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Advising Presidents: Private Advice vs. Public Advocacy

William R. Casto

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Advising Presidents: Private Advice vs. Public Advocacy

WILLIAM R. CASTO*

I. INTRODUCTION

Some time ago—in the last century—I was playing in the Library of Congress's extensive manuscript collections. By chance, I came across an unpublished essay by former Attorney General Robert H. Jackson in which he tells the story of President Franklin D. Roosevelt's sale of fifty obsolete destroyers to the British in 1940.[1] Because the United States was neutral and Britain was at war with Germany, the sale was quite controversial.[2] I was fascinated. I copied the extensive drafts and redrafts but promptly filed them away when I returned home. There they languished for a number of years. Around 2004, I became interested in the misdeeds of the attorneys who advised President George W. Bush on the legality of torture, and it occurred to me that Jackson's experience with Roosevelt might provide insights into the obligations of a legal adviser to the president.[3]

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* Paul Whitfield Horn Professor, Texas Tech University. This article is based upon my currently unpublished book on the advisory relationship between Robert H. Jackson and Franklin D. Roosevelt. *See* William R. Casto, Advising Presidents: Attorney General Robert H. Jackson and Franklin D. Roosevelt (unpublished manuscript) (on file with author).

1. *See* Robert H. Jackson, "The Exchange of Destroyers for Atlantic Bases," 1954 (available in Robert H. Jackson Papers, Library of Congress, Box 57), *reprinted in* ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 81-103 (John Q. Barrett ed., 2003) [hereinafter THAT MAN].

2. *See* PHILIP GOODHART, FIFTY SHIPS THAT SAVED THE WORLD: THE FOUNDATION OF THE ANGLO-AMERICAN ALLIANCE 150 (1965); ROBERT SHOGAN, HARD BARGAIN: HOW FDR TWISTED CHURCHILL'S ARM, EVADED THE LAW, AND CHANGED THE ROLE OF THE AMERICAN PRESIDENCY 241-46 (1995).

3. *See* William R. Casto, *Executive Advisory Opinions and the Practice of Judicial Deference in Foreign Affairs Cases*, 37 GEO. WASH. INT'L L. REV. 501, 504 (2005) [hereinafter *Practice*].

My interest led me to an in-depth study of the advisory relationship between President Roosevelt and Attorney General Jackson from 1940-1941 on the eve of America's entry into World War II.[4] The wealth of information regarding Jackson's service as attorney general astonished me.[5] A number of frank private diaries are available.[6] Treasury Secretary Henry Morgenthau, who played a major role in parts of the Jackson drama, had a stenographer keep a verbatim transcript of most of his phone calls and private meetings.[7] Jackson himself has left a tremendous reservoir of primary resource, including a 1,644-page oral history,[8] an unfinished draft autobiography,[9] an unfinished memoir of President Roosevelt's administration,[10] a carefully crafted essay (with many redrafts) on one of his most controversial advisory opinions,[11] and hundreds of boxes of private correspondence and records.[12] This immense wealth of virtually untapped primary resources enabled me to reach a comprehensive understanding of the advisory relationship between Jackson and Roosevelt.[13]

Using these materials, I have been able to reconstruct detailed and nuanced analyses of a number of advisory episodes.[14] For example, Jackson and Roosevelt butted heads over government wiretapping.[15] Jackson was also involved in an intricate advisory dance over the issue of the United States providing military assistance to Great Britain when the United States was a neutral nation.[16]

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4. *See* William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-For-Bases Deal*, 52 AM. J. LEGAL HIST. 1, 1-2 (2012) [hereinafter *Advising*].

5. *See generally* ROBERT H. JACKSON, REMINISCENCES OF ROBERT HOUGHWOUT JACKSON (1952) (on file with Columbia Univ., Oral History Project) [hereinafter REMINISCENCES]; THAT MAN, *supra* note 1, at xi; Robert Houghwout Jackson Papers, Library of Congress [hereinafter Jackson Papers].

6. *See, e.g.*, HAROLD ICKES, THE SECRET DIARY OF HAROLD L. ICKES (1953); HERMAN KAHN, GUIDE TO A MICROFILM EDITION OF THE DIARIES OF HENRY LEWIS STIMSON IN THE YALE UNIVERSITY LIBRARY 4 (1973) (on file with Yale University Library).

7. *See generally* HENRY MORGENTHAU, JR., DIARIES OF HENRY MORGENTHAU, JR., APRIL 27, 1933-JULY 27, 1945 (1933-1945) (on file with Franklin D. Roosevelt Presidential Library & Museum).

8. *See generally* REMINISCENCES, *supra* note 5.

9. *See generally* Jackson Papers, *supra* note 5, at Box 189, Folders 1-3.

10. *See* THAT MAN, *supra* note 1, at xi. The Memoir is the backbone of John Barrett's wonderful book THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT. *See id.*

11. *See* Robert J. Delahunty, *Robert Jackson's Opinion on the Destroyer Deal and the Question of Presidential Prerogative*, 38 VT. L. REV. 65, 65-66 (2013).

12. *See generally* Jackson Papers, *supra* note 5.

13. *See Advising*, *supra* note 4, at 1.

14. *See infra* Section III.

15. *See* Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1050 (2008).

16. *See* William R. Casto, Advising Presidents: Attorney General Robert H. Jackson and Franklin D. Roosevelt 70-127 (unpublished manuscript) (on file with author) [hereinafter Casto, Jackson and Roosevelt]; *see also Advising*, *supra* note 4, at 14.

Most modern discussions of the advisory relationship between legal advisers and their president are distorted by powerful political considerations.[17] The legal advice that President George W. Bush received regarding the legality of torture is a good example.[18] The debate over this advice has been shaped in large measure by partisan politics and genuinely held beliefs about the propriety of using torture as an ordinary investigative technique.[19] Focusing on the Roosevelt-Jackson relationship has enabled me to factor partisan politics and public policy more or less out of the equation.

The political storms that swept the nation in 1940 and 1941 have been largely forgotten.[20] Today, most people think that President Roosevelt's stewardship of the country on the eve of our entry into World War II was wise and proper.[21] Therefore, controversial political considerations like torture today and neutrality in 1940 do not intrude upon our analysis of the Roosevelt-Jackson relationship.[22] With this blessed relief, we can concentrate entirely upon the advisory process.[23] When political considerations are factored out of the advisory equation, all that is left is the process itself.[24]

Most legal advice in government is not controversial and certainly not very interesting.[25] For example, in a 1940 cabinet meeting, the president suggested that perhaps individuals should be barred from photographing municipal airports, water supplies, and public buildings generally.[26] Jackson, with the aid of an able assistant, looked into the matter and advised "there is considerable doubt whether the statute authorizes restrictions on

17. *See* Jonathan K. Geldert, *Presidential Advisors and Their Most Unpresidential Activities: Why Executive Privilege Cannot Shield White House Information in the U.S. Attorney Firings Controversy*, 49 B.C. L. REV. 823, 824-25 (2008).

18. *See Practice*, *supra* note 3, at 503.

19. *See generally* Marc A. Thiessen, *Democrats Lose the 'Torture' Debate*, WASH. POST (Jan. 5, 2015), https://www.washingtonpost.com/opinions/marc-thiessen-democrats-lose-the-torture-debate/2015/01/05/5e5347ca-94da-11e4-927a-4fa2638cd1b0_story.html?utm_term=.ea757ce8e902.

