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## National Security Lawyering: The Best View of the Law as a Regulative Ideal

Mary B. DeRosa


*Georgetown University Law Center*, [mbd58@georgetown.edu](mailto:mbd58@georgetown.edu)

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# National Security Lawyering: The Best View of the Law as a Regulative Ideal

MARY DEROSA\*

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\* Professor from Practice, Georgetown University Law Center. © 2018, Mary DeRosa. Ms. DeRosa served as Deputy Assistant and Deputy Counsel to the President, and as National Security Council Legal Adviser in the Obama Administration. She held other national security-related positions in the United States government, including Chief Counsel for National Security for the Senate Judiciary Committee, working for the Chairman, Senator Patrick Leahy. She has also been a Senior Fellow at the Center for Strategic and International Studies, was in private practice at Arnold & Porter, and served as a law clerk to the Honorable Richard Cardamone, United States Court of Appeals for the Second Circuit.

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## INTRODUCTION

In *The National Security Lawyer in Crisis: When the “Best View” of the Law May Not Be the Best View*, Robert Bauer describes the challenges for executive branch lawyers providing advice during a national security crisis.<sup>1</sup> Bauer focuses on two especially perilous episodes in United States history—the Cuban Missile Crisis and the run-up to U.S. involvement in World War II—and analyzes the legal advice Presidents Kennedy and Roosevelt, respectively, received.<sup>2</sup> In both cases, widely respected lawyers gave legal advice that supported the President’s preferred outcome, but almost certainly did not represent what the lawyers considered the best view of the law.<sup>3</sup>

What lessons should we draw from these examples? Bauer, a former Counsel to the President with considerable personal experience in crisis lawyering, argues that the approach these lawyers took reflects the reality of legal advice during a national security crisis: they did not provide advice that represented the best view of the law as they understood it.<sup>4</sup> Instead, they crafted legal arguments designed to permit, and support the legitimacy of, policies the President deemed crucial to national security.

The “best view” model of lawyering appears to have no formal or widely recognized definition, either in Bauer’s article or elsewhere in the literature. Perhaps the best articulation of the concept is in the memorandum that sets out the “best practices” for the Department of Justice’s Office of Legal Counsel (OLC), which directs OLC lawyers to “provide advice based on [their] 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.” In rendering this advice, they must seek “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.”<sup>5</sup> Although the memo’s

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1. Robert Bauer, *The National Security Lawyer in Crisis: When the “Best View” of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175 (2018).

2. *Id.* at 182–229.

3. *Id.*

4. *Id.*

5. Memorandum from David J. Barron, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legal Counsel, to Attorneys of the Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010) at 1, <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/JJ28-QHK5>] [hereinafter Barron, *Best Practices*].

instruction is directed to OLC lawyers only, the approach it presents is understood by many to be a model for national security lawyers elsewhere in the Executive Branch as well.<sup>6</sup>

Bauer takes a dim view of this best view model, which he considers rigid, disconnected from important policy context, and unworkable in a crisis.<sup>7</sup> Bauer proposes an exception to the best view approach for lawyers facing a national security crisis. Lawyers under those circumstances, he argues, should be free to provide alternative legal analysis that supports the preferred policy position, so long as it is credible and made in good faith.<sup>8</sup>

Bauer's proposal to create an exception to the best view standard for crises, however, risks compromising the quality of national security lawyering overall. National security lawyers in the Executive Branch practice in an environment without many of the formal and informal incentives for high-quality legal advice that are common in other fields. The stakes are unusually high, which increases pressure from policymakers. At the same time, there is less external oversight from the courts and Congress, and the secrecy of much of the subject matter makes peer and public input difficult. Because of these challenges, it is important to build into the process of developing national security legal advice as many protections for high-quality legal analysis as possible.<sup>9</sup> The best view standard is such a protection, and a critical one.

Bauer's concern about a best view approach stems, in part, from his view that it requires lawyers to develop their legal advice in a manner that is insulated from policy developments and concerns.<sup>10</sup> He argues persuasively that such a cloistered process is unworkable, particularly in a national security crisis.<sup>11</sup> But this kind of separation is not necessary to a best view model of lawyering and is not now, nor has it been for much of the last twenty-five years, the way national security legal advice develops. Instead, for most of that time, senior lawyers from the

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6. This observation is based on the author's experience as a senior national security lawyer in two presidential administrations and from numerous discussions with other practitioners. In particular, it is an understanding that has guided many discussions of the Lawyers Group, discussed *infra* notes 91–105 and accompanying text.

7. Bauer, *supra* note 1, at 175–76.

8. *Id.* at 182.

9. What constitutes “high quality” legal advice or lawyering is, of course, open to considerable debate. Some would emphasize lawyers' responsibility to carry out their fiduciary duty to a client by helping to advance the client's interests. Others would place a higher priority on the need for attention to professional standards, rigor in craft, and honest interpretation of precedent. Recognizing that the former is a critical component of high-quality lawyering, when this comment discusses threats to high-quality lawyering, its focus primarily is the latter concern. Indeed, as discussed *infra* notes 114–16 and accompanying text, for Executive Branch lawyers, more than those practicing in the private sector, the two responsibilities often move in the same direction. Because it is the President's responsibility to “take Care that the Laws be faithfully executed,” United States Constitution, Article II, Section 3, rigor in the interpretation of the law is part of the client interest that an Executive Branch lawyer must uphold. This responsibility applies not only to advice about the client's immediate question, but the long-term impact of the precedent that the advice might establish for the Executive Branch.

10. See *infra* notes 67–71 and accompanying text.

11. See *infra* notes 70–71 and accompanying text.

national security agencies have considered key legal questions through a “Lawyers Group” process. Far from being insulated from the policy process, Lawyers Group members are in the middle of that process and work closely with their policy clients.<sup>12</sup> Close connection to policy development does not prevent these lawyers from applying a best view standard, even during a crisis.

The best view standard is important to high-quality national security lawyering not because it always results in an objectively “right” legal answer—that is not possible. Instead, the best view standard acts as a guidepost—a regulative ideal—for lawyers, reminding them of their distinctive role in the process and grounding them with an external professional standard.<sup>13</sup> It serves as a counterweight to the inevitable pressures that these lawyers face. It also honors and upholds the unique responsibilities of Executive Branch lawyers to assist the President in carrying out his constitutional responsibility to see that the laws are faithfully executed.<sup>14</sup> Bauer’s proposal to recognize a lower standard in crisis situations would subvert this protection across the board. If a best view approach is optional, it loses its regulative power as a protection for high-quality lawyering.

Bauer argues that his proposal is modest, limited only to crisis situations, and is protected from abuse by a requirement of transparency by policymakers.<sup>15</sup> In practice, however, the limitation to crisis situations is unworkable. He provides no definition of crisis and acknowledges that “no hard-and-fast rule”<sup>16</sup> is possible for determining the existence of a crisis. Indeed, he concedes that the line between normalcy and emergency is “difficult, if not impossible” to identify.<sup>17</sup> Thus, given the nature of national security policy—where most things feel like a crisis—the increased flexibility in standard and process would almost inevitably expand to encompass more than Bauer intends. Nor does his proposed protection of transparency provide any real safeguard against abuse of this process. Transparency, although a powerful and important check, is inadequate as the sole protection against abuse because it is extremely difficult to institutionalize in the national security process.

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12. See *infra* notes 91–100 and accompanying text. The term “client” here, and throughout this comment, refers to the President and the other officials in policy and operational positions to whom national security lawyers provide their advice. In fact, government lawyers’ obligations run not to the officeholders, but to the offices that they hold. Thus, the White House Counsel’s “client” is the Office of the President and, perhaps, more broadly to the U.S. Government and the American people. This is an important distinction. For the purposes of this comment, however, unless stated otherwise, the individuals holding those positions will be presumed to reflect the interests of their offices.

13. See *infra* notes 110–13 and accompanying text.

14. See *infra* notes 115–16 and accompanying text.

15. See Bauer, *supra* note 1, at 181–82.

16. *Id.* at 252.

17. *Id.* (quoting Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?*, 112 *YALE L.J.* 1011, 1022 (2003)).

Bauer's proposed departure from the best view standard would, therefore, risk becoming the norm for national security lawyering. If that were the case, a critical safeguard for the quality of national security lawyering would be lost.

