bush II torture memorandum is another example.

Countless critics have parsed, dissected, and eviscerated the infamous torture¹¹⁰ memorandum¹¹¹ written by Jay Bybee and John Yoo. Suffice it to say that Bybee's and Yoo's analyses were clearly wrong as a matter of traditional

106. See U.S. ATTORNEY'S MANUAL §§ 9-27.230 & 9-27.220. Similarly, after a conviction a federal "court, in determining the particular sentence to be imposed, shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553 (a).

107. See NICHOLAS HERMAN & JEAN CARY, LEGAL COUNSELING, NEGOTIATING, AND MEDIATING: A PRACTICAL APPROACH § 19.05 (2d ed. 2009) (discussing the National District Attorneys Association's (NDAA) National Prosecution Standards).

108. In the author's personal experience as a grand juror, grand juries are quite willing to return a no-true bill in situations where someone clearly violated the law.

109. See, e.g., STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.32 (1991).

110. A semantic discussion of whether a program of incessant physical beatings and water boardings over a course of several months is actually torture is beyond the scope of the present essay. Those who claim that the Bybee and Yoo memorandum did not counsel torture embarrass themselves.

111. The Bush II attorneys actually wrote a series of memoranda related to the issue of torture. See LUBAN, *supra* note 2, at ch.5. The present essay concentrates on the Bybee/Yoo memorandum of Aug. 1, 2002.

legal analysis,¹¹² which gives rise to the possibility that they were confronted with the problem of dirty hands. On the one hand, they had a professional obligation to follow the law, but on the other hand, they had a representational obligation to the American people.

Bybee and Yoo may have believed that they were not confronted with the problem of dirty hands because in fact they thought that their advice was an accurate statement of the law. Yoo apparently claims that his memorandum was a straight forward explication of the law and was divorced from policy considerations.¹¹³ There is a Jacques-Derrida-meets-Humpty-Dumpty strand of contemporary legal thinking that refuses to concede that any legal analysis can ever be wrong.¹¹⁴ If this is what Bybee and Yoo believe, then of course they would believe that their memorandum was above legal criticism. There is, however, another possible explanation of Yoo's claim that he merely followed the law. To a significant degree, modern political life is played upon a public stage. It would be a serious, political gaffe for Bybee and Yoo to admit that they gave improper legal advice and to justify their legal misconduct on the basis that moral necessity overrode fidelity to law. Perhaps Yoo views discretion on this occasion to be the better part of valor and therefore claims that his analysis was not wrong. Of course, we cannot know what Bybee and Yoo actually think.

For purposes of hypothetical discussion, we might assume that Bybee and Yoo, like Jackson, knew that their advice was contrary to law, or at best dubious, but nevertheless rendered the advice to achieve some government good. If this is the case, then the dirty-hands model is relevant.

If the Bybee/Yoo memorandum is viewed as a problem of dirty hands, the problem is significantly different from the paradox that confronted Jackson. The law that Jackson chose to ignore was a fairly technical rule of government contracting law with virtually no moral content. In contrast, the laws against torture were created to give legal force to a quintessential moral rule about the treatment of fellow human beings.¹¹⁵ The Destroyers Deal did not really involve a clash of moral values; the torture memorandum did. Jackson can be condemned

112. See, e.g., OFFICE OF PROF'L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (2009); BRUFF, *supra* note 2, at 239–52; LUBAN, *supra* note 2, at 162–205. Professor Luban concludes, "[w]ith only a few exceptions, the torture memos were disingenuous as legal analysis, and in places they were absurd." LUBAN, *supra* note 2, at 163. There is no precise calculus for divining clearly wrong legal analyses. Nevertheless, judgment is possible based upon the common experience of the interpretive community of lawyers. Using this analytical framework, the analysis in the Bybee/Yoo memorandum is clearly wrong. LUBAN, *supra* note 2, at 192–97; WENDEL, *supra* note 69, at ch. 6.

