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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. The present 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. In particular, this essay examines the president’s unilateral decision in 1940 to transfer fifty destroyers to the British. That Destroyer Deal is distant in time and is now relatively uncontroversial. Today, everyone agrees with the substantive policy of helping Great Britain against Nazi Germany. The parallax between torture today and helping the British then enables us to factor partisanship and substantive policy more or less out of our judgment.

To facilitate the Destroyer 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

* Paul Whitfield Horn Professor, Texas Tech University. I value the comments received when I presented this paper at the Harvard law School, the Texas Tech University School of Law, and the St. Mary’s University at San Antonio School of Law. I also wish to thank Professors John Q. Barret, Bryan Camp, Susan Fortney, David Luban, Adam Morse, Richard Murphy, H. Jefferson Powell, and W. Bradley Wendel for their thoughtful comments and assistance regarding the present article.
attorneys. On balance, I conclude that President Bush’s lawyers did the wrong thing, but I explain why others might disagree.

I. INTRODUCTION

In recent years, legal advisory opinions rendered during the administration of President George W. Bush have sparked heated controversy. Unfortunately, many contemporary discussions of the advisory relationship between the president and his attorneys are distorted by intense and sometimes rancorous partisanship. The present essay uses the relationship between Attorney General Robert H. Jackson and President Franklin D. Roosevelt as a laboratory 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. To facilitate the destroyers deal, Jackson erroneously advised that the president had unilateral authority to accomplish the exchange. 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, the essay attempts a balanced ethical analysis of the Bush II Administration’s torture memorandum.

Towards the end of a distinguished career in public service, 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.

Another respected Attorney General has voiced similar thoughts.

Jackson’s brief but nuanced description of the attorney general’s role makes theoretical sense, but any realistic study of the advisory relationship between a president and the president’s legal advisers should be based upon actual practice rather than theory. Niccolo di Bernardo Machiavelli, who above all else was a realist, frankly told readers of The Prince that “it seems

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3 See notes 9-100, supra, and accompanying text.

4 See notes 101-46, supra, and accompanying text.


7Machiavelli is a controversial figure whose name has become synonymous with “the view that politics is amoral and that any means however unscrupulous can justifiably be used in achieving political power.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 713 (1983) (“Machiavellianism”). Undoubtedly, he believed that there was and should be a significant, amoral aspect to political life, but in his actual life as a renaissance diplomat and foreign relations adviser for the city state of Florence, he did not consistently practice what he seemed to preach in The Prince. See MILES J. UNGER, MACHIAVELLI: A BIOGRAPHY (2011). In addition to advising how a prince or government official should act, Machiavelli sought to present an empirical study of how government officials actually comport themselves.
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 grapple with the actual truth of things rather than to dwell in dreams.

A recently published article presented an exhaustive – some might say exhausting – exploration of Jackson’s 1940 advice that President Roosevelt had unilateral authority to transfer 50 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, Jackson, 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 the present 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.

8 NICCOLO MACHIAVELLI, THE PRINCE ch XV (M. Unger transl.).
9 Casto, Destroyers-for-Bases, supra, note 2.
11 See, for example, the insightful comments in Alice Ristroph, Is Law? Constitutional Crisis and Existential Anxiety, 25 CONST. COMM. 431 (2009).
12 LUBAN, LEGAL ETHICS, supra, note 1, at 192 (quoting Brewster).
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. There is no direct evidence that Jackson knowingly rendered erroneous legal advice. Certainly, Jackson never said so. Nevertheless, there is a wealth of circumstantial evidence indicating that Jackson was wrong and that he knew so.\footnote{See notes 18-33, infra, and accompanying text; Casto, \textit{Destroyers-for-Bases}, supra, note 2, at 85-93 & 124-31.}

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 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 American destroyers originally launched at the end of World War I. The situation was complicated by the United States’ neutrality and the fact that many Americans wished to avoid becoming embroiled in the European War. Nevertheless, the president resolved to support the British by trading fifty 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 a written opinion published to the nation, Jackson construed three separate statutes that stood in the president’s way. His three analyses ranged from the brilliant to the 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
certified] that such material is not essential to the defense of the United States.”

Jackson distinguished this statute with a brilliant legal analysis based upon the statute’s language, purpose, and self-evident public policy. 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. Jackson blew through this road block with an analysis that he admitted was “hairsplitting.”