This Comment will consider Bauer's proposal to depart from a best view approach. Part I describes the unique challenges that national security lawyers in the Executive Branch face in providing high-quality legal advice. Because external checks on the quality of legal analysis are generally less effective in the national security field, it becomes particularly important to build internal protections like the best view standard into the process of developing national security legal advice. Part II examines Bauer's definition of the "best view" approach to lawyering and argues that the best view is far more flexible than his conception and can be used effectively in national security crisis situations. Part III explains why the best view approach is a critical protection for high-quality national security lawyering. The best view acts as a regulative ideal: an external professional standard to guide the deliberations of national security lawyers and uphold the unique responsibilities of Executive Branch lawyers. Finally, Part IV looks at Bauer's argument that his proposal represents only a limited exception to a best view approach. The section concludes that his proposal would inevitably expand and undermine the regulative power of the best view standard, thereby reducing overall the quality of national security lawyering.

## I. CHALLENGES TO HIGH-QUALITY NATIONAL SECURITY LAWYERING

External oversight improves the quality of analysis and decision-making directly—by identifying and correcting errors and missteps—and indirectly—by forcing decision-makers to develop, articulate, and defend their arguments more carefully.<sup>18</sup> The knowledge that someone will be evaluating the persuasiveness of your analysis creates a valuable incentive to identify and address possible opposing arguments. Conversely, if it is less likely that other branches of government or the public will demand well-reasoned legal decision-making, the quality of advice can suffer. To be sure, there is external oversight of Executive Branch national security legal advice, from courts, Congress, and from the public, through the work of journalists who focus on legal decision-making. But the sensitive nature of so many national security matters and the secrecy with which

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18. See Mary DeRosa & Mitt Regan, *Deliberative Constitutionalism in the National Security Setting*, in *THE CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM* (Ron Levy et al. eds., forthcoming 2018) (discussing the risks that limited external oversight can pose: "If there is minimal likelihood that other branches or the public will demand a full well-reasoned explanation for a decision, the quality of the deliberation that precedes it may suffer. This in turn can impair its perceived legitimacy.") [hereinafter DeRosa & Regan, *Deliberative Constitutionalism*]; Simone Chambers, *Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation*, 12 J. POL. PHIL. 389, 391 (2004) (explaining the requirement to justify oneself to others creates "the necessity to articulate one's position carefully, to defend it against unexpected counter arguments, to take opposing points of view into consideration, to reveal the steps of reasoning one has used, and to state openly the principles to which one appeals.").

they are handled, makes this oversight less common and less effective than in other disciplines, creating risks for the quality of lawyering.

#### A. THE COURTS

National security law, far more than most other disciplines, is defined and interpreted in the Executive Branch.<sup>19</sup> With increasing frequency in the last half century,<sup>20</sup> courts have relied on justiciability rules—primarily Article III Standing and the Political Question doctrine—to avoid reaching decisions on sensitive national security legal issues.<sup>21</sup> In this way, courts have refused to weigh in on key legal questions related to the appropriateness of military operations,<sup>22</sup> the legality of United States’ surveillance activities,<sup>23</sup> and many other complex legal questions.

The Article III standing requirement is a key element of the Constitution’s limitation of federal courts’ jurisdiction to “cases” and “controversies.”<sup>24</sup> When courts consider Article III standing, they are determining whether the litigant challenging government action is entitled to have the court reach the merits of their claim.<sup>25</sup> The Supreme Court has explained that the law of Article III standing “serves to prevent the judicial process from being used to usurp the powers of the political branches.”<sup>26</sup> To establish Article III standing, an injury “must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’”<sup>27</sup> Courts’ application of standing rules have had a significant impact on cases involving classified national security programs.<sup>28</sup>

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19. Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1038–39 (2016) [hereinafter Vladeck, *Merits-Based Adjudication*].

20. See, e.g., Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011).

21. Vladeck, *Merits-Based Adjudication*, *supra* note 19, at 1038–39 (“[A]lthough some of these doctrines are trans-substantive, and thus, are barriers to merits-based adjudication in all civil litigation against the government, many of them either uniquely apply to, or have been uniquely stretched to encompass, challenges to national security policies. Thus, the phenomenon . . . is much more than just the application of a more general trend against merits-based civil adjudication to the specific subset of national security suits; rather, it is the very real creation of what I have elsewhere described as ‘the new national security canon.’”).

22. See *Jaber v. United States*, 861 F.3d 241, 247–48 (D.C. Cir. 2017) (court held a declaratory judgment action that alleged United States drone strike in Yemen violated domestic and international law was barred by the political question doctrine because it called for court to pass judgment on wisdom of the Executive Branch’s decision to commence military action and “[i]n matters of political and military strategy, courts lack the competence necessary to determine whether the use of force was justified.”); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc) (court rejects challenge to Clinton Administration strike on a chemical plant in Sudan).

23. See *Clapper v. Amnesty Int’l*, 568 U.S. 398 (2012).

24. *Id.* at 408.

25. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

26. *Clapper*, 568 U.S. at 408.

27. *Id.* at 409 (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

28. Vladeck, *Merits-Based Adjudication*, *supra* note 19, at 1042 (“But whereas the Court’s hostility to standing has generally been trans-substantive, it has had an especial impact on challenges to secret government programs.”).

In *Clapper v. Amnesty International*, for example, the Supreme Court rejected the standing claim of a group of “attorneys and human rights, labor, legal, and media organizations”<sup>29</sup> whose jobs required them to engage in sensitive communications with clients and sources abroad.<sup>30</sup> The group challenged section 702 of the Foreign Intelligence Surveillance Act (FISA), which authorized certain kinds of mass electronic surveillance on non-U.S. persons reasonably believed to be outside the United States.<sup>31</sup> Plaintiffs argued that section 702 made it far more likely that their communications would be intercepted and, because the provision had no requirement for individualized suspicion, it was unconstitutional.<sup>32</sup> The Clapper Court concluded that the plaintiffs could not reach the merits of their arguments<sup>33</sup> because they did not “face a threat of certainly impending interception” under section 702.<sup>34</sup> Therefore the harm they claimed—costs incurred to avoid surveillance—were “simply the product of their fear of surveillance”<sup>35</sup> and did not give rise to standing.<sup>36</sup>

Courts also regularly invoke the Political Question doctrine to avoid decisions on the merits of cases they deem more appropriate for resolution by the political branches. As Stephen Vladeck has explained,

Although it has its origins in *Marbury v. Madison*, in contemporary terms, the political question doctrine is shorthand for two primary but distinct objections to judicial review—either because the Constitution commits resolution of the dispute to other branches of the government or because the claims lack “judicially manageable standards.”<sup>37</sup>

So, for example, in *El-Shifa Pharmaceutical Industries Co. v. United States*, the D.C. Circuit applied the Political Question doctrine to dismiss a case involving a claim by the owner of a Sudanese pharmaceutical plant who argued President Clinton’s allegation that he was affiliated with terrorists defamed him.<sup>38</sup> The court concluded that to reach the merits would require it to rule on whether the decision to bomb the pharmaceutical plant was “mistaken and not justified,”<sup>39</sup> which would be a political question. The court explained, “[t]he political question doctrine bars our review of claims that, regardless of how they are styled, call

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29. *Clapper*, 568 U.S. at 406.

30. *Id.*

31. *Id.* at 401–02 (citing § 1881a of the FISA Amendments Act).

32. *Id.* at 407.

33. *Id.* at 417–18.

34. *Id.* at 417.

35. *Id.*

36. *Id.*

37. Vladeck, *Merits-Based Adjudication*, *supra* note 19, at 1045 (citing *Marbury v. Madison*, 5 U.S. 137, 170–71 (1803) and *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

38. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc).

39. *Id.* at 844.



into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.”<sup>40</sup>

Other doctrines have also acted to reduce court review of the legality of actions the government takes in the name of national security. These include the State Secrets privilege,<sup>41</sup> which operates to exclude privileged state secrets from evidence and can sometimes result in dismissal of a case, and the “Totten bar,”<sup>42</sup> which can be invoked to dismiss a case when its entire subject matter is deemed to be a state secret, such as a lawsuit seeking to enforce an agreement to spy for the United States.<sup>43</sup>

To be sure, these threshold doctrines do not eliminate all judicial review of national security matters. A series of Supreme Court cases arising out of the Bush Administration’s policies, for example, have provided significant direction on issues related to detention,<sup>44</sup> Guantanamo Bay,<sup>45</sup> and military commissions.<sup>46</sup> However, the collective impact of this judicial restraint in national security cases is to limit oversight of Executive Branch legal interpretations.<sup>47</sup> This leaves Executive Branch lawyers who advise on national security matters with limited judicial direction on the major issues with which they grapple regularly,<sup>48</sup> and limited expectation that their legal analysis will receive substantive review by the court.