113. See LUBAN, *supra* note 2, at 164 n.5 (collecting Yoo quotes). Before signing the torture memorandum, Bybee claimed that the purpose of OLC is "to provide objective legal advice, free from other political constraints or influences." BRUFF, *supra* note 2, at 71 (quoting Bybee).

114. See *supra* note 11 and accompanying text.

115. For a powerful criticism keyed to the extraordinary moral content of laws against torture, see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

for his lack of fidelity to the law but as a matter of representational morals he clearly should not be condemned. In the torture memorandum, Bybee and Yoo counseled unlawful behavior, and as a matter of legal absolutism, they should be condemned for this.¹¹⁶ On the other hand, whether they were morally justified is a murkier question.

Walzer posited the ticking-bomb scenario as a useful tool for analyzing the problem of dirty hands. He believes that in that specific situation, which he limited to a single, *sui generis* dilemma, a public official might properly violate the rule against torture. Jackson's opinion, like the time-bomb scenario, was limited to a one-time transaction. But Bybee and Yoo wrote a blank check for a general regime of lawless torture without regard to the facts of particular situations.

Even ethicists who believe that torture is appropriate in a true time-bomb scenario do not believe that torture should be adopted as an all-purpose general investigatory tool. For example, Professor Jean Elshtain concluded,

[f]ar greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to 'torture' one guilty or complicit person. . . . But I do not want a law to 'cover' such cases, for, truly, hard cases do make bad laws.¹¹⁷

Before and after 9/11, Judge Richard Posner drew the same distinction.¹¹⁸ In contrast, Bybee and Yoo sought to facilitate a general policy of government torture by counseling that torture is lawful.

A. THE PROBLEM OF SECRECY

There is another significant distinction between the Jackson opinion and the Bybee/Yoo memorandum. Within days of signing the former opinion, Jackson released it to the public, which insured a robust and open, political debate. Although many objected to his legal analysis, most agreed with the underlying extralegal moral/political *quid pro quo* of trading destroyers for valuable bases. In sharp contrast, the Bybee/Yoo memorandum, which counseled a general

116. Again to repeat: we cannot know whether they believed they were counseling unlawful behavior. Even if they believed that they were right, their advice, as a matter of traditional legal analysis, was clearly wrong. As such, they should be condemned as being at least incompetent. Given Bybee and Yoo's obvious technical abilities, the charge of incompetence is implausible.

117. Jean Bethke Elshtain, *Reflections on the Problem of "Dirty Hands,"* in TORTURE: A COLLECTION, *supra* note 77, at 87. For a similar analysis, see BOBBITT *supra* note 70, at 383–85.

118. Compare Richard Posner, *The Best Offense*, NEW REPUBLIC Sept. 2, 2002, at 2 with POSNER, *supra* note 67, at 81–87. Judge Posner posits a ticking nuclear bomb in Time Square and states "if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility." Richard Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 30. Nevertheless, he opposes establishing general rules to allow torture in "defined circumstances" because "some officials are bound to want to explore the outer banks of the rules. Having been regularized, the practice will become regular." *Id.*

policy of lawless torture, was kept secret for two years before someone leaked it.¹¹⁹ Similarly, the government's general embrace of torture as a proper investigatory tool was kept silent. When the Bybee/Yoo memorandum was exposed to the public, the government quickly withdrew and disavowed it.

The secrecy of the Bybee/Yoo memorandum is particularly important because the concept of dirty hands can, in practice, be profoundly undemocratic. The dirty-hands paradigm involves an official in the grips of an excruciating moral paradox. For example, in the case of torture, the dilemma is between complying with laws against torture or violating those laws in order to obtain an important benefit for the nation as a whole. These types of decisions are seldom made by either the legislative or the judicial branches. In practice, the decision is an executive decision made outside the democratic process. This political isolation is obvious when the executive decides to violate an act of Congress, but the isolation also exists when the executive takes action that is probably, but not clearly, illegal. In both the case of clear illegality and probable illegality, the executive exercises unilateral power beyond the immediate and effective control of the democratic processes.