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. 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.” The primary purpose of this provision was to restrict the president’s authority to transfer destroyers to the British.

Notwithstanding Congress’s obvious desire to restrict the president’s authority, Jackson wrenched a proviso to an eighty-year-old post-Civil-War statute from its clear context and construed the ancient proviso as authorizing the president to transfer any and all naval vessels to

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14 An Act to expedite national defense, and for other purposes, 76th Cong., 3d sess., ch. 440, § 14 (a), 54 Stat. 676, 681.

15 See Casto, Destroyers-for-Bases, supra, note 2, at 93-95.


18 U.S. Const. Art 4, §3, cl. 2. See Casto, Destroyers-for-Bases, supra, note 2, at 57.


20 See Casto, Destroyers-for-Bases, supra, note 2, at 38, 81, & 91.

foreign powers so long as the president recorded his decision in writing. Jackson released his erroneous opinion to the nation as part of a political campaign to garner support for the president’s decision.

Under accepted canons of statutory construction, Jackson’s advice was erroneous.\(^{22}\) Moreover, his analysis made a mockery of the two-month old Vinson Amendment. The Amendment was enacted specifically to limit in some way the president’s authority to transfer the destroyers. Jackson dealt with this embarrassment by simply not mentioning 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 had no other purpose than 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.\(^{23}\) Jackson, himself, described Cohen “as having the best legal brains he has ever come into contact with.”\(^{24}\) Cohen rejected Jackson’s final analysis.\(^{25}\) Newman A. Townsend\(^{26}\) had

\(^{22}\) Jackson’s construction was contrary to the statute’s title, its plain meaning, and the rule that statutory provisos apply only to the provision to which they are attached. See Casto, Destroyers-for-Bases, supra, note 2, at 90.


\(^{25}\) See Casto, Destroyers-for-Bases, supra, note 2, at 91.
primary responsibility within the Department of Justice for crafting attorney-general opinions, and Jackson described him as a “counselor on whom I often relied.” 27 Townsend also rejected Jackson’s final analysis. 28 Dean Acheson, 29 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. 30 Cohen, Townsend, Frankfurter, and Acheson offered alternative statutory analyses to justify the president’s unilateral authority to transfer the destroyers.

Finally, Jackson, himself, agreed with Cohen’s and Townsend’s alternative analyses and on August 13, 1940, gave the president an informal green light for the transfer. In reliance upon 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.” 31 This iffy analysis fell apart three days later when the Chief of Naval Operations refused to make the


28 See Casto, Destroyers-for-Bases, supra, note 2, at 91-92.

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

30 See Casto, Destroyers-for-Bases, supra, note 2, at 125.

requisite determination of unfitness.\textsuperscript{32} The problem was that the destroyers were on active duty, the Navy had assured Congress that the destroyers were needed for active duty, and the British desperately needed the ships for immediate active duty. They were in no way “unfit for further service.” It was only then that Jackson decided to adopt an erroneous construction of the ancient proviso that he, his advisers, Justice Frankfurter, and Acheson had rejected just a few days earlier.\textsuperscript{33}

Jackson’s advice to the president regarding the technical issue of unilateral presidential authority 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.\textsuperscript{34} 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 patently 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 and knows is erroneous. Jackson’s advice regarding the destroyers deal is a good example. In this essay, I will explain my conclusion.

\textbf{II. THE PROBLEM OF DIRTY HANDS}

\textsuperscript{32} See Casto, Destroyers-for-Bases, supra, note 2, at 86-88.

\textsuperscript{33} See id.

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 Destroyer Deal. Walzer called his paradox “The Problem of Dirty Hands.” 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.” 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.” Weber continued, “Whoever wants to engage in politics at all, and especially as a vocation, has to realize these ethical paradoxes.”

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 have an additional obligation to act for the nation. A government official “acts on our behalf, even in our name.” This responsibility entails an additional layer of representational moral obligations. A government official has “considerable

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36 NICCOLO MACHIAVELLI, THE PRINCE, ch. XV.
37 Max Weber, “Politics as a Vocation,” in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 121 (H. Gerth & Wright Mills eds. 1946).
38 Id. at 125.
39 Walzer, Dirty Hands, supra, note 35, at 162.
responsibility for consequences and outcomes" that impact the nation as a whole. Sometimes the individual moral obligation may conflict with the representational obligation, 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. One of his key insights 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 those occasions has learned how not to be good. 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, set to go off within the next twenty four hours.” Of course, this hypothetical is at best an outlier. In real life, as opposed to fiction and philosophical speculation, the ticking-bomb scenario almost never happens. 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 destroyer deal was simultaneously right and wrong.