20. *See* William R. Casto, *Advising Presidents: Robert H. Jackson and the Problem of Dirty Hands*, 26 GEO. J. LEGAL ETHICS 183, 183 (2013) [hereinafter *Dirty Hands*].

21. *Id.* To be sure, there is criticism of the events leading up to Pearl Harbor, but Jackson moved on to the Supreme Court half a year earlier, and none of his advice related directly or indirectly to Pearl Harbor. *See generally Robert H. Jackson*, BIOGRAPHY, http://www.biography.com/people/robert-h-jackson-36992#synopsis (last updated Oct. 30, 2014) [hereinafter *Biography*].

22. *See Advising*, *supra* note 4, at 14; *see also Practice*, *supra* note 3, at 503.

23. *See infra* Part III.E.

24. *See infra* Part III.E.

25. *See generally* Dawn E. Johnsen, *Guidelines for the President's Legal Advisors*, 81 IND. L.J. 1345, 1345 (2006).

26. *See Advising*, *supra* note 4, at 128 n.685.

these properties."[27] Apparently the president did not wish to pursue the matter, and that was the end of it.[28] In contrast to this mundane episode, highly controversial projects presented quite different advisory problems.

In my in-depth study of Jackson and Roosevelt, I have examined a number of controversial episodes in which Jackson pressed the law to its limits and beyond.[29] As I was studying these episodes, I noticed interesting discrepancies between what Jackson apparently advised the president in private and what Jackson told others. These discrepancies led me to consider the implications of advising one thing in private and something significantly different to others.[30] That is what I am going to discuss in the following article.

II. JACKSON'S CAREER IN A NUTSHELL

Jackson was born in 1892.[31] Oddly enough, he never attended college and did not have a law degree.[32] However, by the 1920s, he was a well-regarded country lawyer in western New York.[33] He also was a casual political acquaintance of New York Governor Franklin Roosevelt.[34] After Roosevelt was elected president, Jackson took what was supposed to be a temporary appointment as general counsel of the Bureau of Internal Revenue.[35] In the next few years, he worked in a succession of ever more important posts.[36] He moved over to the Department of Justice to become assistant attorney general for the Tax Division.[37] Next, he became assistant attorney general for the Antitrust Division and distinguished himself in defending the president's unsuccessful court-packing scheme.[38] From there, he became solicitor general, attorney general, and finally joined the Supreme Court.[39]

As his ten-year trajectory from general counsel of Bureau of Internal Revenue to the Supreme Court suggests, he was a highly-regarded

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27. *See* Jackson Papers, *supra* note 5, "To the President, May 27, 1940," at Box 92, Folder 1; Jackson Papers, *supra* note 5, "Newman Townsend to Robert H. Jackson, May 25, 1940," at Box 92, Folder 1.

28. *See Advising*, *supra* note 4, at 128 n.685.

29. *See infra* Part III.A.

30. *See infra* Part III.E.

31. *See Biography*, *supra* note 21.

32. *See* EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 34 (1958).

33. *See id.* at 37.

34. JOHN Q. BARRETT, *Jackson Advice to a Political Candidate*, JACKSON LIST (Jan. 20, 2010), http://thejacksonlist.com/wp-content/uploads/2014/02/20100120-Jackson-List-Advice-to-Political-Candidate.pdf.

35. *See* GERHART, *supra* note 32, at 72.

36. *See* William E. Leuchtenburg, *Foreword* to THAT MAN, *supra* note 1, at vii.

37. *See* GERHART, *supra* note 32, at 83.

38. *See id.* at 88.

39. *See id.* at 191-92.

attorney.[40] President Roosevelt liked and respected Jackson, and Jackson wholeheartedly returned the president's regards.[41] In the words of Jackson's excellent biographer, Roosevelt was Jackson's "hero, friend, and leader."[42]

Jackson's advisory relationship with his hero, friend, and leader was complicated by Roosevelt's somewhat dismissive attitude toward the law.[43] In Jackson's experience, "[t]he President had a tendency to think in terms of right and wrong, instead of legal and illegal. Because he thought that his motives were always good for the things he wanted to do, he found difficulty in thinking that there could be legal limitations on them."[44] Similarly, in an informal eulogy, Jackson noted that Roosevelt "often was critical of our [legal] profession, of its backward-looking tendencies, its preoccupation at times with red tape to the injury of what he thought were more vital interests."[45]

III. EMPIRICAL EVIDENCE

A. The Helium Controversy

In 1938, Jackson, who was then solicitor general, was pinch-hitting for Attorney General Homer Cummings while Cummings was out of town.[46] A bitter dispute had developed between Secretary of State Cordell Hull and Interior Secretary Harold Ickes over the sale of helium to Nazi Germany.[47] The United States had informally agreed to the sale with Ickes' apparent approval, but Ickes decided to punish the Nazis for their recent annexation of Austria and reneged on the deal.[48] He explained to Supreme Court Justice Felix Frankfurter, "the real consideration with me was that we would be rebuking Germany."[49] President Roosevelt asked Jackson, who then was solicitor general, to look into the legal ins and outs of the dispute.[50]

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40. *See* THAT MAN, *supra* note 1, at vii, ix.
41. *See generally id.*
42. *Id.* at xii.
43. *See* GERHART, *supra* note 32, at 191-92.
44. *See* THAT MAN, *supra* note 1, at 74.
45. *Id.* at 168.
46. *See* Michael D. Reagan, *The Helium Controversy*, *in* AMERICAN CIVIL-MILITARY DECISIONS: A BOOK OF CASE STUDIES 43, 49 (Harold Stein ed., 1963).
47. *See* Casto, Jackson and Roosevelt, *supra* note 16, at 19-25 (unpublished manuscript) (on file with author); *see also* Reagan, *supra* note 46, at 45. The story is well told in James Augustine Walsh, The Helium Controversy of 1938 (Apr. 23, 1964) (unpublished M.A. thesis, University of Arizona). *See generally id.*
48. *See* Reagan, *supra* note 46, at 48.
49. Felix Frankfurter, "Harold Ickes to Felix Frankfurter, Dec. 1, 1938" (available in Felix Frankfurter Papers, Manuscript Division, Library of Congress, Box 149).
50. *See* THAT MAN, *supra* note 1, at 116-17.