The primary restraint upon an official confronted by the problem of dirty hands is undemocratic. It is the official's personal judgment informed by the advice of others. In many situations, however, an indirect but powerful democratic restraint can influence an official's judgment. As a practical matter, executive conduct is subject to a rolling referendum based upon the messy hurly-burly of the political process.¹²⁰ Elections are the most obvious aspect of this rolling referendum, but the referendum is far more complex and not always so formal. Elections, critical media attention, congressional activities, and litigation may profoundly influence executive action. As Richard Nixon learned to his dismay, even second-term Presidents are subject to the rolling referendum. The net result is that executive action that at first glance is profoundly undemocratic becomes acceptable because it is indirectly subject to the political process writ large. If, however, a President can contrive through secrecy to insulate a decision (for example, the decision to torture) from the political process, all we have is unilateral executive action unconstrained by the need for indirect political acquiescence, acceptance, or approval. In the Destroyers Deal, unlike the Bush II torture policy, the decision to sell the destroyers was immediately announced to the public.

119. See BRUFF, *supra* note 2, at 239 & 247.

120. Professor Jack Goldsmith has advanced a powerful and persuasive analysis of some of the most significant aspects of the rolling referendum on executive conduct. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENT AFTER 9/11* (2012). He describes aspects of modern American society that significantly constrain the exercise of executive power. In particular, the media is quick to bring executive conduct and misconduct to the public's attention. Grist for the media's mill is supplied by attorneys outside government who vigorously challenge perceived misconduct and by leakers within government. In addition within government, inspectors general and military lawyers have a limited degree of independence that allows them to review misconduct.

B. PRIVATE V. PUBLIC LEGAL ADVICE

Many critics of the Bybee/Yoo memorandum strenuously object to its failure to address clearly relevant legal considerations, including judicial precedent that obviously run counter to the memorandum's conclusion.¹²¹ In this regard, the torture memorandum is remarkably similar to Jackson's opinion. Like Bybee and Yoo, Jackson refused even to mention powerful counterarguments against part of his analysis. Perhaps Jackson's, Bybee's, and Yoo's stunning failures even to recognize the existence of powerful—indeed, compelling—counterarguments is the normal practice in writing politically controversial legal opinions. If so, the critics of Bybee's and Yoo's lacunae may be a bit off target. To paraphrase Machiavelli, we should not dwell in dreams of perfect legal memoranda. Rather, we should go to the actual truth of things.

In critiquing legal advice regarding politically controversial decisions, a formal, public written opinion should never be mistaken for the advice actually given. There is reason to believe that on some occasions, the advice—including oral advice—actually rendered in private may be significantly different from the formal advice given in public. In particular, advisers may reserve frank discussions of weaknesses for private conversations.

This distinction between frank legal advice rendered in private followed by a formal opinion written for others should not be mistaken as the general rule. Typically, there is a sound legal basis for advice that a contemplated action is lawful. On these typical occasions, the private advice and the formal written advice will be more or less the same. But in unusual situations, epitomized by Jackson's opinion, there may be glaring differences between the frank private advice and the formal written advice. On these unusual occasions, the actual private advice almost always will be kept secret, and we therefore will never know for sure about the details of the private advice.

There is some empirical evidence to support the distinction between private advice and a formal public advisory opinion. Elliot Richardson, a respected former Attorney General, assumed that Jackson informally briefed the President on the weaknesses of Jackson's written opinion, and this was Jackson's normal practice.¹²² The distinction also appears in advice given by the British Attorney General on the legality of the 2003 invasion of Iraq.¹²³ Similarly, before the

121. See, e.g., LUBAN, *supra* note 2, at 198–99; BRUFF, *supra* note 2, at 250–51; see also William Casto, *Executive Advisory Opinions and the Practice of Judicial Deference in Foreign Affairs Cases*, 37 GEO. WASH. INT'L L. REV. 501, 503–04 (2005).