#### B. OTHER EXTERNAL OVERSIGHT

Other external forces, such as the United States Congress and the press, also operate less effectively as a check in national security than in other areas. The United States Congress can play an important role in questioning Executive Branch legal analysis and has done so on a number of occasions. For example, during the 2011 United States intervention in Libya, the Senate Foreign Relations Committee questioned Obama Administration State Department Legal Adviser Harold Koh at length about the Administration’s controversial interpretation of

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40. *Id.*

41. *See* *United States v. Reynolds*, 345 U.S. 1 (1953).

42. *See* *Totten v. United States*, 92 U.S. 105 (1875).

43. *Id.*

44. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

45. *See* *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

46. *See* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

47. *But cf.* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 *FORDHAM L. REV.* 827, 830 (2013) (Acknowledging courts’ deference to the Executive Branch on national security issues, but arguing that courts still, in practice, play a significant role in executive branch decisionmaking: “When the executive faces a credible threat of litigation or the pendency of one or more specific cases, it often alters the affected national security policies in ways that render them more rights protective.”).

48. Bauer discusses this “long history of judges, most markedly in national security cases, finding ways to defer to executive judgment,” and argues that the relative lack of judicial direction makes identifying a true “best view” of the law more difficult. *See* Bauer, *supra* note 1, at 231.

the “60-day clock” provision of the War Powers Resolution.<sup>49</sup> Similarly, several congressional committees have held hearings on Executive Branch interpretations of its authority to use force in counterterrorism operations.<sup>50</sup>

On some highly classified matters, however, members of Congress—even those who sit on the congressional intelligence committees—have struggled to raise effective challenges to Executive Branch legal interpretations with which they disagree. In 2003, Senator John D. Rockefeller, then Chairman of the Senate Select Committee on Intelligence (SSCI), was alarmed after receiving a White House briefing about Bush Administration surveillance activities that were protected under a security compartment codenamed “STELLARWIND.”<sup>51</sup> An Executive Branch lawyer from OLC had written a legal opinion supporting the legality of the activities.<sup>52</sup> Rockefeller had doubts about the program’s wisdom and legality, but was unable to talk to lawyers or others on his staff.<sup>53</sup> Instead, he recorded his concerns in a two-page handwritten letter, which he had delivered to Vice President Cheney. The letter read in part “[c]learly, the activities we discussed raise profound oversight issues. As you know, I am neither a technician nor an attorney. Given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse these activities.”<sup>54</sup> Rockefeller placed a copy of the letter in a sealed envelope in the SSCI’s secure office space.<sup>55</sup> He released the letter public two years later, only when certain elements of the STELLARWIND program had been declassified after being leaked to the New York Times.<sup>56</sup>

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49. *Libya and War Powers: Hearing before the Comm. On Foreign Relations*, 112th Cong. (2011) (statement of Hon. Harold Koh, Dep’t of State Legal Advisor), <https://congressional.proquest.com/congressional/docview/t29.d30.hrg-2011-for-0023?accountid=36339> [<https://perma.cc/DTL5-MCQH>].

50. The Senate Foreign Relations Committee, for example, has held hearings on the President’s authority to use force on several occasions, including three in 2017: December 13, 2017, *Using Force: Strategic, Political, and Legal Considerations: Hearing Before the S. Foreign Relations Comm.*, 115th Cong. (2017), <https://www.foreign.senate.gov/hearings/using-force-strategic-political-and-legal-considerations-121317> [<https://perma.cc/Z9LZ-583C>]; August 2, 2017, *The Authorizations for the Use of Military Force: Administration Perspective: Hearing Before the S. Foreign Relations Comm.*, 115th Cong. (2017), <https://www.foreign.senate.gov/hearings/the-authorizations-for-the-use-of-military-force-administration-perspective-080217> [<https://perma.cc/W5DZ-GNBH>]; June 20, 2017, *Reviewing Congressional Authorizations for the Use of Military Force: Hearing Before the S. Foreign Relations Comm.*, 115th Cong. (2017), <https://www.foreign.senate.gov/hearings/reviewing-congressional-authorization-for-the-use-of-military-force-062017> [<https://perma.cc/494K-KH2U>].

51. Ryan Lizza, *State of Deception: Why won’t the President reign in the Intelligence Community?*, NEW YORKER (Dec. 16, 2013), <https://www.newyorker.com/magazine/2013/12/16/state-of-deception> [<https://perma.cc/MFE3-LBHS>].

52. *Id.*

53. See Letter from Sen. Jay Rockefeller to Vice President Richard Cheney (July 17, 2003), <https://fas.org/irp/news/2005/12/rock121905.pdf> [<https://perma.cc/2S3P-ZE76>].

54. *Id.*

55. *Id.*

56. Peter Baker & Charles Babington, *Bush Addresses Uproar Over Spying*, WASH. POST (Dec. 20, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121900211.html> [<https://perma.cc/24V2-SJDL>].

In a more recent example of the challenges for congressional oversight of classified legal analysis, Senator Ron Wyden and a few other Senators, also members of the SSCI, raised concerns about a classified legal interpretation of the PATRIOT Act's business records provision, which permitted bulk collection of certain telephone metadata. The interpretation had been briefed to SSCI members and others in Congress and approved by the Foreign Intelligence Surveillance Court (FISC). Nonetheless, Wyden and others believed that "the language of the PATRIOT Act had been stretched beyond recognition"<sup>57</sup> and that the program the interpretation supported "was something very different from what Americans thought was going on."<sup>58</sup> Wyden and the other senators wrote letters to senior Executive Branch officials conveying their concerns and seeking declassification of the contested legal interpretation.<sup>59</sup> Because the issue was classified, the senators felt they could go no further than vague public statements.<sup>60</sup> As journalist Charlie Savage has written "a few Democratic lawmakers who knew the [classified legal interpretation] began raising cryptic alarms that something was amiss with how the government was interpreting the Patriot Act, but no one could figure out what they were talking about."<sup>61</sup>

Later, when the interpretation became public after leaks by NSA contractor Edward Snowden, it was widely criticized.<sup>62</sup> That is not to say the interpretation was, in fact, incorrect or that the underlying program was illegal. What it does demonstrate is the challenge for members of Congress in raising concerns about the legal analysis supporting sensitive national security programs. This is a difficulty that does not exist in most other areas that Congress oversees.

In his book *Power and Constraint*, Jack Goldsmith describes the significant role "accountability journalism"<sup>63</sup> has played as an informal check on national security policy. "The press's many revelations about the government's conduct of the war were at the foundation of all the mechanisms of presidential accountability after 9/11. They informed the public and shaped its opinions, and spurred activist, courts, and Congress to action in changing the government's course."<sup>64</sup> Journalism on national security legal decision making has also thrived during this period. New York Times reporter Charlie Savage, for example, has written extensively about legal debates and the development of national security legal

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57. 159 CONG. REC. H6053–56 (daily ed. 2013) (remarks of Senator Ron Wyden on the senate floor).

58. *Id.*

59. *Id.*

60. *Id.*

61. CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY* 168 (2015).

62. *See, e.g.*, Ellen Nakashima, *Verizon Providing All Call Records to U.S. Under Court Order*, WASH. POST (June 6, 2013), [https://www.washingtonpost.com/world/national-security/verizon-providing-all-call-records-to-us-under-court-order/2013/06/05/98656606-ce47-11e2-8845-d970ccb04497\\_story.html?utm\\_term=.6ea9cdf3a0be](https://www.washingtonpost.com/world/national-security/verizon-providing-all-call-records-to-us-under-court-order/2013/06/05/98656606-ce47-11e2-8845-d970ccb04497_story.html?utm_term=.6ea9cdf3a0be) [https://perma.cc/KSW5-NURU].

63. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* 56 (2012).

64. *Id.* at 57.

advice.<sup>65</sup> This reporting shines a light on otherwise secret advice, attracting public discussion and, in some cases, criticism. Knowing that secret interpretations may become public naturally leads lawyers to take more care in their deliberations and ultimate advice. Still, because the subject matter of so much of the advice is classified, reporters have less access to definitive official sources and must rely on lawyers and others with knowledge who are willing to leak information, often in violation of laws, regulations, and agreements that protect classified information. As a result, the reporting is sporadic and often delayed. This journalism is not, therefore, a consistent, reliable source of accountability for national security lawyers.<sup>66</sup>

The fact that this shielding from oversight reduces one important informal incentive for high-quality lawyering in the national security field heightens the importance of building other such incentives into the process of developing national security legal advice. A requirement that legal analysis and advice represents the best view of the law, as the lawyers understand it, is such a protection, and a critical one. The next section will examine what the “best view” approach means, whether it is practical in the context of national security lawyering, and whether Bauer’s criticisms of the approach are valid.