Jackson tried but failed to broker a compromise between Ickes and Hull, and he then met with the president to—in Jackson's words—tell him what he could do "in the way of a legal opinion."[51] Now the president supported Hull in public, but in private he encouraged Ickes to stick to his guns.[52] He advised Ickes to use "Fabian" tactics of delay.[53] Jackson could have provided a legal opinion that would have supported either Ickes or Hull.[54] The next day there was a crucial meeting to resolve the issue.[55] The president argued strongly in favor of allowing the Nazis to have the helium, but Jackson gave a legal opinion that unambiguously supported Ickes' recalcitrance.[56]

B. The TVA Mess

Later that year, an extremely bitter dispute arose between Arthur Morgan, who was chairman of the Tennessee Valley Authority's (TVA) three-man board of directors, and David Lilienthal, who was another director.[57] The TVA was one of the shining jewels in the New Deal's crown.[58] The feud was a potent brew of personal animus and disagreement over policy.[59] Finally, the dispute got out of hand.[60] In public and private, Morgan began accusing Lilienthal of dishonesty and corruption.[61] Lilienthal was furious and considered suing Morgan for libel.[62] Something had to be done, so the president summoned the feuding TVA directors to Washington so that Morgan could formally explain his charges.[63] When the president asked for facts to support the charges, Morgan refused to answer.[64] For six hours, Morgan refused to answer the president because he believed that only Congress could conduct an inquiry into his actions as chairman of the TVA's board of directors.[65]

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51. Marvin H. McIntyre, "Memo for the President, May 10, [1939]," *in* 15 FRANKLIN D. ROOSEVELT AND FOREIGN AFFAIRS 68 (2d ser., Donald B. Schewe ed., 1969) (erroneously dated by editor as 1939 instead of 1938).

52. *See* THAT MAN, *supra* note 1, at 116-17.

53. *See* ICKES, *supra* note 6, at 373.

54. Casto, Jackson and Roosevelt, *supra* note 16, at 11 (unpublished manuscript) (on file with author).

55. *Id.*

56. *See* THAT MAN, *supra* note 1, at 116-17.

57. For an excellent and balanced treatment, *see* THOMAS K. MCCRAW, MORGAN V. LILIENTHAL: THE FEUD WITHIN THE TVA 26, 63 (1970).

58. *See id.* at 82.

59. *See id.* at 98-100.

60. *See id.* at 98.

61. *See id.* at 83-84.

62. FRANCIS BIDDLE, IN BRIEF AUTHORITY 54 (1962).

63. MCCRAW, *supra* note 57, at 99-100.

64. BIDDLE, *supra* note 62, at 58.

65. MCCRAW, *supra* note 57, at 101.

President Roosevelt then asked Jackson whether the president had unilateral authority to fire Morgan.[66] Paul Freund, a young attorney on Jackson's staff, wrote an extensive preliminary analysis of the president's authority.[67] Freund, who later became one of the nation's premier professors of constitutional law, advanced two well-developed analyses.[68] First, he argued that as a matter of statutory analysis, the TVA Act did not forbid a presidential termination of Chairman Morgan.[69] He then presented a detailed constitutional analysis of why the president had constitutional authority to terminate the chairman and why Congress could not abridge the president's constitutional authority.[70]

Jackson carefully studied Freund's preliminary analysis and wrote an opinion that he released to the public.[71] His public opinion cut the constitutional issue to the bone.[72] He made only a passing allusion to the president's constitutional authority.[73] Similarly, the president "made it plain [to the press corps] that he was relying upon his authority under the [TVA] law, instead of his general powers under the Constitution, in removing the TVA chairman."[74]

Notwithstanding Jackson's drastic de-emphasis of the president's constitutional power, he apparently reassured the president in private that regardless of the TVA Act, the president had unilateral constitutional authority to fire Chairman Morgan.[75] About a decade later, Jackson remembered the "TVA Mess" as turning almost entirely upon the issue of the president's unreviewable constitutional authority.[76] In an important Supreme Court opinion, he described the Mess as a situation in which the Constitution "disabl[ed] the Congress from acting upon the subject."[77] Likewise, in his later "Reminiscences," he emphasized the constitutional issue.[78] His only reference to statutory interpretation was a completely unelaborated reference to "the terms of the statute."[79] He was probably

66. *See id.* at 102.
67. *See* Jackson Papers, *supra* note 5, at Box 84, Folder 4.
68. *See id.*
69. *See id.*
70. *See id.*
71. *See generally* Power to Remove Tenn. Valley Auth. Members, 39 Op. Att'y Gen. 145 (1938).
72. *See id.* at 145-46.
73. *See id.* at 146-48.
74. Turner Catledge, *A.E. Morgan Dismissed from TVA by Roosevelt; H.A. Morgan Now Heads It*, N.Y. TIMES, Mar. 23, 1938, at 1.
75. *See* Power to Remove Tenn. Valley Auth. Members, 39 Op. Att'y Gen. at 146; Jackson Papers, *supra* note 5, at Box 190, Folder 5.
76. S*ee* Jackson Papers, *supra* note 5, at Box 190, Folder 5.
77. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637-38 (1951) (Jackson, J., concurring).
78. S*ee* Jackson Papers, *supra* note 5, at Box 190, Folder 5.
79. *See id.*

remembering his actual direct advice to the president and not his formal public opinion.[80]

C. Wiretapping

Jackson became Attorney General in 1940 and almost immediately became embroiled in a dispute over wiretapping by the Federal Bureau of Investigation (FBI).[81] Today, every law student knows that the Constitution's Fourth Amendment places significant restraints on governmental eavesdropping; however, that was not the case in 1940.[82] The pertinent precedent then was *Olmstead v. Unites States*,[83] in which the Supreme Court held that the Constitution did not place any restrictions on governmental wiretapping.[84]

After the *Olmstead* case, Congress enacted the Communications Act of 1934, which did not outlaw wiretapping,[85] but did forbid anyone from disclosing the contents of a wiretap to another person.[86] Based on two Supreme Court cases construing the Communications Act, Jackson concluded that wiretapping by the FBI was illegal.[87] He formally banned the practice in March of 1940.[88]

J. Edgar Hoover, the director of the FBI, hated Jackson's order and commenced a successful bureaucratic guerilla war against the ban.[89] As a result, two months after Jackson announced his ban, President Roosevelt secretly ordered Jackson to allow FBI wiretapping in national security cases.[90] Indeed, the president personally wrote his own legal opinion on the issue.[91] Jackson immediately complied with the president's directive.[92]

Before and after the president directed Jackson to lift the ban on FBI wiretapping, Jackson believed that the practice was illegal.[93] About a year after the president's secret directive, Jackson advised the Secretary of the

80. *See id.*

81. *See* Katyal & Caplan, *supra* note 15, at 1047; Casto, Jackson and Roosevelt, *supra* note 16, at 37 (unpublished manuscript) (on file with author).

82. *See* U.S. CONST. amend. IV; *see also* Katyal & Caplan, *supra* note 15, at 1047-48.

83. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

84. *See Olmstead*, 277 U.S. at 466.

85. Pub. L. No. 416, § 605, 48 Stat. 1064, 1103 (1934).

86. *Id.*

87. Nardone v. United States (*Nardone I*), 302 U.S. 379, 382 (1937); Nardone v. United States (*Nardone II*), 308 U.S. 338, 341 (1939).

88. *See* Jackson Papers, *supra* note 5, at Box 94, Folder 6., *reprinted in* 86 CONG REC. 471-72 (1940).

89. *See* CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 231 (1991).

90. *See id.* at 232.

91. *See* Katyal & Caplan, *supra* note 15, at 1050.

92. *See* GENTRY, *supra* note 89, at 232.

93. *See* Katyal & Caplan, *supra* note 15, at 1051.