122. See *supra* note 82 and accompanying text.

123. When the United Kingdom was contemplating joining the 2003 invasion of Iraq, the British Attorney General wrote a lengthy confidential memorandum that gave “a cautious go-ahead to [Prime Minister] Blair, loaded with substantial misgivings and caveats.” LUBAN, *supra* note 2, at 202. Ten days later, after the Prime Minister had decided to go to war, the Attorney General wrote a significantly different opinion for public consumption. The second opinion consisted of “nine terse, conclusory paragraphs with no nuance and no hint of doubt.” *Id.* When questioned two years later about his conclusory public opinion, the Attorney General claimed

American government killed Anwar al-Awlaki, an American citizen in Yemen, the Office of Legal Counsel (OLC) rendered a detailed 50-page opinion that carefully considered many arguments for and against the action's legality.¹²⁴ The opinion has not been released. Instead, the Attorney General defended the killing in a comparatively brief public statement that was more of an advocacy document than a detailed weighing and balancing of the arguments and counterarguments.¹²⁵ This is not to suggest that the British Attorney General and OLC counseled unlawful action. Instead, these two occasions should be viewed as further empirical evidence of a sharp divide between frank private advice followed by an advocacy oriented public opinion.

The publication of an advisory opinion on a politically controversial issue is a political—not a legal—act. Publishing a written opinion that frankly discusses significant arguments contrary to the opinion's conclusion is an invitation to attack the underlying substantive action as one of doubtful legality. Opponents of the underlying action inevitably will cherry pick portions of the published opinion to suit their political purposes. Therefore the absence of any detailed weighing and balancing of arguments and counterarguments in a public opinion is not surprising.

C. OLC'S BEST PRACTICES

The Bybee/Yoo memorandum also has been criticized as contrary to the normal practice of OLC. The Office's current Best Practices guidelines provide that "OLC must provide advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration."¹²⁶ Similarly, possibly with unwitting irony, Yoo has insisted that "at the Justice Department and this office, there's a long tradition of keeping the law and policy separate."¹²⁷

The ideal that legal advisers separate law from policy is both right and wrong. In the ordinary run of cases, the ideal accurately describes what attorneys actually do. Typically clients in and out of government simply wish to take action that is

that the public opinion was "my own genuinely held, independent view." *Id.* at 203 (quoting the Attorney General). Fortunately, the Attorney General's cautious, detailed, and nuanced confidential opinion was subsequently leaked.

124. See Charles Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011.

125. Eric Holder, Att'y Gen., Speech at Northwestern University School of Law (Mar. 5, 2012).

126. Office of Legal Counsel, Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) [hereinafter Best Practices]. The Best Practices guidelines immediately continue: "OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives." *Id.* The guidelines also provide that "OLC's . . . legal analyses should always be principled, forthright, as thorough as time permits, and not designed merely to advance the policy preferences of the President or other officials." *Id.*

127. LUBAN, *supra* note 2, at 164 n.5 (quoting Yoo).

lawful, and legal advice merely reassures the client that the action will not violate the law. If, using ordinary legal analysis, the attorney determines that the contemplated action is unlawful, the client typically will conform its conduct to the legal advice.

But there are atypical situations in which attorneys may deviate from OLC's Best Practices and from Yoo's claimed separation of law and policy. In the Destroyers Deal, there was a direct conflict between the law enacted by Congress and the President's extralegal policy objective of sending the destroyers to Great Britain. Dean Acheson, who coauthored a significant opinion related to the Deal,¹²⁸ believed that a "lawyer bends his brains to support policy."¹²⁹ There is significant anecdotal evidence suggesting that the separation of law and policy is at best aspirational and certainly not the primary governing principle with respect to politically controversial issues. Jackson obviously relied heavily on policy to shape his destroyers opinion. In private, Justice Felix Frankfurter defended Jackson's opinion by quoting "that somewhat cynical but wise observation of Lord Salisbury 'What is an Attorney General for except to find justifiable legal grounds for a desirable policy.'"¹³⁰ Elliot Richardson, based upon his experience as Attorney General, believed that Jackson appropriately relied upon policy in shaping the destroyers opinion.¹³¹