## II. WHAT IS THE “BEST VIEW”?

To assess Bauer’s arguments against the use of a best view approach, it is first necessary to understand how he believes the model works. Bauer describes two features of a best view approach. First, as the name suggests, lawyers following a best view approach will provide legal advice that represents the best view of the law as they understand it. Second, Bauer sees a requirement that lawyers following a best view model be separate and insulated from policymakers and policy discussions. Bauer directs much of his criticism of the best view model at this notion of a separation requirement. As discussed below, separation is not necessary for a best view approach. Bauer’s depiction of a process in which lawyers must operate separately and protected from the policy process in order to provide the best view of the law is not what most commentators and practitioners would recommend, and it is not the way those providing advice in this area actually operate when they apply a best view standard.

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65. See SAVAGE, *supra* note 61.

66. Cf. Oona Hathaway, *Power Wars Symposium: The Savage Effect*, JUST SECURITY (Nov. 2, 2015), <https://www.justsecurity.org/27276/savage-effect/> [<https://perma.cc/5QLD-GCML>] (“But the downsides of such heavy reliance on a reporter for a glimpse into our government’s inner workings are obvious: Savage must get his information from sources, and those sources often have an agenda or a limited view of the issue at hand. (They are also, it bears mentioning again, often breaking their legal and ethical obligations not to disclose classified or confidential information.) That means that the glimpse he is offered is necessarily a skewed one.”).

## A. SEPARATION AND THE “BEST VIEW”

In Bauer’s telling, those seeking the best view of the law must be “as insulated as possible from policy.”<sup>67</sup> He sees lawyers playing a “distant consultative role” when providing their advice, which “remain[s] a factor unto itself.”<sup>68</sup> As Bauer describes it, to arrive at the best view, lawyers are expected to “purge from their work any consideration” of policy consequences and entertain discrete questions on which they deliberate and “return” to present their answers.<sup>69</sup> In other words, if lawyers are involved in the policy decision-making process, if they are “in the game,” to use a phrase quoted often in Bauer’s article, they have departed from the best view approach.

Bauer goes on to criticize this separation model. He argues that insulation from policy is “more than we should ask or certainly expect” from lawyers in a national security crisis.<sup>70</sup> As discussed below, Bauer makes a persuasive argument that separation from the policy process often is not the best way for lawyers to provide advice on fast-moving, high-stakes national security issues. The lack of separation, however, should not be considered fatal to a goal of providing the best view of the law.

That lawyers have a responsibility to maintain some independence from their clients has long been accepted in the practice.<sup>71</sup> Independence and a distinctive professional identity are necessary, according to Robert Gordon in his influential article on the subject, because lawyers “influence their clients to some extent, whether they want to or not . . . . They can’t choose not to be influential, they can only decide not to think about their influence and whether they should exercise it differently.”<sup>72</sup> Gordon advocates for “[t]he ideal of independence” because it “requires lawyers to reflect and deliberate about the nature and results of that influence, as well as act prudently . . . to change whatever results of that influence are bad ones.”<sup>73</sup> Independence does not, however, require separation from clients and their decision-making.

Some commentators, particularly in the wake of legal controversies during the George W. Bush Administration, have embraced a separation model of government lawyering. They argue that lawyers will only fairly and independently address difficult questions of law if they are removed from client influence and play a quasi-judicial role. The most notable in this camp is Bruce Ackerman, who has argued that the White House Counsel’s office and the Justice Department’s OLC are unable to provide fair and accurate advice on executive power issues

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67. Bauer, *supra* note 1, at 181.

68. *Id.* at 181, 239.

69. *Id.* at 246.

70. *Id.* at 246.

71. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 5–6 (1988).

72. *Id.* at 30.

73. *Id.*

because their occupants are loyal to the President who appointed them and are, therefore, interested in facilitating his policies.<sup>74</sup> Ackerman has proposed abolishing those offices<sup>75</sup> and in their place creating a “Supreme Executive Tribunal” within the Executive Branch that would be “insulated from *ex parte* influence” meaning “no more telephone calls” from the White House Counsel or others working for the President.<sup>76</sup> Ackerman envisions the tribunal instead rendering its opinions based on formal briefs and oral arguments.<sup>77</sup>

Similarly, Neal Katyal has proposed an Executive Branch “Director of Adjudication,” appointed for a term of four years and separated from the President and policy process.<sup>78</sup> This Director should take on the opinion-writing and adjudicative function of OLC because, Katyal argues, OLC lawyers are “regularly present at White House meetings” and “[s]imply put, they are lawyers with a client to serve.”<sup>79</sup>

Bauer makes a strong case against this separation model. A close relationship between the lawyers and the policy process is critical to developing policy that is both effective and legal. First, when lawyers are present as policy develops, they can identify and address legal questions and concern as they arise. Lawyers can help steer policy in a direction that is legally sound. When lawyers are separated from policy development, they may be asked for legal advice at a later stage, requiring a starker and more difficult “yes” or “no” answer.<sup>80</sup> In addition, when lawyers are a part of the process, they have easier access to facts that are relevant to their analysis, thereby improving the quality of their advice. Separation from the policy process makes the lawyers’ job harder and their advice potentially less relevant and useful. Even if separation were the better model, it is simply unrealistic to suggest that national security lawyers, particularly in the crisis situations that are Bauer’s focus, will be able to separate themselves from policy decision making. The stakes of decisions are too high and the pace too fast for lawyers to be able to shield themselves from policy.

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74. See Bruce Ackerman, *Abolish the White House Counsel, And the Office of Legal Counsel Too, While We’re At It*, SLATE (Apr. 22, 2009), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/04/abolish\\_the\\_white\\_house\\_counsel.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/04/abolish_the_white_house_counsel.html) [https://perma.cc/3VF6-TNRY] [hereinafter Ackerman, *Abolish the White House Counsel*]; Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011) [hereinafter Ackerman, *Lost Inside the Beltway*].

75. Ackerman, *Abolish the White House Counsel*, *supra* note 74.

76. Ackerman, *Lost Inside the Beltway*, *supra* note 74, at 38.

77. *Id.*

78. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2337 (2006).

79. *Id.*

80. See Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 515 (1993) (Koh identifies the problem of “lock-in,” which can occur when the lawyer—he was speaking specifically of OLC—is asked to evaluate the legality of a course of action to which the government has already committed itself. He argues that the lawyer can then feel “locked into a position by its client’s action” and “forced to issue a legal opinion justifying that action after the fact.”).

A preference for separation is not, however, the prevailing view among commentators, including the writers Bauer quotes in his article, many of whom have a background in the Department of Justice's OLC. Bauer focuses on the role of the OLC, which he sees as the embodiment of the cloistered best view approach.<sup>81</sup> Among the lawyers who advise Executive Branch policymakers, OLC lawyers are the most institutionally detached from the policy process;<sup>82</sup> they do not typically participate directly in the policy process to the same degree that agency general counsel and legal advisers do. Nonetheless, these former OLC writers do not argue lawyers should "purge from their work any consideration" of policy consequences or be "as insulated as possible from policy."<sup>83</sup>

Dawn Johnsen, a former acting head of OLC, argues for independent OLC legal advice that is "accurate and honest" and "unbiased by policymakers' preferred outcomes,"<sup>84</sup> but does not suggest that this advice must develop in a manner that is insulated from policymakers or policy preferences. Johnsen acknowledges that the OLC is not a "disinterested arbiter" and its "charge is to help the President achieve desired policies in conformity with the law."<sup>85</sup> When lawyers have advised that a proposed policy is not consistent with law, Johnsen says their role should not end there. Instead, they "should help the President and policymakers achieve objectives through alternative lawful means."<sup>86</sup> Johnsen argues that this is important, in part, because it could be destructive in the long term to OLC's goals and to the rule of law if OLC were perceived to be "unhelpful and unnecessarily negative."<sup>87</sup>

Jack Goldsmith ran the OLC during a tumultuous period of the George W. Bush Administration and was responsible for the repeal of several formal opinions authored by his predecessors.<sup>88</sup> Goldsmith has described the importance of independence and "loyalty to the institution and to the law," while recognizing that a lawyer is "a member of the Executive Branch and is not neutral to the President's or to the commander's agenda."<sup>89</sup> He approvingly quotes former

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81. See Bauer, *supra* note 1, at 181–82 ("[I]t is self-defeating to insist on a 'best view,' or to commit the assignment of finding one to the exclusive control of a specialized corps of lawyers, which at the present time and for this purpose is the OLC.").

82. This has been less true on national security matters, as discussed *infra* notes 101–05 and accompanying text.

83. Indeed, the Office of Legal Counsel "best practices" to which Bauer refers often, speak of OLC's responsibility to "[facilitate] the work of the Executive Branch and the objectives of the President, consistent with the law" although the advice may not be "designed merely to advance" policy preferences. Barron, *Best Practices*, *supra* note 5, at 2.

84. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1595 (2007).

85. *Id.* at 1581.

86. *Id.*

87. *Id.* at 1601.

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

89. Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 196 (2010) [hereinafter Goldsmith, *Reflections*].

Attorney General Elliot Richardson, who said, “[a]dvice to a President needs to have the political question clearly in view, without regard to any pejoratives attached to the word political.”<sup>90</sup>

## B. THE LAWYERS GROUP

Thus, much of the expert commentary on the role of national security lawyers does not advocate a cloistered process for developing legal advice. More importantly, for better or worse, this kind of separation is not now, nor has it been for much of the last twenty-five years, the way national security legal advice develops in the Executive Branch, even as, for much of that time, lawyers have followed a best view approach. In contrast to the separation model, legal advice for the President and his senior advisors and policymakers has developed through what has become known as the national security “Lawyers Group” process.<sup>91</sup> Far from being insulated from the policy process, Lawyers Group members are in the middle of that process and work closely with their policy clients.<sup>92</sup> Bauer does not discuss this Lawyers Group, which played a critical and high profile role in national security legal advice during the Obama Administration.<sup>93</sup>

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90. *Id.* In his 2000 article *Executive Branch Legal Interpretation: A Perspective from the office of Legal Counsel*, 2 ADMIN. L. REV. 1303 [hereinafter Moss, *Executive Branch Legal Determination*], another former OLC head, Randolph Moss, comes closest to articulating the more separated role that Bauer describes. Moss discusses the role of the Attorney General and OLC specifically. He does not suggest that executive branch lawyers applying a “best view” standard must be insulated from the policy process. Indeed, he rejects a judge-like model of OLC behavior that “shuns consideration of his client’s desired policy goals and acts instead with complete impartiality” as “a caricature.” *Id.* at 1306. Moss does, however, contemplate a neutral, even “quasi-judicial,” role for OLC. Even so, Moss promotes as an “important” role for OLC lawyers, which they play on “almost a daily basis,” working with clients to “refine and reconceptualize proposed executive branch initiatives in the face of legal constraints.” *Id.* at 1329. Thus, he does not propose a model of separation from clients’ policy concerns and goals.

Bauer also refers to criticism from Rosa Brooks—a former Department of Defense official—of some of the George W. Bush Administration’s legal positions and her analogy of government lawyering to the game of tennis. Nothing in her discussion, however, suggests that Brooks advocates development of legal advice ignorant of policy consequences. Indeed, Brooks recognizes that lawyer may at times “skirt the edge of the permissible,” presumably for policy reasons, but be “clearly within the rule” and “not cheating.” ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* 55 (2016).

91. See SAVAGE, *supra* note 61, at 64–65.

92. *Id.*

93. 94. *Id.* The Lawyers Group process itself, like the best view standard, is an important protection for the quality of national security lawyering. See DeRosa & Regan, *Deliberative Constitutionalism*, *supra* note 18, 35–41 (arguing that the deliberative process that the Group provides enhances the quality and perceived legitimacy of national security decision making); Harold Hongju Koh, *National Security Legal Advice in the New Administration*, JUST SECURITY (Nov. 16, 2016), <https://www.justsecurity.org/34507/national-security-legal-advice-administration/> [<https://perma.cc/9DZ3-JVL3>] (“what this interagency process helped to accomplish was that essentially all legal decisions of import regarding US national security issues—including confidential and covert operations—and any change in US government legal position, were vetted through the general counsels of all relevant agencies. Different agencies have different equities, perspectives, and areas of expertise and getting the input of all relevant legal arms of our vast executive branch is vital to sound decisionmaking.”) [hereinafter Koh, *National Security Legal Advice*].



The Lawyers Group includes the senior lawyers from the major national security agencies who meet regularly to deliberate and reach consensus on legal advice for the President and the members of his National Security Council.<sup>94</sup> The Group's core participants include the National Security Council (NSC) Legal Adviser,<sup>95</sup> who is the President's senior national security lawyer and convenes the Group; the Assistant Attorney General in charge of the Justice Department's OLC; the State Department Legal Adviser; the General Counsels of the Department of Defense, the Office of the Director of National Intelligence (DNI), and the Central Intelligence Agency (CIA); and the Legal Adviser to the Chairman of the Joint Chiefs of Staff.<sup>96</sup> Except for the OLC representative, each of these participants has a close advisory relationship with a senior national security policymaker or advisor with whom he or she communicates regularly about policy developments.<sup>97</sup>

The Lawyers Group met regularly during the Clinton Administration.<sup>98</sup> Although during the George W. Bush Administration, at least in the early years, lawyers largely discarded that process in favor of a less inclusive "War Council," which appears to have relied more frequently on formal OLC opinions for key legal advice, the Lawyers Group process remained in use for some covert action and intelligence matters.<sup>99</sup> The Lawyers Group process returned and was critical to the development of national security legal advice during the eight years of the Obama Administration.<sup>100</sup>

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94. *Id.*

95. Since the beginning of the Obama Administration, the National Security Council Legal Adviser has also served as Deputy Counsel to the President for National Security Affairs. *See id.*

96. *Id.*

97. The National Security Council Legal Advisor, who coordinates the group's work, is fully integrated into the National Security Council policymaking process and attends most meetings of the President's national security policymakers that take place at the White House. This includes meetings of the National Security Council, which the President chairs and consists of heads of relevant national security departments and agencies; Principals Committee meetings, which the National Security Advisor chairs, but otherwise has the same level of attendees as the NSC meetings; and Deputies Committee meetings, which a Deputy National Security Advisor chairs and include deputy level participants from the national security departments and agencies. The inclusion of the National Security Council legal adviser (who now is dual-hatted as Deputy Counsel to the President for National Security Affairs) in these meetings has been the practice since the Clinton Administration, but was formalized in the Trump Administration in its Presidential Memorandum setting out the organization of the National Security Council Process. Organization of the National Security Council, the Homeland Security Council, and Subcommittees, 82 FR 16881 (April 4, 2017).

98. John Bellinger, *Charlie Savage and the NSC Lawyers Group*, LAWFARE (Nov. 8, 2015, 11:25 AM), <https://www.lawfareblog.com/charlie-savage-and-nsc-lawyers-group> [https://perma.cc/TJ76-WD22]. *See also* Jennifer N. Marett, *The National Security Council Legal Adviser: Crafting Legal Positions in War and Peace*, 8 J. NATL. SEC. L. & POL'Y 153, 168 (2015).

99. Bellinger, *supra* note 98.

100. SAVAGE, *supra* note 61, at 64–65. Savage describes the role of the Lawyers Group in the Obama Administration: it "provided advice to the policymakers at each stage in the bureaucratic process, taking assignments from them and presenting legal issues in high-level meetings." *Id.*; *see* Koh, *National Security Legal Advice*, *supra* note 93.

Bauer's failure to recognize this Lawyers Group as the process by which national security legal advice develops leads him to focus almost exclusively on the formal opinion-writing role of OLC. By delegation from the Attorney General, the Assistant Attorney General for OLC provides authoritative legal advice to the President and all the Executive Branch agencies.<sup>101</sup> OLC has the authority to provide a definitive Executive Branch position—when asked—on domestic law questions.<sup>102</sup> OLC lawyers often carry out that responsibility by writing formal legal opinions, including on national security issues.<sup>103</sup> But in the national security Lawyers Group process, OLC representatives play a somewhat different and less formal role because of the nature of the group and its deliberations. The OLC representatives in that process operate much as other Lawyers Group participants do—they give the benefit of their expertise and perspective, but, until asked otherwise, contribute informal views, rather than formal legal opinions.<sup>104</sup> The OLC representatives are key participants in these legal discussions, but they are not alone, and they are fully aware of the policy and factual context of the issues they are considering. Thus, the advice does not develop in the kind of cloistered environment that Bauer describes.<sup>105</sup>

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101. U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, <https://www.justice.gov/olc> [<https://perma.cc/QX39-5HNY>] (last visited Feb. 22, 2018).

102. Moss, *Executive Branch Legal Determination*, *supra* note 90, at 1305 (“When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch.”).