Navy that wiretapping by the Office of Naval Intelligence (ONI) was illegal even in national security cases.[94] The president's secret directive applied only to FBI wiretapping and was silent on ONI wiretapping.[95] In an oral history recorded in the 1950's, Jackson again stated that the president's directive was contrary to Supreme Court precedent construing the Communications Act.[96]

Apparently, Jackson advised the president in private that wiretapping was illegal and probably said that he would not authorize wiretapping unless the president directed him in writing to do so.[97] The president then wrote his own legal opinion and directed Jackson to implement the wiretapping program.[98] The president's action would have made no sense if Jackson had already advised him that wiretapping was legal.[99] The only other known occasion when President Roosevelt wrote his own legal opinion was about a year later when Jackson refused to opine that an obscure provision of the Lend Lease Act was unconstitutional.[100] Although Jackson clearly believed that government wiretapping was illegal and so advised the president, he later wrote a public letter to Congress that most people think advanced a spurious legal argument that the practice was legal.[101]

D. The Destroyers Deal

Jackson's advice on the sale of destroyers to Great Britain is another example of a public opinion being significantly different from the advice actually given in private.[102] In 1940, the British were in dire straits.[103] They

94. Robert H. Jackson to the Secretary of the Navy (June 9, 1941), *with attachment*; T[homas] I. Emerson, Memorandum for the Assistant Solicitor General (June 7, 1941), *reprinted in* 1 SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL 454, 456 (Nathan A. Forrester ed., 2013).

95. *See* Katyal & Caplan, *supra* note 15, at 1050.

96. *See* THAT MAN, *supra* note 1, at 68.

97. *See id.*

98. Katyal & Caplan, *supra* note 15, at 1050.

99. *See* THAT MAN, *supra* note 1, at 68.

100. *See* Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1353 (1955); Casto, Jackson and Roosevelt, *supra* note 16, at 156-60 (unpublished manuscript) (on file with author).

101. *See* GENTRY, *supra* note 89, at 232; WALTER F. MURPHY, WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS 135-36 (1965); Frank Donner, *Electric Surveillance: The National Security Game*, 2 CIV. LIBERTIES REV. 15, 19 (1975); Katyal & Caplan, *supra* note 15, at 1055-56; Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1410, 1412-13 (2010). The spurious argument, which was first developed by Alexander Holtzoff a few years earlier, was that the Communications Act only outlawed divulging the contents of a wiretap, but a government employee who divulged the contents of a wiretap to another employee did not in fact divulge the contents. *Id.* at 1412. The argument was nonsense because the Supreme Court held in *Nardone II* that evidence obtained as a result of a wiretap was not admissible in court. *See Nardone II*, 308 U.S. at 341. In Justice Frankfurter's memorable phrase, the evidence would be "a fruit of the poisonous tree" and therefore not admissible in evidence. *Id. Nardone II* involved an intra-governmental communication of wiretap information. *See id.* at 339. If the intra-governmental communication was legal, there would have been no poisonous tree issue. *See id.* at 341.

102. *See Advising*, *supra* note 4, at 8.

stood alone against the triumphant Nazi war machine.[104] Only the Channel prevented a complete German conquest, and the British desperately needed the destroyers to defend against an anticipated German invasion.[105] After a few months of hesitation, President Roosevelt decided to sell fifty old destroyers to the British in exchange for base rights in the western Atlantic Ocean and the Caribbean Sea.[106]

In a formal, public legal opinion, Jackson addressed four independent legal issues that stood in the "Destroyers Deal's" way.[107] His analyses ranged from brilliant to frivolous.[108] The most difficult issue was quite technical: Did the president have lawful authority to transfer title of the ships to the British?[109] The problem was that the Constitution clearly gave Congress—not the President—authority to regulate the disposal of government property.[110]

At the president's behest, Jackson looked into the matter and concluded that under an old, post-Civil War statute, the president had authority to transfer title if the Navy determined that the ships were "unfit for further service."[111] The only problem with this analysis was that the ships were clearly fit for further service.[112] They were on active duty, and the British desperately needed them for active duty.[113] When push came to shove, Harold Stark, the Chief of Naval Operations (CNO), refused to allow the destroyers to be certified as unfit for further service.[114] He insisted that "such an opinion would be false else the British would not be so anxious to get the same destroyers."[115]

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103. *See* SHOGAN, *supra* note 2, at 137.

104. *See id.* at 133, 139.

105. *See id.* at 154.

106. *See id.* at 211; *see generally* GOODHART, *supra* note 2. *See also Advising*, *supra* note 4, for an exhaustive legal story.

107. *See Advising*, *supra* note 4, at 84-85, 93, 95.

108. *See id.* at 99.

109. *See id.* at 85-86.

110. U.S. CONST. art. IV, § 3, cl. 2; *see* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 330 (1936); United States v. San Francisco, 310 U.S. 16, 29-30 (1940); *Advising*, *supra* note 4, at 57 (quoting 36 Op. Att'y Gen. 75 (1929)) (advising the president that "the directions of Congress are controlling with respect to the [transfer of federal property]"); *see* 28 Op. Att'y Gen. 143, 145-46 (1910).

111. Act of Aug. 5, 1882, ch. 391, 22 Stat. 1, 296-97 (codified as amended at 34 U.S.C. § 491 (1940)).

112. *See* JAMES R. LEUTZE, BARGAINING FOR SUPREMACY: ANGLO-AMERICAN NAVAL COLLABORATION, 1937-1941 118 (1977) ("[S]uch an opinion would be false else the British would not be so anxious to get the same destroyers.").

113. *See Advising*, *supra* note 4, at 46-47.

114. *See* LEUTZE, *supra* note 112, at 117.

115. *See id.* at 118 ("[S]uch an opinion would be false else the British would not be so anxious to get the same destroyers.").

So it was back to the drafting table.[116] Jackson was under significant political pressure to find a way to allow the deal to move forward.[117] An acquaintance told Jackson that if he could not find a way, Jackson would be fired.[118] The president remarked in Jackson's presence that if a solution was not found to the legal problem a head "will have to fall."[119]

Jackson found a way, but his way did not make legal sense.[120] His first solution to the problem had required the Navy to make an utterly untenable finding of fact.[121] When CNO Stark refused to do so, Jackson shouldered the burden by advancing an utterly untenable legal argument.[122]

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116. *See Advising*, *supra* note 4, at 106.

117. *See id.*

118. THOMAS E. MAHL, DESPERATE DECEPTION: BRITISH COVERT OPERATIONS IN THE UNITED STATES, 1939-1944 165 (1998).

119. William R. Casto, *Attorney General Robert Jackson's Brief Encounter with the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 365-66 n.7 (2010). The statement occurred in a telephone conversation between President Roosevelt and the Canadian Prime Minister, who then told Ambassador Moffat the same day that Roosevelt assured the prime minister that:

> A way out of the legal difficulties [regarding the Destroyers Deal], which had been blocking him, had at last been found. At least if it hadn't, continued the President, one of the heads now in the room (Attorney General [i.e., Jackson], the Secretary of War, the Secretary of Navy, and the Acting Secretary of State) will have to fall.

Id.

120. *See Advising*, *supra* note 4, at 106.

121. *See id.* at 59.