An attorney bends her brains in different ways to support policy, and frequently policy oriented analysis will not conflict with OLC's Best Practices. For example, if an attorney's initial careful analysis does not support policy, all capable advisers will rethink the issue and consult other capable attorneys for fresh insights. If the rethinking and consultations are to no avail, legal analysis is not at an end. Capable advisers will rack their brains for program modifications that will obviate the legal problem without significantly affecting the underlying policy. These policy-oriented tactics of rethinking, consultation, and modification solve many difficult legal problems. The tactics of rethinking, consultation, and modification, however, are unlikely to occur if the initial careful analysis supports policy.

Resort to policy becomes more problematic under OLC's Best Practices when an attorney confronts an ambiguous legal issue in which there are good legal arguments to support an interpretation consistent with underlying policy and good legal arguments to the contrary. Every attorney/adviser that I have ever known will resolve this "tie"¹³² situation in support of the underlying policy. An

128. See Casto, *supra* note 3, at 71–79.

129. *Id.* at 78 (quoting Acheson).

130. *Id.* at 120 (quoting Frankfurter).

131. See *supra* note 82 and accompanying text.

132. The word tie should not be taken literally. The relative strengths of legal arguments are not subject to precise measurement. The concept of tie encompasses any situation in which neither the legal argument supporting policy nor the counter argument is clearly superior to the other.

attorney who resorts to policy to break a tie surely does not violate the Best Practices. Jackson believed that in these circumstances, an attorney should give “the Administration . . . the benefit of a reasonable doubt as to the law.”¹³³

The Best Practices become problematic when there are strong legal arguments against the underlying policy and comparatively weak legal arguments to support the policy. Jackson also would have resolved this dilemma by giving “the Administration . . . the benefit of a reasonable doubt as to the law.” He did just that in his “hairsplitting” analysis of the Espionage Act.¹³⁴ At the end of his life, he reminisced that an “Attorney General is part of a team . . . [H]e is the advocate of the administration, and necessarily partisan.”¹³⁵ Of course, he would counsel his governmental client about the weaknesses of his legal analysis.¹³⁶ In contrast, the Best Practices mandate that in this situation an attorney should opine that the proposed policy is illegal.

Finally, there is the situation where legal arguments supporting the proposed policy are clearly without merit. If there is sufficiently strong political support for a policy that is illegal under a Best-Practices analysis, the Best Practices may, as a matter of practice, give way. This is not to say that the Best Practices would necessarily give way within OLC. A President might seek an opinion from the Attorney General or the White House Counsel’s Office that ignored the law and facilitated the policy.¹³⁷

There is evidence that the Best Practice principles are not universally applied in government. For example, when the torture memorandum was leaked to the public, two capable and experienced attorneys described “the memorandum’s arguments [as] standard lawyerly fare, routine stuff.”¹³⁸ Moreover, there is a parallel between Jackson’s weak arguments in his destroyers opinion and Bybee’s and Yoo’s pretensions. Elliot Richardson’s thoughts¹³⁹ and Justice Frankfurter’s comment¹⁴⁰ also lend support to the idea that, at least with respect to highly politicized issues, the Bybee and Yoo memorandum may be standard fare. Additional support for Bybee and Yoo comes from the Department of Justice in the subsequent Obama Administration. The Department’s Office of Professional Responsibility recommended that Bybee’s and Yoo’s actions be referred to

133. GERHART, *supra* note 83, at 557 (quoting Jackson).

134. *See supra* notes 16–17 and accompanying text.

135. Casto, *supra* note 3, at 130 (quoting Reminiscences of Robert H. Jackson, Columbia University Oral History Research Office (1955)).