40 Id. at 161.

41 Id. at 167.

42 Walzer probably drew his ticking-bomb scenario from a 1960 French novel about the revolt in Algeria. See JEAN LARTÉGUY, LES CENTURIONS (1960). The movie Dirty Harry presents a classic ticking-bomb scenario that does not involve a ticking bomb.

Some have argued that Walzer’s problem of dirty hands is no problem at all because there can be no such dilemma or paradox.\textsuperscript{44} 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 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.

In terms of judging Jackson’s conduct, 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.”\textsuperscript{45} 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.


\textsuperscript{45} Weber, Politics, \textit{supra}, note 37, 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. 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.46 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? The particular legal rule that Jackson counseled the president to violate had little or no moral content. Where is the moral imperative in a law that establishes procedures for the sale of naval vessels?47

46 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.

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 surely 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.

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.\(^{48}\) 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, but not others’ -- quite nonsensical. We may conclude that Jackson’s knowing misconstruction of the law was simultaneously right and wrong.

Some might counter 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 most fundamental constitutional values. At the head of the list, comes the bedrock concept of the

\(^{48}\) See, e.g., Wendel, Torture Memos, supra, note 1, at 121-22 (condemning Jackson’s failure to provide accurate legal advice). See also notes 71-73, infra, and accompanying text.
rule of law. If high government officers do not consider themselves bound by the law, why should anyone else? The rule of law is a glue that holds our society together.\footnote{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. W. Bradley Wendel, \textit{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.} Close behind the rule of law comes the principle of separation of powers. When Jackson, in effect, counseled the president to violate an act of Congress, some might argue that he violated this fundamental principle of how our government is supposed to operate. The president is supposed to follow constitutional rules legislated by Congress.

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, some laws are routinely under-enforced due to lack of resources or for other reasons. We 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 ideal of the separation of powers. The ideal has always been viewed as a malleable political principle rather than an absolute doctrine.\footnote{See JOHN NOWAK \& RONALD ROTUNDA, CONSTITUTIONAL LAW §3.5 (8th ed. 2010).} 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 “Party 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.”\textsuperscript{51}

Notwithstanding well-known and accepted practices that attenuate the value 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 in respect of 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 important consideration but not an absolute, moral dreadnaught. Of course, this analysis can only make sense to a consequentialist. A legal absolutist would reject it.

Some might argue that the statute that Jackson chose to violate was more than an obscure rule of federal contract law. 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.\textsuperscript{52} In other words, Jackson’s opinion can be viewed as a direct assault on the principle of separation of powers. The president was trying to do something that a month earlier the Congress had specifically told him not to do. 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

\textsuperscript{51} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

\textsuperscript{52} See notes 18-20, supra, and accompanying text.
authority.\textsuperscript{53} 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.”\textsuperscript{54}

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.\textsuperscript{55} 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.\textsuperscript{56} 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.\textsuperscript{57} 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.

To repeat: the separation of powers implications of Jackson’s erroneous counsel was 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.

\textsuperscript{53} Jackson elected not to use this argument. \textit{See} Casto, \textit{Destroyers-for-Bases supra}, note 2, at 80-81 & 85-93.

\textsuperscript{54} Dean Acheson et al., “No Legal Bar Seen to Transfer of Destroyers,” N.Y. TIMES, Aug. 11, 1940. \textit{See} Casto, \textit{Destroyers-for-Bases, supra}, note 2, at 71-79.

\textsuperscript{55} \textit{See id.} at 70 & 114-15.

\textsuperscript{56} \textit{See id.} at 114.

\textsuperscript{57} \textit{See id.} at 70 & 114-15.
Acheson consciously refused to exalt form over substance.\textsuperscript{58} He frankly 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.”\textsuperscript{59}

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 the idea of civil disobedience.\textsuperscript{60} In addition, the Destroyer 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 that soften the absoluteness of its strictures.\textsuperscript{61}

\textsuperscript{58} See \textit{id.} at 78-79 & 102.