122. 39 Op. Att'y Gen. 484, 489 (1940). Jackson's published opinion relied upon a statute enacted after the Civil War to create procedures for selling naval vessels struck from the Navy list. *Id.* In 1882, Congress authorized the sale of ships "unfit for further service." *See* Act of Aug. 5, 1882, ch. 391, 22 Stat. at 297. The next year, Congress established procedures for the sale of ships unfit for further service. Act of March 3, 1883, ch. 141, 22 Stat. 582, 599-600 (codified as amended at 34 U.S.C. § 492 (1940)). At the end of Section 492's detailed procedures for the sale of ships, Congress added a proviso that states, "[N]o vessel . . . shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing." *Id.* Jackson read the proviso as authorizing the president to sell any ship in the Navy, including ships needed for active duty, so long as the president recorded the sale in writing. 39 Op. Att'y Gen. at 490. According to principles of statutory interpretation in effect in 1940, his reading was nonsensical. *See* Lapina v. Williams, 232 U.S. 78, 90-91 (1914); Cox v. Hart, 260 U.S. 427, 434 (1922). It is clear that Section 492, including its proviso, dealt with the procedures for selling vessels that were authorized to be sold under Section 491. *See* Act of March 3, 1883, ch. 141, 22 Stat. at 599-600. Section 492's title was "Sale of vessels stricken from register." *See id.* at 582. Although titles are not the law, they were of use in interpreting legislation. *Lapina*, 232 U.S. at 90-91; Fairport, Painesville & E. R.R. Co. v. Meredith, 292 U.S. 589, 594-95 (1934). Likewise, there is an accepted canon of interpretation that a proviso applies "only to the provision to which it is attached." United States v. McClure, 305 U.S. 472, 478 (1939); *Cox*, 260 U.S. at 434. Jackson read Section 492's proviso as creating an exception to Section 491, which was enacted the year before to authorize the sale of ships. Acquisition of Naval and Air Bases, 39 Op. Att'y Gen. at 489. Finally, Jackson's opinion conflicted with the proviso's plain meaning. *Id.* The proviso dealt with the "manner: of sales, and did not authorize the sale of any ship." Act of March 3, 1883, Ch. 141, 22 Stat. at 599.

Jackson's opinion also flew in the face of the Vinson Amendment, which Congress enacted just a month earlier. Act of July 19, 1940, ch. 644, 54 Stat. 779 (codified as amended at 40 U.S.C. §§ 483-85 (2002)). The Amendment provided, "No vessel, ship, or boat . . . now in the United States Navy . . . shall be disposed of by sale or otherwise . . . except as now provided by law." *Id.* This provision

E. More Modern Examples

More modern attorneys general have also reshaped their private advice for public consumption. The British Attorney General's (Lord Goldsmith) advice on the legality of Britain's participation in the Iraq War is a case on point.[123] The key issue was whether United Nations (UN) Resolution 678, which authorized the invasion of Iraq in the Persian Gulf War, had been revived by subsequent UN actions.[124]

Lord Goldsmith's travails have been carefully analyzed in an excellent article by Professor Markus Puder.[125] A strong case can be made that Lord Goldsmith believed that commencement of the war was illegal under international law, but that he eventually changed his opinion under political pressure from Prime Minister Tony Blair.[126] In the event, Lord Goldsmith advised in private that there was "a reasonably arguable case" that Resolution 678 had been revived, but that a court might well conclude that

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was not enacted in a vacuum. *See* Harold B. Hinton, *Huge U.S. Navy, National Service Planned*, N.Y. TIMES, June 19, 1940, at 1. Congress knew that the president was contemplating selling destroyers to the British and wanted to keep the ships in the Navy to protect our security. *See* Chesly Manly, *Roosevelt War Policy Arouses Growing Storm*, CHI. TRIB., June 22, 1940, at 1 (noting ongoing "negotiations [sic] for the release of destroyers"); *British Would Buy Destroyers Here*, N.Y. TIMES, June 12, 1940, at 16. Representative Vinson, who chaired the House Naval Affairs Committee, drafted his Amendment with destroyers specifically in mind, stating, "[T]hat he wanted this language included to stop current talk of destroyers being sold to the Allies." Hinton, *supra* note 122. According to Jackson, Vinson's Amendment was no more than a bizarre Statute of Frauds in which the sole purpose was to require that any transfer of vessels must be recorded in writing, which was not a restriction. *Id.* Obviously, any transfer of naval vessels would, as a practical matter, be recorded in writing. *See id.*

Two of Jackson's advisers noted the existence of Section 492's proviso and believed that its purpose was to allow the president some flexibility in the sale of vessels that had been determined to be unfit for active duty. *See* Jackson Papers, *supra* note 5, "Newman A. Townsend, Memorandum, Aug. 13, 1940,"at Box 88. Newman Townsend advised that "when the provisions of Section 491 had been complied with [i.e., a determination that the destroyers were "unfit for further service"] the president has broad discretion [under the proviso] with regard to the method and manner of disposition [of ships struck from the Navy Register]." *Id.* Jackson described Townsend as "a hard headed, conservative, and forthright former judge [and a] counselor on whom I often relied." *Advising*, *supra* note 4, at 7. Similarly, Benjamin Cohen, who worked with Jackson on the Destroyers opinion, also noted the existence of Section 492's proviso but, like Townsend, read it as being applicable to the sale of ships struck from the Navy Register. Undated Memorandums: "Sending Effective Material Aid to Great Britain with Particular References to the Sending of Destroyers," attached to Benjamin V. Cohen to the President, 19 July 1940, President's Secretary's Files, FDR Library, Hyde Park, NY. Jackson described Cohen "as having the best legal brains he has ever come in contact with." ICKES, *supra* note 6, at 656.

123. *See* Simon Jeffrey, *Lord Goldsmith's Legal Advice and the Iraq War*, GUARDIAN (Apr. 27. 2005, 12:24 PM), https://www.theguardian.com/world/2005/apr/27/iraq.iraq2.

124. *See id.*

125. *See* Markus G. Puder, *Guidance and Control Mechanisms for the Construction of UN-System Law—Sung and Unsung Tales from the Coalition of the Willing, or Not*, 121 PENN ST. L. REV. 143, 149 (2016). Professor Puder's analysis is based upon a careful and thoughtful study of the massive collection of documents and testimony published by the British government, related to the United Kingdom's participation in the Iraq War. *See generally* THE IRAQ INQUIRY, http://www.iraqinquiry.org.uk/the-evidence/declassified-documents/ (last visited Feb. 27, 2017).

126. Puder, *supra* note 125, at 149-58.

the Resolution had not been revived.[127] Ten days later, after Prime Minister Blair decided to go to war, Lord Goldsmith wrote a significantly different opinion for public consumption.[128] Gone was the language that his opinion was based upon "a reasonably arguable case" and that a court might conclude otherwise.[129] Instead, he briefly and unequivocally stated, "the authority to use force under resolution 678 has revived and so continues today."[130]

Similarly, before the American government killed Anwar al-Awlaki, an American citizen in Yemen, the Justice Department's Office of Legal Counsel (OLC) wrote a detailed fifty-page opinion that carefully considered many legal arguments for and against the assassination's legality.[131] The most sensitive parts of the opinion have never been released to the public.[132] Instead, the attorney general defended the killing in a public statement that was a straight advocacy document rather than a careful weighing and balancing of the arguments and counterarguments.[133] This is not to suggest that the American and British attorneys general counseled unlawful action.[134] Instead, these two comparatively recent episodes should be viewed as further empirical evidence of a sharp divide between frank private advice followed by advocacy-oriented public pronouncements.