136. *See supra* note 82 and accompanying text.

137. *See* Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1466–68 (2010).

138. Eric Posner & Adrian Vermeule, *A ‘Torture’ Memo and its Tortuous Critics*, WALL ST. J., July 6, 2004. *Accord What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration*, 111th Cong. 314–16 (2009) (testimony of Michael Stokes Paulson) (torture memo “well within the range of customary, legitimate, proper, and entirely ethical legal advice”).

139. *See supra* note 82 and accompanying text.

140. *See supra* note 130 and accompanying text.

the bar for professional discipline, but in what has been described as an “embarrassingly facile memorandum,”¹⁴¹ the Deputy Attorney General refused.¹⁴² This refusal may be plausibly read as tacitly supporting the claim that Bybee’s and Yoo’s pretensions are indeed standard lawyerly stuff. Similarly, a federal appeals court has held that Yoo is entitled to a tort defense of qualified immunity.¹⁴³

D. USURPING THE PRESIDENT’S AUTHORITY

The secrecy of the torture memorandum suggests a disturbing possibility. There are powerful political reasons for deleting counterarguments and weaknesses from a legal opinion written for public consumption, but these considerations become significantly attenuated when the written opinion is a secret document. Why delete pertinent counterarguments from a secret advisory opinion? The British Attorney General did not do so,¹⁴⁴ nor did OLC when it advised on the legality of the extrajudicial killing of an American citizen in Yemen.¹⁴⁵ Suppose that White House Counsel Alberto Gonzales, who received Bybee’s and Yoo’s advice, was unaware of the powerful counterarguments and simply advised the President that the Executive clearly had lawful authority to ignore acts of Congress and international law. Suppose Gonzales merely told the President that torture was legal.

We do not know and probably never will know what the President’s attorneys actually told him. President Bush briefly discussed the matter in an interview after he left office:

Lauer: Why is waterboarding legal, in your opinion?

Bush: Because the lawyer said it was legal. He said it did not fall within the Anti-Torture Act. I’m not a lawyer, but you gotta trust the judgment of people around you and I do.

Lauer: You say it’s legal. “And the lawyers told me.”

Bush: Yeah.¹⁴⁶

Suppose that the President’s statements accurately provide a complete description of what his attorneys told him. This poignant thought is consistent with the secrecy of the torture memorandum.

In politically sensitive situations like the torture memorandum, extralegal policy inevitably plays a major role in shaping legal advice. But whose policy is

141. Spaulding, *supra* note 2, at 440.

142. *See generally id.* at 440–44.

143. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012).

144. *See supra* note 123 and accompanying text.

145. *See supra* notes 124–25 and accompanying text.

146. *Decision Points: Part 3* (NBC television broadcast Nov. 8, 2011). Whether the president ever saw the Bybee/Yoo memorandum is unclear. NANCY V. BAKER, *GENERAL ASHCROFT: ATTORNEY AT WAR* 29 (2006).

to govern? Surely it is the President's, but perhaps not. Suppose, for example, a career attorney does not agree with the President's policy. Would it be appropriate for the attorney to use interpretive discretion to thwart presidential policy?

Typically, Executive Branch attorneys providing legal advice do not prefer their personal views of policy over the President's, but sometimes they might. For example, in the summer of 1940, a career attorney in the Treasury Department apparently did so.¹⁴⁷ Treasury Secretary Morgenthau complained to the President about the attorney in charge of the opinion section in Treasury's Office of General Counsel. According to Morgenthau, the attorney had "given every indication of a disposition to construe [the Neutrality] Act so as to bring about a result which is wholly contrary to the policy of the administration of assisting the democracies."¹⁴⁸

Was the attorney morally justified in attempting to use legal analysis to thwart policy? As a general matter, surely an attorney should strive to support and not hinder presidential policy even when the attorney disagrees with that policy. The President's constitutional status as the nation's chief representative should privilege the President's policy. Among other things, the President has been constitutionally selected to make difficult policy decisions. In glaring contrast, the particular policy views of individual career government attorneys are matters of happenstance. Their individual views are in no way privileged by a constitutional selection process.