103. *See, e.g.*, Memorandum Opinion from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for the Special Assistant to the President and Legal Adviser to the National Security Council, *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 U.S. OP. OFF. LEGAL COUNSEL 182 (May 8, 1996); Memorandum Opinion from Randolph D. Moss, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for the Attorney General, *Authorization for Continuing Hostilities in Kosovo*, 24 U.S. OP. OFF. LEGAL COUNSEL 327 (Dec. 19, 2000), <https://www.justice.gov/sites/default/files/olc/opinions/2000/12/31/op-olc-v024-p0327.pdf> [<https://perma.cc/E2JB-SJ83>]; Memorandum Opinion from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for the Deputy Counsel to the President, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), [https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188_0.pdf) [<https://perma.cc/7TPC-HD7X>]; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005), [https://www.therenditionproject.org.uk/pdf/PDF%2016%20\[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf](https://www.therenditionproject.org.uk/pdf/PDF%2016%20[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf) [<https://perma.cc/XN3X-WYL7>]; David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, Memorandum for the Attorney General, *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (July 16, 2010), [https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16\\_-\\_olc\\_aaga\\_barron\\_-\\_al-aulaqi.pdf](https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf) [<https://perma.cc/6BSV-JSW5>]; Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for the Attorney General, *Authority to Use Military Force in Libya* (April 1, 2011), [https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf) [<https://perma.cc/8N34-ZZJG>].

104. *See* DeRosa & Regan, *Deliberative Constitutionalism*, *supra* note 18, at 34.

105. *Id.* Some have argued that the Lawyers Group process contributes to a decline in the influence of OLC on national security issues. *See* Jack Goldsmith, *The Decline of OLC*, *LAWFARE* (Oct. 28, 2015, 6:11 PM),

## C. A MORE FLEXIBLE BEST VIEW APPROACH

Bauer is correct, then, to question the value of a separation model for providing legal advice in a national security crisis. Where he goes astray is in assuming that to reject separation requires abandoning a best view approach altogether. According to Bauer, the lawyers “seem today stuck between the two choices: an insistence that law remains a factor unto itself, as insulated as possible from policy and political currents, or a more flinty-eyed acceptance that it must yield more ground to high policy in national security.”<sup>106</sup> Bauer’s “flinty-eyed” approach, which he favors during times of crisis, would not insist on a best view standard, but would instead accept a range of “reasonable,” “plausible,” or “available” legal grounds.<sup>107</sup>

In fact, rejection of the separation model does not require lawyers to abandon a best view approach. It is true that immersion of lawyers in the policy process makes adhering to a best view approach more difficult. First, the close relationship with policymakers leaves lawyers more subject to pressure to come out a certain way in their advice. More subtly, lawyers sometimes lose sight of their distinctive role in the policy process—to provide high-quality legal advice—and assume the role of simply another policy advisor.

Although these pressures make it more challenging for lawyers to adhere to a best view standard, there are incentives, grounded primarily in professional identity, that operate in the other direction. Jack Goldsmith has said one such check for him as an OLC lawyer was “the powerful culture at OLC of detachment, professional integrity, and loyalty to the institution and to the law.”<sup>108</sup> The Lawyers Group process provides another key protection for its members. The process offers a forum of legal peers with whom lawyers can discuss challenging legal questions and develop high-quality advice. Even more important, the group dynamic reinforces the lawyers’ distinct professional identity and strengthens its members in their interactions with clients. “If legal advice is unwelcome, the lawyer is not alone; the backing of peers in the Lawyers Group strengthens his or her position.”<sup>109</sup>

Thus, the best view standard is far more flexible than Bauer describes and can survive exposure to policy decision-making. As the next section explains, the

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<https://www.lawfareblog.com/decline-olc> [<https://perma.cc/5KMH-3FCA>]. The less formal role in the Lawyers Group arguably dilutes OLC’s position in some respects because it is operating as one member of a group, but it increases their influence in other ways. Typically, outside of the national security context, OLC does not become involved in the day-to-day formulation of legal advice by agency lawyers. Instead, they provide advice orally or in writing on particularly difficult or controversial legal issues, but only when the client comes to them with discrete questions. The Lawyers Group process broadens OLC’s role by involving it at an earlier stage in the development of legal advice. OLC retains its unique status as the “last word” on domestic law issues, but in the Lawyers Group process they operate more informally.

106. Bauer, *supra* note 1, at 181.

107. *Id.* at 240–41, 250.

108. Goldsmith, *Reflections*, *supra* note 89, at 196.

109. DeRosa & Regan, *Deliberative Constitutionalism*, *supra* note 18, at 35.

best view model protects high-quality lawyering by acting as a regulative ideal and supporting key responsibilities of government lawyers. It is important, therefore, to preserve it as a standard for national security lawyers.

### III. THE “BEST VIEW” MODEL PROTECTS HIGH-QUALITY LAWYERING

As discussed in Section I, national security lawyers often operate with less clarity about the law, less access to others with expertise, and less formal accountability than lawyers who practice in other areas. These factors can impact the quality of national security legal advice, particularly in a crisis. This relative lack of formal, external accountability heightens the need for internal mechanisms that provide incentives for lawyers to do their job well. The best view model is such a mechanism—and a critical one.

#### A. THE BEST VIEW STANDARD AS A REGULATIVE IDEAL

It is fair to ask whether it is even possible to identify a “best view” of the law for national security issues. Bauer describes well the difficulties of finding the “correct” answer to any legal question. Lawyers confront fast-moving proposals for which relevant facts are hard to pin down and change quickly. Judicial precedent, as discussed above, is limited, and there are relatively few determinative sources on which lawyers can rely.<sup>110</sup> Lawyers can rarely say with any certainty that they have the “right” answer and applying a best view standard is certainly no guarantee that they will get there. Randolph Moss addressed this challenge to the best view approach in his 2000 article:

Scholars have labored for years over the question whether the law is determinate—that is, whether legal dilemmas admit of right and wrong answers. In one sense this question is more theoretical than real. Lawyers, legislators, and judges operate on a daily basis on the understanding that there are right and wrong answers in the law, or, at least, answers that do and must govern relevant conduct. Theory, moreover, in my view, comports with this reality. The law involves a vast array of principles and precedents. The best view of the law is that which provides the most coherent explanation of those principles and precedents.<sup>111</sup>

A best view standard for legal advice does not guarantee the right answer to every legal question—that would be impossible. Seeking the best view, however, will lead good lawyers toward better answers. Moreover, the best view approach serves a broader and more important purpose than finding the correct answer in a particular case. The standard serves as a regulative ideal: a critical guidepost for lawyers seeking legal answers in this difficult environment.<sup>112</sup> Applying a best

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110. See *supra* notes 19–48 and accompanying text.

111. Moss, *Executive Branch Legal Determination*, *supra* note 90, at 1321.

112. See Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 NW. J. INT’L HUM. RTS. 24 (2008).

view standard helps lawyers advising on national security remain focused on their distinctive role in the process—a role that assumes responsibility for the legality of individual policy decisions and, critically, the integrity of executive branch law. The best view provides an external professional standard of conduct to guide their analysis. It serves as a counterweight, grounded in a sense of professional identity, to the inevitable pressures that these lawyers face.

A regulative ideal provides a guide for those practicing in a field with relatively few clear limits. One writer described the value of a regulative ideal in the very different context of insurance law. In considering the principle of upholding the reasonable expectations of the insured, he explained:

That principle serves as a regulative ideal: the expression of a value that should help to shape the development of insurance law. Honoring policyholders' reasonable expectations is not something we can always achieve; in fact, it is not something we will always even attempt to achieve. But honoring reasonable expectations as to coverage is a good of sufficient importance that we should continually measure our progress toward achieving that good in a world of insurance that is limited by imperfect information, strategic behavior, the partial incompatibility of that good with other goods, and the practical compromises that markets are always in the process of making.<sup>113</sup>

Thus, even if the true “best view” often is unknowable, the best view standard promotes high-quality lawyering by giving lawyers a goal and a standard by which to order their deliberations. The best view standard operates as a lodestar. To set the standard lower—to set the goal of lawyers' deliberations as identifying one of many possible answers that is not clearly illegal—would remove this important incentive. There will be little to guide the lawyers other than the preferences of policymakers. Moreover, for the same reason that it is difficult to identify the “right” answer, it will be hard to distinguish between an answer that is “available” and one that crosses a line to simply wrong. Giving lawyers permission to exercise this kind of flexibility will inevitably reduce the quality of advice overall.