IV. PUBLIC VS. PRIVATE ADVISORY OPINIONS

In my forthcoming book *Advising Presidents*, I draw a clear distinction between legal advice given to the president in private and a subsequent legal opinion released to the public.[135] For a variety of reasons, an adviser is absolutely required to provide accurate legal advice to the president.[136] If a

127. *Revealed: The Government's Secret Legal Advice on Iraq War*, GUARDIAN, Apr. 28, 2005, § 30, at 3.

128. *See* Puder, *supra* note 125, at 151.

129. *See id.* at 150.

130. *Id.* at 151 (alteration in original).

131. *See generally* Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html.

132. *See id.*

133. Attorney General Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012).

134. *See id.*

135. *See generally* Casto, Jackson and Roosevelt, *supra* note 16 (unpublished manuscript) (on file with author).

136. *See id.* at 187-237 (unpublished manuscript) (on file with author). My complete analysis draws upon the thought of Thomas Hobbes, H. L. A. Hart, Tony Honoré, and Dennis Thompson. *See* H. L. A. Hart & A. M. Honoré, *Causation in the Law II: Factors Negating Causal Connection*, 72 L. Q. REV. 260, 267 (1956); DENNIS F. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE 53, 56 (1987); *see generally* THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press 1996) (1651). In the special case of the legal adviser to the president, there is an added constitutional dimension to the legal adviser's obligation: the president is charged by the Constitution to "take care that the laws be

proposed plan is unlawful, the adviser is obligated to inform the president.[137] If the adviser does not so advise the president, the adviser has duped the president into violating the constitutional duty to faithfully execute the law.[138] If a proposed plan is arguably lawful but probably unlawful, the adviser must say so to the president.[139] The advisor has an absolute duty to inform the president of the possible legal consequences of implementing the plan.[140] In all of these situations, there is a strong strand of respectable principle that the president may properly direct the implementation of an unlawful or probably unlawful project.[141] If so, the adviser may properly release an opinion that fully supports the president's decision.[142]

Public legal opinions, such as Jackson's opinion on the Destroyers Deal, the British attorney general's opinion regarding Iraq, and the advice on killing Anwar al-Awlaki, take the form of an attorney's examination of the applicable law. They may look like legal opinions, but they are in fact briefs. They are advocacy documents pure and simple. They are not legal briefs written for a judicial audience. They are political briefs written for the court of politics and public opinion.

Legal culture has always privileged attorneys, as advocates, to exaggerate the strength of their client's case.[143] A litigator may even press positions that are contrary to existing law[144] in arguing a case.[145] There are limits imposed by law, but those limits, by and large, relate to the judicial process.[146] In the judicial process, the legality of a particular position is the focus of a court's attention, and an attorney has a special obligation not to mislead the court.[147] In contrast to the judicial process, the political process has a significantly different focus. In the political process, the legality of a

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faithfully executed." U.S. CONST. art. II, § 3 (the president must receive accurate advice about the lawfulness of a proposed action).

137. *See Dirty Hands*, *supra* note 20, at 184.

138. *See id.*

139. *See id.* at 192, 199.

140. *See id.* at 199-200.

141. *See id.* at 197. The basic argument is that when a nation is confronted by an existential threat, law may (and indeed, should) be violated in order to preserve that nation's existence. *Dirty Hands*, *supra* note 20, at 197 (discussing Niccolò Machiavelli, Abraham Lincoln, and Winston Churchill). Thomas Jefferson made precisely the same point in a famous letter. Letter from Thomas Jefferson to John N. Colvin (Sept. 10, 1810), *in* 3 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 99, 101 (J. Jefferson Looney et al. eds., 2006) [hereinafter LOONEY ET AL].

142. *See* LOONEY ET AL., *supra* note 141, at 101.

143. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2017).

144. *Id.* at r. 3.1 cmt. For example, an attorney advocate may urge the courts to accept any non-frivolous interpretation of the law that favors the client. The mere fact that a legal position is creative or contrary to existing law does not make that position frivolous.

145. *Id.*

146. *Id.*

147. *Id.*

particular policy is merely one among many factors relevant to the public's acquiescence in, or approval of, a policy.[148] In 1938, Jackson assisted the president in commencing construction of the District of Columbia's National (now Reagan) Airport without congressional appropriations.[149] This action was a blatant violation of an act of Congress and the United States Constitution, but no one cared.[150] Similarly, sending the destroyers to Britain was illegal, but the court of public opinion concluded that obtaining the bases justified the deal.[151]

The notion that a president's attorney might offer a legal opinion to the public that the attorney knows or believes is wrong is at first glance disconcerting. One purpose of an advisory opinion is to establish legal guidelines that will be generally applicable throughout the government.[152] As Jackson said, the Attorney General "is . . . in a sense, laying down the law for the government as a judge might."[153] Moreover, there is a tendency within the executive branch to give advisory opinions a kind of *stare decisis* effect that will be relied upon to establish legal principles for other unrelated situations.[154] In this context, laying down an authoritative legal principle for general guidance that an adviser believes is wrong or unwarranted is problematic.

Jackson's 1941 opinion regarding presidential authority to seize private defense industries is an example of an opinion that cast a long and misleading shadow.[155] The massive North American Aviation plant at Inglewood, California, was one of the nation's principle producers of military aircraft, and the workers were on strike.[156] President Roosevelt decided to halt the strike by seizing the plant and, in effect, making the workers federal employees.[157] Existing legislation authorized plant seizure

148. *See Dirty Hands*, *supra* note 20, at 201.

149. *See* Casto, Jackson and Roosevelt, *supra* note 16, at 32-36 (unpublished manuscript) (on file with author); *see also History of Reagan National Airport*, METROPOLITAN WASH. AIRPORTS AUTHORITY, http://www.flyreagan.com/dca/history-reagan-national-airport (last visited Mar. 18, 2017); THAT MAN, *supra* note 1, at 47-48.

150. *See* 31 U.S.C. § 1341 (1982); Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 152 (1998).

151. WILLIAM L. LANGER & S. EVERETT GLEASON, THE CHALLENGE TO ISOLATION, 1937-1940 770-72 (1952); SHOGAN, *supra* note 2, at 241-46.

152. *See* REMINISCENCES, *supra* note 5, at 911.

153. *See id.*

154. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1493-94 (2010).

155. *See* 89 CONG. REC. 2941, 3992 (1943) [hereinafter Press Statement].

156. *See* JOHN H. OHLY, INDUSTRIALISTS IN OLIVE DRAB: THE EMERGENCY OPERATION OF PRIVATE INDUSTRIES DURING WORLD WAR II 20 (Clayton D. Laurie ed., 1999) (Mr. Ohly wrote at the end of WWII). The Inglewood plant produced about 20% of all the nation's military aircraft. *Id.* at 19. For an excellent article on the strike, *see generally* James R. Prickett, *Communist Conspiracy or Wage Dispute?: The 1941 Strike at North American Aviation*, 50 PAC. HIST. REV. 215 (1981).