\textsuperscript{59} Dean Acheson to John McCloy, 26 September 1940, Dean Acheson Papers, Box 21, Yale University, quoted in DAVID S. MCLELLAN, DEAN ACHESON: THE STATE DEPARTMENT YEARS 41 (1976). \textit{See also} Dean Acheson, \textit{Ethics in International Relations Today}, in THE VIET-NAM READER, 13-15 (M. Raskin & B. Fall eds., 1965).


\textsuperscript{61} See \textit{infra} notes 77-100, and accompanying text.
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. Although these analyses invoke the language of dirty hands, they tend to reject or ignore Walzer’s paradox. Attorneys are fundamentally 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 really 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 other philosophers who have rejected Walzer’s paradox, Bobbitt believes

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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.

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.”63 Unfortunately, however, he restricts his brief analysis to two outliers.

First, there is torture and the ticking-bomb scenario.64 Bobbitt does not see any ethical problem because he is a thoroughgoing 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.”65 Bobbitt agrees, however, for all the usual reasons that the ticking-bomb scenario is an outlier that seldom happens.66

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 overthrown, when it was believed that disregarding the single law, would tend to preserve it?67

64 Id. at 361-64.
65 Id. at 365.
66 Id. at 362-63.
67 Id. at 366 (quoting Lincoln; emphasis original).
Machiavelli and Winston Churchill used the same reasoning to justify unlawful action when the existence of their republics was threatened.\(^68\)

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 in respect of 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 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.\(^69\)

\(^68\) In the Discourses, Machiavelli took Pietro Soderini, Gonfalonier of Florence, to task for Soderini’s failed defense of the Florentine republic. 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.” NICCOLO MACHIAVELLI, THE PRINCE AND THE DISCOURSES 405 (M. Lerner ed. 1950). 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).

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? No one believes 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 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 this dire threat.

Insofar as the problem of dirty hands is concerned, Professor Bobbitt’s thoughtful book is a sophisticated exploration of how Professor Bobbitt believes that a thoroughgoing consequentialist should address the problem of torture. His book is about the problem of terrorism and not the problem of dirty hands. Moreover, he writes of how a good government official should act. He does not write of 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, but he is 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.

70 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, LAWYERS, supra, note 62, 168-75 (2010). 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
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,” 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. When this paralax 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: “A good President may in some cases, be willing to take aggressive action to protect national security, without worrying too much about the law.” 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 override nonprofessional moral obligations and perform acts of expiation to assuage the attorney’s guilt. Id. at 172-75.

71 Wendel, Torture Memos, supra, note 1, 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.

72 See notes 116-20, infra, and accompanying text.

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 Destroyer 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.’”

Presumably Jackson had a private conversation along these lines when he met with the president and discussed the 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.”

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 Destroyer 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, himself, was confronted with the problem of dirty hands. After all, the Constitution provides that “he shall take Care that the Laws be faithfully executed.”

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75 GERHART, AMERICA’S ADVOCATE at 222 (quoting Jackson).

76 U.S. Const. Art. II, §3.
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 he, Jackson, would support the president with an erroneous legal opinion that he, Jackson, knew was erroneous. 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 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.” \(^{77}\) 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.” \(^{78}\) 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 process of advising the president. 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

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\(^{77}\) Jackson, Reminiscences, *supra*, note 5 at 1102-03.

\(^{78}\) *Id.* at 1103.
Office, and Jackson rendered his destroyers opinion with an understanding that it would not be subject to judicial review.79

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,80 it is nevertheless present 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.”81 In the Steel Seizure Case,82 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.83 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 statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself.”84

79 See Casto, Destroyers-for-Bases, supra, note 2, at 121-22.

80 Shortly before Jackson’s death, he wrote an unpublished law review article describing in some detail the destroyers-for-bases 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.

81 See note 75, supra, and accompanying text.


83 See Casto, Destroyers-for-Bases, supra, note 2, at 130-31

84 343 U.S. at 647 (emphasis added). Later in the opinion, he noted, “I should not bind present judicial judgment by earlier partisan advocacy.” Id. at 649 n. 17.
The distinction between private and public legal advice also explains 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 destroyer deal is an act of political advocacy and not of legal judgment. 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, and the court of public opinion approved the deal.