#### B. THE BEST VIEW STANDARD SUPPORTS THE RESPONSIBILITIES OF GOVERNMENT LAWYERS

The best view standard also protects high-quality lawyering by supporting the duties of Executive Branch lawyers to uphold the public interest and, in particular, the President's constitutional responsibilities. It is widely accepted as a general proposition that government lawyers have an obligation to serve the public

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113. Kenneth S. Abraham, *The Expectations Principle as a Regulative Ideal*, 5 CONN. INS. L.J. 59, 63 (1998). See also Jared Schott, *supra* note 112, at 25. Schott uses the concept of regulative ideal “to link Chapter VII practice and emergency powers both descriptively and normatively. It concedes that the perfect superimposition of the doctrine of legitimate emergency onto Council practice is ‘essentially unrealizable,’ but nevertheless holds that such counterfactual criteria can and should guide our practice.” (citations omitted).

interest in their practice in a way that differs from their private sector counterparts.<sup>114</sup> What this means in practice, however, is far from clear. How does any individual lawyer discern the public interest so that he or she can apply it? Indeed, is it even the lawyer's job to determine what is in the public interest? When it comes to policy matters, policymakers and democratically elected officials would often seem to be in a better position to identify the public interest than their lawyers.

In the Executive Branch, however, there is one element of the public interest that lawyers are in the best position to address: the President's constitutional responsibility to "take Care that the Laws be faithfully executed."<sup>115</sup> The Take Care Clause imposes, at least, a constitutional responsibility on the President of fidelity to the intention and purpose of the law.<sup>116</sup> This obligation makes the task of Executive Branch lawyers different from their counterparts advising private sector clients. Private sector lawyers, when advising their clients, will often provide them several options and explain the risks that an option will be found—by the Executive Branch or the courts—to reflect an incorrect interpretation of the law. Clients then assess how much risk of illegality to assume. This approach to private sector lawyering reflects the fact that private sector clients do not exercise governmental power, nor do they bear any responsibility for the law's execution. The President and Executive Branch have additional responsibilities. In keeping with those constitutional obligations, the President must do more than assess the risks that someone will conclude he was wrong. The President must "faithfully" strive to be right. Seeking the best view of the law when advising on the legality

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114. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, And Will Government Lawyers Serve The Public Interest?*, 41 B.C. L. REV. 789, 789–790 (2000).

115. U.S. CONST. art. II, § 3.

116. See David Luban, "That The Laws Be Faithfully Executed": *The Perils of the Government Legal Advisor*, 38 OHIO N.U. L. REV. 1043, 1050 (2012) ("All lawyers, as I have said, have a duty to give candid and independent advice, but executive branch lawyers have an even more powerful obligation to play the law straight. Article II of the Constitution obligates the President to 'take care that the laws be faithfully executed.' Not just executed, but *faithfully* executed. That word 'faithfully' is here to do some work. It is a warning that the President, above all, must not try to loophole the law . . .") (citation omitted) (emphasis added); Moss, *Executive Branch Legal Determination*, *supra* note 90, at 1312–13 ("[T]he Take Care Clause seems, on its face, to speak directly to the question [of the appropriateness of the best view standard]. It provides that the President 'shall take care that the laws be faithfully executed.' The addition of the word 'faithfully' demonstrates the Framers' intent to stress the President's obligation to perform his duties with a steadfast and principled adherence to the law. The obligation is not to execute the law in a *reasonable* or *colorable* manner, but in a *faithful* manner.") (citations omitted). Moss also points to the Presidential Oath Clause in Article VI, clause 3 of the Constitution, which sets out a special oath for the President. The President must swear that he "will faithfully execute the office of the President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." *Id.* at 1314. Moss argues that this second reference to faithfully executing his duties—which include the duty articulated in the Take Care Clause—reinforces the Take Care obligation. *Id.* at 1314–15. See also Barron, *Best Practices*, *supra* note 5, at 1 (noting that OLC's core function of providing legal advice is in service to the President's "constitutional duties to preserve, protect, and defend the Constitution, and to 'take Care that the Laws be faithfully executed.'" It goes on to explain that for this reason it is "imperative that the Office's advice be clear, accurate, thoroughly researched, and soundly executed").

of presidential actions is the surest—perhaps the only—way for the President’s lawyers to assist him in upholding this responsibility.

#### IV. ASSESSING BAUER’S PROPOSAL

Bauer is generally critical of the best view approach for lawyering. As discussed, this criticism reflects an overly rigid view of how a best view approach operates and underplays the importance of that approach to high-quality lawyering in this area. Nonetheless, Bauer does not propose eliminating the best view approach in all cases. Instead, he argues only that national security lawyers should depart from a best view standard in situations of national security crisis. In practice, however, the limitation to crisis that Bauer proposes is unworkable. With no definition of “crisis” and no effective protections against expansion, Bauer’s exception to a best view approach would easily become the norm, with serious implications for the overall quality of national security lawyering.

##### A. BAUER’S PROPOSAL

Bauer’s article focuses specifically on legal advice during a “condition of crisis.”<sup>117</sup> He examines two fascinating historical examples of lawyering during a crisis: Attorney General Robert Jackson’s memorandum advising President Franklin Roosevelt on the legality of selling U.S. destroyers to Great Britain during World War II and the advice from State Department Legal Adviser Abram Chayes and other State Department lawyers during the Cuban Missile Crisis of 1962. Bauer traces how highly respected lawyers in these circumstances gave advice that most would agree did not represent the best view of the law. Nonetheless, these lawyers have received little criticism. In Bauer’s view—and, in fact, most observers would agree—the actions of these two men were appropriate under the circumstances. Bauer draws from these examples the conclusion that national security crisis calls for a softening of the best view approach.

In Bauer’s view, a crisis demands “a renovation of process and the adoption of an interpretive standard that accommodates more flexibility than that of ‘best view.’”<sup>118</sup> Under those circumstances, the lawyers would work closely with policymakers, not at an “artificial or carefully cultivated distance.”<sup>119</sup> Some senior lawyer, usually the White House Counsel, would run an ad hoc interagency process to develop legal advice<sup>120</sup> that is “less OLC-centric and more flexible.”<sup>121</sup>

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117. Bauer, *supra* note 1, at 179–80.

118. *Id.* at 249.

119. *Id.*

120. *Id.* at 249–50.

121. *Id.* at 253. Although the focus of this Comment is on Bauer’s discussion of the best view standard, his process proposal also poses significant danger. First, it relies on Bauer’s puzzling failure to recognize the Lawyers Group process, *see supra* notes 92–103 and accompanying text, and his mistaken view, as discussed in Sections II. A. and B., that the current process for national security legal decision-making maintains a “carefully cultivated distance from the policy apparatus.” *Id.* at 249. This is simply not the case. Bauer focuses on

Critically, the process would allow for consideration of “legal, policy, political, public communication, and other considerations.”<sup>122</sup> The lawyers in this process would then be free to develop, in good faith, a professionally responsible legal defense of the desired policy, even if that is not what they would deem the best view. Thus, there would be, in these crisis circumstances, “no requirement for a ‘best view’ and no incentive to pretend that one had met that requirement.”<sup>123</sup>

Among the virtues of this approach in crisis situations, according to Bauer, is that it “does not hide its mode of operation: it better captures how the process functions, how the lawyers can be expected to perform, under intense policy pressure.”<sup>124</sup> It replaces the “idealized” best view standard with a more realistic approach. It would not only relieve lawyers of the need to overstate the strength of their legal position, but it would relieve the President of the political consequences of disregarding legal advice deemed the “best view,” when a good faith legal argument exists that supports critical policy.<sup>125</sup>

Bauer would insist on transparency as a “critical condition” on adoption of his model.<sup>126</sup> This includes “a full accounting to the public of the structure of the legal team responsible for the analysis and the substance of the legal position the Administration eventually adopted.”<sup>127</sup> Recognizing the limited judicial oversight of executive national security decisions, Bauer considers transparency to be “the essential checking mechanism.”<sup>128</sup> The transparency he proposes is not “piecemeal disclosures” and cannot be “accomplished by leaks to the press.”<sup>129</sup> Instead, he envisions a “formal accounting, in all practicable detail” of the process and decisions.<sup>130</sup> The power of transparency and an informed public, Bauer argues, should not be underrated.<sup>131</sup> It would provide a “check—necessarily but vitally a political check” on Executive Branch temptations to overstate a crisis or claim a

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the role of OLC in national security legal decision-making. OLC plays a critical role in the Lawyer’s Group process, but there is nothing about that role that interferes with the Group’s ability to work closely with policy makers.

Moreover, the proposal to jettison the Lawyers Group in crisis situations would undermine that process, perhaps fatally. Although the Lawyers Group has been in use, in one form or another, since the 1990s, there is nothing that requires a president or his lawyers to use the process. For the process to survive requires a broad acceptance of its value and an understanding that it is the default process for developing legal advice for high-level national security decision makers. Ad hoc departures during the most critical times would threaten this acceptance. In addition, adoption of an ad hoc process would interfere with the dynamics of the group, which are key to its success. *See supra* note 109 and accompanying text.

122. *Id.* at 250.

123. *Id.*

124. *Id.* at 254.