157. Prickett, *supra* note 156, at 215, 227.

if a company refused to fulfill government orders, but the company was not really refusing to fulfill orders; the workers were on strike, and the company could not fulfill the orders.[158] Jackson gave an opinion that the president had independent constitutional authority to seize the plants,[159] and the government seized the plants.[160]

The North American strike required Jackson to construe the sounds of congressional silence.[161] Jackson read the existing legislation as not addressing, one way or another, the possible existence of independent presidential authority to seize the North American plant.[162] He concluded that the seizure was in furtherance of general congressional policy.[163] Congress had required the president "to equip an enlarged [military] . . . and to carry out the provisions of the Lend-Lease Act."[164] In addition, the President was Commander-in-Chief of the military,[165] and Congress had "appropriated the money and . . . directed the President to obtain" military supplies.[166] Jackson concluded that the seizure was lawful in order to accomplish those congressional policies.[167]

About a decade later, the United States was fighting the Korean War, and the workers in the steel industry were on strike.[168] President Harry Truman believed that the strike would seriously impair the nation's ability to equip the armed forces.[169] He consulted his old friend, Chief Justice Frederick (Fred) Vinson, and Vinson apparently advised the president in private that the president had constitutional authority to seize the steel

158. Robert Porter Patterson, "Memorandum for the Undersecretary of War," 1941 (available in Robert Porter Patterson Papers, Manuscript Division, Library of Congress, Box 139). A month earlier there had been a general strike in the soft coal mines of Appalachia, and the president was contemplating seizing all the mines. *Id.* Undersecretary of War, Robert Patterson, who had served as a judge on the federal Second Circuit before joining the War Department, seriously objected to Jackson's argument that failing to provide coal under these circumstances was a statutory refusal to provide coal. *See id.* Jackson did not renew this statutory argument for the North American strike, and Patterson emphatically testified before Congress in reference to North American Aviation, stating, "There was no refusal on the part of the people to produce." *Id*.; *see Plane Strikers Vote to Go Back to Work*, OAKLAND TRIB., June 10, 1941, at 1.

159. Press Statement, *supra* note 155, at 3992.

160. *Id.* at 3991. The strike was almost immediately settled, and the workers received wage increases substantially identical to the increases they originally sought. Prickett, *supra* note 156, at 231.

161. *See generally* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1994).

162. *See id.* at 161.

163. *See id.*

164. *See id.*

165. U.S. CONST. art. II, § 2.

166. *See* MARCUS, *supra* note 161, at 162.

167. Press Statement, *supra* note 155, at 3992.

168. *See generally* MARCUS, *supra* note 161 (telling the story well).

169. *See id.* at 38.

industry.[170] When President Truman seized the steel industry, the industry challenged the seizure in court in *Youngstown Sheet and Tube Co. v. Sawyer* (*Steel Seizure*).[171]

Chief Justice Vinson apparently based his private advice to the president on Jackson's North American strike opinion.[172] When the justices first met in conference before oral argument, Vinson noted that "Robert Jackson ha[d] written on it as attorney general."[173] When the case came on for oral argument, everyone in the room knew that Jackson, who was on the Supreme Court, had advised that President Roosevelt had authority to seize a private defense plant.[174] During the oral argument, Jackson himself recognized the elephant in the room when he speculated out loud, "I wondered how much of this was laid at my door."[175] The solicitor general replied, "[W]e lay a lot of it at your door."[176] Jackson responded, "Perhaps rightly. . . . I claimed everything, of course, like every other Attorney General does. It was a custom that did not leave the Department of Justice when I did."[177] After oral argument, Chief Justice Vinson again compared President Truman's action to FDR at length.[178] However, Jackson and a majority voted against the president.[179] After the vote, Jackson told his clerks, "Well boys, the President got licked."[180]

Jackson's concurring opinion in the *Steel Seizure Case* has been regarded as "the greatest single opinion ever written by a Supreme Court justice."[181] In foreign policy disputes, his wisdom has come to dominate all discussions of the Constitution's allocation of power between the President and Congress.[182] In Jackson's concurring opinion, he forthrightly grappled with the apparent conflict between his 1941 opinion on presidential power and his 1952 vision.[183] The conflict could have been explained on the basis

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170. JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY 216-17 (2002).

171. 343 U.S. at 582.

172. *See generally* ST. CLAIR & GUGIN, *supra* note 170.

173. THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 169 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT].

174. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 90 (1987).

175. 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 920 (Philip B. Kurland & Gerhard Casper eds., 1975).

176. *Id.*

177. *Id.*

178. THE SUPREME COURT, *supra* note 173, at 169.

179. REHNQUIST, *supra* note 174, at 92.

180. *Id.* at 91-92.

181. Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 242 n.2 (2000).

182. *See* H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION 69-70 (2014).

183. *See Steel Seizure*, 343 U.S. at 648-49 (Jackson, J., concurring).

of statutory interpretation, but he apparently was not convinced that the two situations were easily distinguishable on legal grounds.[184] He staunchly defended the political wisdom of President Roosevelt's action, but he threw his North American opinion under the bus.[185] He began by noting a clear distinction between his judicial duty and his prior duty to serve as the president's advocate.[186] He frankly confessed, "[A] judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."[187] Then he turned the bus around and ran over his prior opinion again: "I do not regard [the North American seizure] as a precedent for this, but, even if I did, I should not bind judicial judgment by earlier partisan advocacy."[188]

Jackson's North American opinion misled Chief Justice Vinson, whose advice to President Truman resulted in a legal fiasco.[189] Although Jackson dismissed his opinion as partisan advocacy, it should be noted that his fundamental vision of constitutional law and the separation of powers probably changed significantly between 1941 and 1952.[190] After World War II, he served as chief U.S. prosecutor at the Nuremburg trials and came face to face with the potential ghastliness of unbridled executive power.[191] This terrible experience influenced his *Steel Seizure* opinion.[192]

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184. *See generally* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 36-37 (1985). The main problem with distinguishing the two seizures is that each seizure required Jackson to define the meaning of Congressional silence, and this task was fraught with difficulty. *See generally id.* In *Steel Seizure*, there was legislative history that the Senate had considered and rejected proposals to give the president a general authority to seize plants, and this history could be viewed as forbidding Truman's seizure. *See Steel Seizure,* 343 U.S. at 607 (Jackson, J., concurring). Perhaps this history influenced Jackson, but he stopped well short of fully relying upon it. *Id.* His only consideration of this seemingly crucial issue was a vague footnote concurring in the legislative history presented in the opinions of the Court, of Justice Frankfurter, and of Justice Burton. *Id.* at 599 n.81.

185. *See Steel Seizure*, 343 U.S. at 648-49 (Jackson, J., concurring).

186. *See id.* at 634.

187. *Id.* at 647. Similarly, in his book, *Reminiscences*, he explained the change in his mental attitude when he joined the Supreme Court:

> Most of all, one has to shift his mental attitudes. In the practice of law, and in advocacy, the positon that you've got to take is pretty generally shaped for you by the plight that your client is in. You have a problem and the problem is to marshal and bring to the support of your client's position everything that is available . . . . Judicially it's quite the opposite. The question isn't what you can bring to support a particular position, but what position ought to result from the consideration of both sides.

REMINISCENCES, *supra* note 5, at 1101.

188. *Steel Seizure*, 343 U.S. at 649 n.17 (Jackson, J., concurring).