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.” Jackson was an honorable, which is not to say perfectly honorable, individual, and one can imagine that for the rest of his life, his memories of the Destroyer 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.”

85 See Casto, Destroyers-for-Bases, supra, note 2 at 101-04.

86 See id. at 101.

87 Walzer, Dirty Hands, supra, note 35, at 167.

88 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).

89 Walzer, Dirty Hands, supra, note 35, at 179 (emphasis original).
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.”90 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.”91 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.”92

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?93 If Jackson’s choice was morally correct, he,

90 Id.
91 Id. at 179-80.
92 Id. at 180. See also PHILIP BOBBITT, TERROR, supra, note 63, at 384.
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.”\textsuperscript{94} 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 “to quickly or too often.”\textsuperscript{95} The possibility of punishment is especially important to curb the enthusiasm of government attorneys that Elliot Richardson described as “heads-up, get-ahead, go-along organization men.”\textsuperscript{96}

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 a broad discretion not to prosecute at all, to prosecute for a lesser included violation, or to prosecute and leave punishment

\textsuperscript{94} VOLTAIRE, CANDIDE.

\textsuperscript{95} See supra note 92, and accompanying text.

\textsuperscript{96} ELLIOT RICHARDSON, THE CREATIVE BALANCE 8 (1976).
to the 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.\(^97\) State prosecutors are viewed as appropriately exercising much the same discretion.\(^98\) Similarly, the concept of jury nullification by grand\(^99\) 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.\(^100\)

V. CONCLUDING THOUGHTS: THE TORTURE MEMORANDUM

Although the present essay and its underlying historical study concentrate upon Robert Jackson’s decision to facilitate the destroyer 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. Jackson’s destroyers opinion was an atypical occasion. Perhaps the dirty-hands model is also pertinent to the Bush II attorneys’ infamous...


\(^{98}\) See NICHOLAS HERMAN & JEAN CARY, LEGAL COUNSELING, NEGOTIATING, AND MEDIATING: A PRACTICAL APPROACH § 19.05 (2d ed. 2009 ), discussing National District Attorneys Association’s (NDAA), NATIONAL PROSECUTION STANDARDS (2d ed. 1991).

\(^{99}\) 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.

torture memorandum. To repeat, however, most advisory opinions do not implicate the problem of dirty hands.

A. The Göteborg Award

An example of mundane legal advice that does not implicate the dirty-hands model is found in the Office of Legal Counsel’s (OLC) 2010 opinion regarding the Göteborg Award for Sustainable Development. A city in Sweden and local businesses had created a non-governmental entity to administer an award for sustainable development, and the entity wished to confer the award (including a substantial cash prize) upon an employee of the United States Commerce Department. At issue was whether the Constitution’s Emoluments Clause precluded the employee from accepting the award.

The Göteborg opinion is a quite unremarkable example of competent legal advice that reaches a proper conclusion. OLC has memorialized its “Best Practices” in a memorandum, which states that advice must “be clear, accurate, thoroughly researched, and soundly reasoned.” The Göteborg opinion does just that. The author reasons that the Emoluments Clause bars “any present … from any … foreign state” and concludes that the Award is chosen

101 See notes 106-47, infra, and accompanying text.

102 See Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development (OLC 2010).


104 OLC, Memorandum for Attorneys of the Office: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010). This language was taken verbatim from the prior Best Practice Memorandum. See OLC, Memorandum for Attorneys of the Office: Best Practices for OLC Opinions (May 16, 2005). The 2010 Best Practices Memorandum further provides that the “OLC seeks to provide advice based on its best understanding of what the law requires.”
by a jury of private Swedish subjects and not by the government of Sweden or the city of Göteborg.

In terms of legal analysis, there is nothing unusual about the Göteborg opinion. OLC simply used traditional analysis to determine the applicable legal principles and then applied the principles to the facts. If traditional legal analysis had yielded the opposite result, OLC surely would have opined that the employee could not accept the award. The opinion is an exemplar of the ordinary run of legal advisory opinions in government. To be sure, some opinions might implicate far more difficult questions of analysis. Nevertheless, in confronting difficult legal issues, OLC strives to base its opinion on “an accurate and honest appraisal of applicable law.”