Given the President's special constitutional status as a policy decision-maker, one could argue that a career attorney has a moral and legal obligation not to thwart the President's decision. Nevertheless, the argument should not be viewed as absolute. In the case from 1940, the Treasury attorney may have been emphatically opposed to any action that might embroil the United States in a destructive European war. If so, he might be viewed as doing his bit to avoid a national disaster.

As a practical matter, the problem of career attorneys subverting presidential policy is relatively insignificant. Insofar as an attorney's personal ethics are concerned, there surely is nothing wrong with an attorney construing the law to reach an ethically correct solution. To be sure, career attorneys should not be empowered to subvert presidential policy, but there are powerful procedural restraints upon the attorney's discretion. Within the government, the attorney's actions are not secret. The attorney's supervisors will know of the actions and be able to correct them.¹⁴⁹ In addition as a matter of constitutional government, the

147. See Casto, *supra* note 3, at 22.

148. Untitled and undated memorandum from Secretary of Treasury to Franklin D. Roosevelt (ca. late May, 1940), attached to Memorandum from F.D.R. to Secretary of Treasury (May 29, 1940), *quoted in* Casto, *supra* note 3, at 22.

149. For example, Secretary Morgenthau noted that one of the attorney's opinions had been rejected based upon a contrary view of Judge Townsend in Justice. *Id.*

attorney may and probably should be disciplined. President Roosevelt's recommendation was to fire or demote the attorney: "We cannot have such people in high places. If you do not want to discharge him, send him to some office in the interior of a Southern State."¹⁵⁰ Given the general absence of air conditioning in 1940, being fired may have been the lesser of two evils.

Political appointees like Bybee and Yoo pose a different and far more serious problem. As a practical matter, the problem of an attorney thwarting the President's policy usually will not arise when the attorney is a political appointee because political appointees likely agree with the President's policy objectives. The torture memorandum, however, presents a significant wrinkle to the general cohesiveness between the President and the President's legal advisers. In the case of torture, it is fair to say that President Bush had two related policy objectives. He wanted to have people tortured in order to gain information, but he also probably wanted to torture people legally. Obviously Bybee and Yoo wanted to facilitate a general policy of torture, but they may have been out of sync with the President with respect to acting lawfully.

President Bush's poignant statement that "you gotta trust the judgment of people around you" suggests the possibility of a truly heinous breach of both personal and professional moral values. Even if the President's lawyers honestly believed that their extreme view of presidential power was right, they also knew that there were powerful counterarguments to the contrary. The lawyers knew that the President trusted them, and if they did not explain the glaring weaknesses of their legal analysis, they committed a stunning breach of personal trust. Likewise in terms of professional responsibility, a failure to explain the weaknesses is equally obnoxious. One of the most fundamental principles of the lawyer/client relationship is loyalty to the client.

Whether the President was fully briefed on the weaknesses of Bybee's and Yoo's opinion also has serious constitutional implications. One of the President's most important duties under the Constitution is to "take Care that the Laws be faithfully executed." This is not to say that the President absolutely must follow the law. There may be unusual situations in which the President is confronted with the problem of dirty hands and should violate the law.¹⁵¹ The decision, however, should be the President's and should not be surreptitiously made by some legal adviser.

Even if the President decides to violate the law, the law may nevertheless inform and shape the President's decision. Based upon his experience as State Department Legal Adviser during the Cuban Missile Crisis, Abram Chayes believed that international law influenced but did not literally constrain President

150. *Id.*

151. *See supra* note 76 and accompanying text.