189. *See* ST. CLAIR & GUGIN, *supra* note 170, at 218, 220.

190. *See* Press Statement, *supra* note 155, at 3992.

191. *See* GERHART, *supra* note 32, at 308.

192. BIDDLE, *supra* note 62, at 411. When Jackson returned from the war crime trials, his friends noted a change in his personality: "[H]e had there abandoned something which his friends loved in him."

In contrast to Jackson's North American opinion, some opinions—as a practical matter—will not mislead the rest of the government about the law. If a legal issue is *sui generis*, there is little or no chance of it being misleading.[193] Jackson's public opinion regarding the Destroyers Deal is a good example.[194] There were no overarching legal principles of general applicability in the Destroyers Opinion.[195] Jackson's analysis was limited to situations in which the president decided to sell naval vessels to a foreign power.[196] The Deal and his opinion were *sui generis*.[197] Therefore, no one in government seeking guidance on other proposals would be misled by the Destroyers Opinion.[198]

Although Jackson's Destroyers Opinion was dressed up to look like a legal opinion that an adviser would give to a client, it was not.[199] Unlike the private advice actually given to a client, a public opinion on a controversial project is a political advocacy document designed to defend a particular course of presidential action; it is public speech designed to sway public judgment on an important issue of public policy.[200]

A good argument can be made that the Constitution's First and Fourteenth Amendments forbid any legal sanctions, including disciplinary action, against an attorney for analyses advanced in a public legal opinion by analyzing the case of *Abrams v. United States*.[201] In *Abrams*, Justice

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Id. Felix Frankfurter, who was Jackson's closest friend on the Supreme Court, agreed that "Nuremburg . . . had a profound influence on his endeavor to understand the human situation." Felix Frankfurter, *Foreword*, 55 COLUM. L. REV. 435, 437 (1955). Jackson left for the trials with "[a]n essentially good natured, an even innocently unsophisticated temperament . . . ." *Id.* He came home knowing "how ultimately fragile the forces of reason are and how precious the safeguards of law so painstakingly built up in the course of the centuries." *Id.*

Jackson, himself, recognized the impact that the trials had on him, and as a result of, "[T]he post-mortem, examination of the Hitler regime, which took place at Nuremburg," he became more inclined to preserve the separation of powers between the state and national governments. 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2565 (Leon Friedman & Fred L. Israel eds., 1969). In this regard, he explained that, "until Hitler had broken down the powers of the separate German states and established a completely centralized police administration, he wasn't able to bring about the dictatorship." *Id.*

In his *Steel Seizure* opinion, he expressly adverted to the Nazi experience as a cautionary tale. *Steel Seizure*, 343 U.S. at 651-52 (Jackson, J., concurring). He was leery of any argument that an American president might invest himself with emerging powers beyond Congressional control, and he understood that some provision for emergency powers was necessary. However, he believed that "emergency powers are consistent with free government only when their control is lodged elsewhere in the executive who exercised them." *Id.* at 652.

193. *See Sui generis*, BOUVIER LAW DICTIONARY (Desk ed. 2012).
194. *See generally Advising*, *supra* note 4.
195. *See generally id.*
196. *See id.* at 8.
197. *See id.* at 3.
198. *See id.*
199. *See Advising*, *supra* note 4, at 32.
200. See *id.* at 74.
201. 250 U.S. 616 (1919).

Holmes argued that the validity of ideas should be tested in the marketplace of ideas and not in court:

> But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[202]

This theory of the "marketplace of ideas" is especially important in respect of self-government in the context of fostering public discussions of significant public importance.[203]

The importance of the marketplace of ideas in discussions of significant issues of public policy is especially significant in the context of public legal analyses.[204] There is a strand of modern legal thought that suggests that no legal analysis can be conclusively condemned as wrong.[205] Thus, after a long career as a law professor, Kingman Brewster concluded, "That every proposition is arguable."[206] Similarly, Abram Chayes, who served as the State Department's Legal Adviser during the Cuban Missile Crisis, believed that, "In principle, under the conventions of the American legal system, no lawyer or collection of lawyers can give a definitive opinion as to the legality of conduct in advance."[207] Many, including the present author, do not subscribe to this legal nihilism, but its existence cannot be gain said.[208]

A weak or erroneous legal opinion released to the public should be viewed as an act of political advocacy. Because the opinion is public, it is subject to vigorous, countervailing analyses.[209] Of course, this First Amendment analysis would not be relevant to a legal opinion not written for public consumption.[210]

In the court of public opinion, there is no doubt that the public would be better served if an attorney general's public opinion were more than self-

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202. *Id.* at 630 (Holmes, J., dissenting).

203. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22 (1948).

204. *See id.*

205. *See, e.g.*, Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENT. 431, 481 (2009).

206. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 192 (2007).

207. ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 27 (1974).

208. *See id.* at 29.

209. Jack Goldsmith, *The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation*, *in* EXTRA-LEGAL POWER AND LEGITIMACY 214, 228 (Clement Fatovic & Benjamin A. Kleinerman eds., 2013).

210. *See generally* U.S. CONST. amend. I.

serving partisanship.[211] Professor Bradley Wendel has cogently argued that attorneys "who are forced to articulate publicly the reasons for their decisions are more likely to come up with principled, reasonable decisions."[212] Professor Jack Goldsmith has made another case for providing the public with an accurate picture of the attorney's private advice.[213] Knowing what the president's attorney actually advised would heighten the public's ability to judge the value of the president's policy.[214] To paraphrase General Pierre Bosquet, however, Professor Goldsmith's argument is magnificent, but it is not politics.[215] Indeed, Professor Goldsmith candidly concedes that "[e]xecutive branch lawyers would almost certainly respond to formal transparency requirements about legal analysis by giving oral advice, or very cursory analysis, or by using some mechanism to push the real analysis underground."[216]

V. CONCLUSION

In my Jackson project, I have consistently cleaved to Niccolò Machiavelli's counsel "to go straight to the actual truth of things rather than to dwell in dreams."[217] At first glance, the distinction between frank private advice and advocacy oriented public pronouncements is unsettling. In a perfect world, we would like to know what the president's lawyers told him or her, but this theoretical dream is unattainable in our world.

In a sense, the distinction between private and public advice facilitates an attorney's ability to advise the president in an ethical fashion. The president, who is charged with faithfully executing the laws, desperately needs accurate legal advice. The distinction facilitates an attorney's ability to render accurate advice and also to serve as the president's advocate. Robert Jackson understood this when he said, "I would tell my client what his chances were, what his risk was, and then support him as best as I could. That is what I did with the Administration."[218]

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211. *Steel Seizure*, 343 U.S. at 647.

212. E-mail from W. Bradley Wendel, Professor of Law, Cornell Law Sch., to William R. Casto, Professor of Law, Texas Tech Sch. Of Law (on file with author).

213. *See* Goldsmith, *supra* note 209, at 229.

214. *See id.*

215. *See* DeCaire v. Gonzales, 474 F. Supp. 2d 241, 260 (2007).

216. Goldsmith, *supra* note 209, at 230.

217. MILES J. UNGER, MACHIAVELLI: A BIOGRAPHY 219 (2011).

218. *See* GERHART, *supra* note 32, at 222.