Legal advice like the Göteborg opinion does not in any way implicate the problem of dirty hands. The only significant ethical consideration is the concept of the rule of law. Regardless of how the Göteborg opinion had gone, no significant extralegal government good would have been attained or denied. The problem of dirty hands as discussed in the present essay only arises in extraordinary situations where the law bars the attainment of some truly significant government good. Jackson’s destroyers opinion presented this extraordinary dilemma. Perhaps the Bush II torture memorandum is another extraordinary example.

B. The Torture Memorandum

Countless critics have parsed, dissected, and eviscerated the infamous torture memorandum written by Jay Bybee and John Yoo. Suffice it to say that Bybee’s and Yoo’s

\(^{105}\) OLC, Best Practices, supra, note 104.

\(^{106}\) 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.
analyses were clearly wrong as a matter of traditional legal analysis, 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. 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. If this is what Bybee and Yoo believe, then of course they would believe that their

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107 The Bush II attorneys actually wrote a series of memoranda related to the issue of torture. [cite] The present essay concentrates on the Bybee/Yoo memorandum of [date].

108 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, BAD ADVICE, supra, note 1, at 239-52; LUBAN, LEGAL ETHICS, supra, note 1, 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.” Id. at 163.

109 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. See LUBAN, LEGAL ETHICS, supra, note 1, at 192-97; WENDEL, LAWYERS, supra, note 62, ch. 6.

110 See LUBAN, LEGAL ETHICS, supra, note 1, 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, BAD ADVICE, supra, note 1, at 71 (quoting Bybee).

111 See notes 11-12, supra, and accompanying text.
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. To repeat, however, we cannot know that this is actually the case. If, however, it 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. The Destroyer Deal did not really involve a clash of moral values; the torture memorandum did. In the Destroyer Deal, Jackson can be condemned 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

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as a matter of legal absolutism, they should be condemned for this.\textsuperscript{113} On the other hand, whether they were morally justified is a more murky 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, \textit{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.”\textsuperscript{114} Before and after 9/11, Judge Richard Posner drew the same distinction.\textsuperscript{115} In

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  \item \textsuperscript{113} 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.
  \item \textsuperscript{114} Jean Bethke Elshtain, Reflections on the Problem of “Dirty Hands,” in TORTURE, A COLLECTION at 87 (S. Levinson ed. 2004). For similar analyses, see PHILIP BOBBITT, TERROR, \textit{supra}, note 63, at 383-85.
  \item \textsuperscript{115} Richard Posner, \textit{The Best Offense}, NEW REPUBLIC 28 (Sept. 2, 2002); RICHARD POSNER, NOT A SUICIDE PACT 81-87 (2006). 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.” \textit{Id.} at 30. Nevertheless, he opposes establishing general rules to allow torture in “defined circumstances” because
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contrast, Bybee and Yoo sought to facilitate a general policy of government torture by counseling that torture is lawful.

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 policy of lawless torture, was kept secret for years. 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 the memorandum.

Many critics of the Bybee/Yoo memorandum strenuously object to the failure to address clearly relevant legal considerations, including judicial precedent, that obviously run counter to the memorandum’s conclusion.\(^{116}\) 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 the frivolous 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 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. The distinction also appears in advice given by the British Attorney General on the legality of the 2003 invasion of Iraq. Similarly, before

117 See note 75, supra, and accompanying text.

118 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.” DAVID LUBAN, LEGAL ETHICS, supra, note 1, at 202. Ten days later,
the American government killed Anwar al-Awlaki, an American citizen in Yemen, OLC rendered a detailed 50-page opinion that carefully considered many arguments for and against the action’s legality.\textsuperscript{119} The opinion, itself, 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.\textsuperscript{120} 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 distinction 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.

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

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\item[\textsuperscript{120}] Remarks of Attorney General Eric Holder at Northwestern University School of Law (Mar. 5, 2012).
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the contemplated action or position proposed by an agency or the Administration.” 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.”

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.”

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 lawful, and legal advice merely reassures the client that the action will not violate the law. The Göteborg opinion epitomizes the typical situation. 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. Dean Acheson, who coauthored a significant opinion related to the Destoyers-for-Bases Deal, believed that a “lawyer bends his brains to support policy.” There is significant anecdotal evidence suggesting that the separation of law and policy is at best aspirational and certainly not the primary governing principle in respect of politically controversial issues. Jackson obviously relied heavily on policy

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121 OLC, Best Practices, supra, note 104. 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.