Kennedy's decisions.¹⁵² For example, international law may have had some influence on the decision to eschew air strikes, which everyone agreed was illegal, and opt for a blockade, which also probably was illegal.¹⁵³ Similarly, the probable illegality of the blockade may have influenced the decision to seek approval from the Organization of American States.¹⁵⁴ Of course, there also were cogent policy reasons for these two decisions. Chayes's point is not that international law actually limited the decision-making process. Instead, he cogently argues that international law was one of many factors that played a role in shaping the administration's course of action.¹⁵⁵

Just as adherence to the law influenced the President's decision in the Cuban Missile Crisis, so too could it have played a more significant role in President Bush's decision to embrace torture. If the President reached his decision based upon the cheerleading torture memorandum, the decision to embrace torture was purely a matter of extralegal policy considerations and from the President's understanding, presented no serious legal problem. On the other hand, if the President was informed that there was serious doubt whether torture was legal, he still might have given his approval, but the President might have insisted on some procedural limitations. For example, if the United States is going torture people based upon a dubious legal opinion, decisions to torture surely should not be delegated to mid-level bureaucrats.¹⁵⁶

If the President was not briefed on the weaknesses of the torture memorandum, his legal advisers duped him into violating his most fundamental duty. As a matter of constitutional government, a lapse like this is unforgiveable. Only the attorneys and the President know if the attorneys failed their moral, legal, and constitutional duty.

VI. CONCLUSION

When all is said and done, the paradox of Jackson's destroyers opinion is not typical of the practice of law. Attorneys seldom encounter situations in which the moral good to be obtained dictates that they render a legal opinion contrary to law. In these rare situations, the attorney is responsible for violating the fundamental principle of fidelity to law and is morally responsible for the action

152. See CHAYES, *supra* note 12, at ch. III.

153. See *id.* at 30–40. Similarly, George Balls, who was an attorney and served as Under Secretary of State during the crisis, supported a naval blockade as having the most “color of legality.” KAI BIRD, *THE CHAIRMAN* 527 (1992) (quoting Ball).

154. See *id.* at ch. IV.

155. *Id.* at 100–01.

156. For example, President Obama has created a “kill list” for terrorists operating abroad, but names are not added to the list without his personal approval. See Jo Becker & Scott Shane, *Secret “Kill List” Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1. This is not to say that the policy of killing Americans overseas is illegal. The author of the present essay believes that the policy is a proper and lawful solution to a very difficult problem.

that the attorney seeks to facilitate. Jackson was morally responsible for facilitating the President's desire to aid Great Britain in its struggle against Nazi Germany. Bybee and Yoo are morally responsible for facilitating the government's desire to adopt a general policy of torturing anyone who might have information about a possible threat to the United States. As a matter of personal moral choice, Bybee and Yoo may think that they did the right thing. Others will disagree.

To repeat, however, Jackson's dilemma was unusual. The more significant implications of the present essay relate to the more common situation in which a government attorney crafting an advisory opinion encounters conflicting legal arguments, one of which supports policy while the other opposes policy. If the conflicting arguments are more or less equal in strength, all attorneys will opt for the argument that supports policy. Because policy is the only basis for picking one argument over another, attorneys are morally responsible for the consequences of the policy that they have chosen to facilitate. At least in respect of presidential policy making, the attorney's moral responsibility, however, may be attenuated by the President's constitutional status as a representative of the nation. The President has been constitutionally selected to make difficult policy choices. It surely is morally proper in most situations for an attorney to assume that a President's policy will achieve a worthwhile government good.

When an attorney facilitates policy by choosing a comparatively weak argument over a clearly stronger argument, the attorney is clearly morally responsible for the consequences of the policy that the attorney has sought to facilitate.¹⁵⁷ If an attorney is a legal nihilist who believes that every proposition is arguable, the attorney's personal moral responsibility is in no way diminished. If anything, the attorney's moral responsibility is enhanced. In such a situation, the attorney does no more than bend her mind to facilitate the extralegal policy.

157. If an attorney facilitates policy by choosing a comparatively strong argument over a comparatively weak argument, the attorney also bears some moral responsibility. Nevertheless, the moral responsibility surely is significantly attenuated.