125. *Id.* at 255–57.

126. *Id.* at 251.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 254.



legal basis when none exists by assuring “that the issue will be openly joined.”<sup>132</sup>

Thus, Bauer articulates two protections against expansion or abuse of his more flexible legal standard. First, it would operate only in times of national security crisis and, second, full transparency about its use would operate as an effective political check. In practice, however, neither of these provide real protection against expansion or abuse of the ad hoc process Bauer describes.

#### B. LIMITATION TO “CRISIS” IS UNWORKABLE

As discussed above, much of the power of the best view standard is as a regulative ideal, a norm that provides an incentive for high-quality lawyering.<sup>133</sup> But to work in this manner it cannot be viewed as optional. Developing a best view is difficult work. Advising clients of the best view can be challenging as well. For national security lawyers to take on this burden, it is important that they understand it to be a requirement for high-quality lawyering. Thus, an exception for crisis, which suggests the best view approach is not necessary when the policy truly matters, undermines, perhaps fatally, its power as a regulative ideal.

Compounding this problem is the concern that nothing about Bauer’s proposal would effectively limit its application to the “crisis conditions,” much less the kind of existential crises that Bauer’s examples of World War II and the Cuban Missile Crisis represent. Indeed, Bauer does not provide any definition of what he means by “crisis.” He acknowledges that the line between “crisis and the regular but still pressing, even urgent flow of events” is difficult to pin down and would be “necessarily open to disagreement.”<sup>134</sup> He concludes, therefore, that it is not useful to identify factors or criteria that will trigger this new process.<sup>135</sup> Instead, he proposes that a decision about what circumstances call for the ad hoc process will be left to the Executive to determine. The protection against overuse will be political: the executive will be required to answer to the public for that decision.<sup>136</sup>

Thus, “crisis” will be defined entirely by the President at the time of decision, with no clear guideposts on which he or his lawyers can draw. It is the nature of national security policy that many, perhaps most, issues feel like a crisis to those in the middle of them. National security lawyers and policymakers confront issues every day that, directly or indirectly, involve life, death, and safety. If “crisis” does not refer to grave or existential threats and, indeed, has no definition at all—if it is in the eye of the beholder—it is not only possible, but virtually inevitable that what Bauer intends as an exceptional process would become commonplace.

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132. *Id.*

133. *Supra* notes 110–13 and accompanying text.

134. Bauer, *supra* note 1, at 252.

135. *Id.*

136. *Id.*

## C. TRANSPARENCY ALONE IS AN INADEQUATE CHECK

Bauer next proposes a requirement of transparency about legal advice as the critical protection against abuse of his departure from the best view standard.<sup>137</sup> This transparency, he says, will ensure that the public will be able to identify flaws and errors in legal advice and the President and other policymakers will be held politically accountable.<sup>138</sup> Bauer and others have described the many benefits of transparency as an accountability mechanism for national security policy.<sup>139</sup> Transparency permits the public to assess for itself whether its government is balancing correctly the many competing interests that national security policy affects.<sup>140</sup> Transparency is, therefore, necessary to obtain the broad, long-term public support that national security programs and policies require.<sup>141</sup> Transparency about national security legal advice has the same salutary effect. Exposure of legal advice to public scrutiny and criticism often will reveal weaknesses or expose flawed assumptions underlying the work.<sup>142</sup> The knowledge that legal advice may become public will also tend to make lawyers more careful to think through potential criticism in advance, increasing the quality of advice.

Bauer is correct that transparency is a powerful check. The problem with relying exclusively on transparency as a protection against abuse is that it is too difficult to institutionalize and too easy to avoid. It is the nature of national security policy that much of the information at issue is sensitive. The risks that transparency poses to ongoing policies is greater than in any other field. It should go without saying that shielding some national security programs and policies from public view is necessary for them to function properly. For this reason, most national security institutional players see it as their responsibility to protect the secrecy of their information.<sup>143</sup> Very few actors within the national security community consider promoting transparency to be their responsibility. Jack Goldsmith described this phenomenon with transparency of legal advice in a speech to Intelligence Community lawyers:

You tend to approach issues of secrecy versus transparency *ad hoc* and in the context of litigation. My sense is that in the FOIA context in particular, the

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137. *Id.* at 251.

138. *Id.*

139. *See id.* *See also* Jack Goldsmith, *My Speech at ODNI Legal Conference: "Toward Greater Transparency of National Security Legal Work"*, LAWFARE (May 12, 2015, 8:30 AM), <https://www.lawfareblog.com/my-speech-odni-legal-conference-toward-greater-transparency-national-security-legal-work> [<https://perma.cc/Z2HA-WERH>] [hereinafter Goldsmith, *Toward Greater Transparency*]; Rachel Brand, *Transparency in the Intelligence Community*, LAWFARE (Nov. 2, 2015), <https://www.lawfareblog.com/transparency-intelligence-community> [<https://perma.cc/VT7G-7EUX>]; Ben Wittes, *Lessons on Detention from Capt. Patrick McCarthy's Talk at MILOPS*, LAWFARE (May 1, 2014), <https://www.lawfareblog.com/lessons-detention-capt-patrick-mccarthy-talk-milops> [<https://perma.cc/FBD3-T9JY>].

140. *Id.*

141. *Id.*

142. *See* Goldsmith, *Toward Greater Transparency*, *supra* note 139.

143. *Id.*

Justice Department's relatively narrow focus on winning the legal or disclosure issue prevails at the expense of the medium-term (but harder-to-measure) risk of losing credibility before the courts. The litigation context in which these issues often arise, combined with the fact that you are enormously busy keeping the country safe, means that you have little [time] to step back and consider systemic costs and benefits of your transparency practices, or organizational reforms.<sup>144</sup>

In this atmosphere, arguments for transparency are challenging within the national security policy structure. The potential harm from release of information on national security decisions is direct, definable, and immediate. The benefits of transparency are indirect, imprecise, and tend to focus on long-term goals of good government and rule of law. Indeed, in the short-term, transparency rarely results in applause from the public—the opposite is more likely. That is why most public releases of information about national security legal advice in the years since 9/11 have resulted from leaks.<sup>145</sup> Thus, for a policy of transparency to take hold, there must be sustained, high-level commitment to relatively abstract goals. This is not impossible, but experience tells us it is quite rare.

Transparency is a potentially powerful check on national security policy-makers. But it is inadequate as the sole protection against abuse of the process Bauer proposes because it relies on the policymakers recognizing its value and enforcing the discipline upon themselves. This is simply unrealistic.

#### CONCLUSION

If the best view standard is a necessary protection for high-quality Executive Branch lawyering, what does that say about the actions of Attorney General Jackson and State Department Legal Adviser Abram Chayes? Does it mean if those situations recurred, the lawyers facing them should declare the Presidents' policies—selling destroyers to the British, who were at war with Nazi Germany and instituting a naval “quarantine” during the Cuban Missile Crisis—illegal? Did Jackson and Chayes do the wrong thing?

In fact, given those circumstances, most lawyers—including those who value the best view approach—would agree that Jackson and Chayes acted appropriately. An argument for the best view standard must acknowledge this reality.

To Bauer, the fact that lawyers in some exceptional circumstances must push the envelope in their legal advice, argues for a separate standard and process for those occasions. To do so is more honest, he says, because the lawyers will have

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144. *Id.*

145. See Goldsmith, *My Speech*, *supra* note 139 (“An amazing number of very highly classified programs have been revealed to the public in the last eleven years. These revelations included a lot of Executive branch legal work related to these programs—by my rough count, at least several hundred documents. The vast majority of these disclosures involved insider leaks to the press followed by shamefaced government production in reaction to leaks.”).

“no incentive to pretend”<sup>146</sup> that they gave, and the President relied on, the best view. In addition, a process that approves these departures will relieve the President of criticism he might face for relying on a legal analysis that is something less than “the best.”<sup>147</sup>

There is significant danger, however, in lowering the legal standard to accommodate these situations. The problem with Bauer’s proposal is that by creating a separate standard and process to address these exceptional circumstances, he makes these departures easier; less politically painful for the President and carrying fewer reputational risks for the lawyers. The virtually guaranteed result would be that these exceptional departures become more common. As discussed, this would undermine the regulative force of the best view norm, which is a critical protection for high-quality national security lawyering.

Departing from the best view might sometimes be necessary, but it should not be easy. If the President and his lawyers understand that they will absorb criticism for adopting a strained interpretation of the law—or even one they know to be incorrect—they will be more cautious about taking that step. If the need is great, they will accept the risks. It will be a difficult decision—but it should be.

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146. Bauer, *supra* note 1, at 250.

147. *Id.* at 255.