122 LUBAN, LEGAL ETHICS, supra, note 1, at 164 n 5 (quoting Yoo).

123 See notes 102-06, supra, and accompanying text.

124 See Casto, Destoyers-for-Bases, supra, note 2, at 71-79.

125 Id. at 78 (quoting Acheson).
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.’”\textsuperscript{126} Elliot Richardson, based upon his experience as Attorney General, believed that Jackson appropriately relied upon policy in shaping the destroyer opinion.\textsuperscript{127}

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”\textsuperscript{128} situation in support of the underlying policy. An attorney who resorts to policy to break a tie surely does not violate the

\textsuperscript{126}See Casto, Destroyers-for-Bases, \textit{supra}, note 2, at 120 (quoting Frankfurter).

\textsuperscript{127}See note 74, \textit{supra}, and accompanying text.

\textsuperscript{128}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.
Best Practices. Jackson believed that in these circumstances, an attorney should give “the Administration … the benefit of a reasonable doubt as to the law.”

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. 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.” Of course, he would counsel his governmental client about the weaknesses of his legal analysis. 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 entirely policy-driven analysis from the Attorney General or the White House Counsel’s Office.

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

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130 See notes 16-17, supra, and accompanying text.

131 Columbia University Oral History, Reminiscences of Robert H. Jackson, 1102-03.

132 See note 75, supra, and accompanying text.

133 See Trevor Morrison, Stare Decisis in the Office of Legal Counsel, 110 COLUMBIA L REV. 1448, 1466-68 (2010).
and experienced attorneys described “the memorandum’s arguments [as] standard lawyerly fare, routine stuff.” Moreover, there is a parallel between Jackson’s weak and preposterous arguments in his destroyers opinion and Bybee’s and Yoo’s pretensions. Elliot Richardson’s thoughts and Justice Frankfurters comment also lend some support to the idea that, at least in respect of highly politicized issues, the Bybee and Yoo memorandum may be standard fare and routine stuff. The most significant 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 the bar for professional discipline, but in what has been described as an “embarrassingly facile memorandum,” the Deputy Attorney General refused. This refusal may be plausibly read as supporting the claim that Bybee’s and Yoo’s pretentions are indeed standard lawyerly stuff.

C. The Torture Memorandum: 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 vanish if the written opinion is a secret document. Why delete pertinent counterarguments from a secret advisory opinion? The British Attorney General did not do so, and nor did OLC when it advised on the legality of the

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135 See note 74, supra, and accompanying text.

136 See note 126, supra, and accompanying text.

137 Spaulding, Independence, supra note 1, at 440.

138 See generally id. at 440-44.

139 See note 118, supra, and accompanying text.
extrajudicial killing of an American citizen in Yemen.\textsuperscript{140} Suppose that White House Counsel Alberto Gonzalez, who received the 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 Gonzalez 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.\textsuperscript{141}

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 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?

\textsuperscript{140} See notes 118-20, supra, and accompanying text.

\textsuperscript{141} Transcript of NBC News Special, “Decision Points: Part 3,” Nov. 8, 2011.
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.  

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.”

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 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

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142 See Casto, *Destroyers-for-Bases*, supra, note 2, at 22.

143 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), President’s Secretary’s Files, FDR Library, Hyde Park, NY.
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.144 In addition as a matter of constitutional government, the 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.145

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 almost always 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

144 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. at 2.

145 F.D.R. to Secretary of the Treasury (May 29, 1940), id.
clearly wanted to have people tortured in order to gain information, but he also 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 in respect of 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 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. The decision, however, should be the president’s and should not be surreptitiously made by some legal adviser. 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.

VI. CONCLUSION

When all is said and done, the paradox of Jackson’s destroyers opinion is an outlier in the practice of law. Attorneys almost never encounter situations in which the moral good to be

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146 See note 73, supra, and accompanying text.
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 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 probably will disagree.

To repeat, however, Jackson’s dilemma was an outlier. The more significant implications of the present essay relate to the common situation in which an 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.\textsuperscript{147} If an attorney is a legal nihilist who believes that every proposition is arguable, the attorney’s moral responsibility is in no way diminished. If anything, the attorney’s personal moral responsibility is enhanced. In such a situation, the attorney does little more than bend her mind to rubber stamp the extralegal policy.

\textsuperscript{147} 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.