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# Serving a Lawless President

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# Serving a Lawless President

***Man is nothing else but what he makes of himself.***

**Jean-Paul Sartre**

**by William R. Casto** *

## I. INTRODUCTION

What does an Attorney General do when confronted with a lawless President? At first glance, the answer is easy,[1] but on second thought, a realistic answer is complicated. The answer is complicated because the phrase "lawless president" is not necessarily pejorative. In fact, western leaders have always exercised a prerogative power to throw the law overboard when they see fit.[2] Some of our greatest Presidents have followed this path. Thomas Jefferson did,[3] as did Abraham Lincoln[4] and Franklin Roosevelt.[5]

So what does the President's Attorney General do? The law and principles of professional responsibility offer a clear answer to the question whether an attorney should conspire with the President to act unlawfully. The short and simple answer is "no."[6] If we seek more nuanced guidance than this procrustean solution, we must look beyond

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[1] One is reminded of the old professional-responsibility joke that the answer to any legal ethics problem is, "I would not take that case, or I would not take that client."

[2] *See generally* EXTRA-LEGAL POWER AND LEGITIMACY: PERSPECTIVES AND PREROGATIVE (Clement Fatovic & Benjamin Kleinerman eds., 2013).

[3] *See* notes 38–45, *infra* and accompanying text.

[4] *See* notes 34–35, *infra* and accompanying text.

[5] *See* notes 87–154, *infra* and accompanying text.

[6] At least attorneys are not to assist in the commission of a crime. Paul Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251 (2018). The escape valve of prosecutorial discretion may allow authorities not to charge clear transgressions. *See* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 348–59 (1987). On three occasions, Attorney General Robert Jackson conspired with President Roosevelt to commit crimes. *See* notes 91–154, *infra* and accompanying text. Two of these criminal acts involved very specific statutory crimes. The third, which involved the unlawful sale of destroyers to Great Britain, was a criminal theft of government property.

the law and beyond the principles of professional responsibility. A lawless official must seek guidance in extra-legal—hopefully moral—principles.

This existentialist essay[7] ignores the question of what an attorney should do. To be sure, one could ruminate on the issue,[8] but that is not the path here taken. Instead, the essay describes how one capable and honorable Attorney General actually dealt with the problem. The exploration concentrates on the "is" (was) and not the "ought." This approach accords with the wisdom of an experienced and thoughtful observer of public life: "It seems better to me to go straight to the actual truth of things rather than to dwell in dreams."[9]

In thinking about an attorney's service to a lawless President, a clear distinction must be drawn between advising the President about the law and assisting the President in implementing a program. A number of serious thinkers have carefully analyzed the role of government attorneys in facilitating government lawlessness, but their attention has been focused on the attorneys' advice rather than participation in a criminal conspiracy.[10] There are clear and easily understood principles regarding legal advice that the attorney may properly give and so long as the advice is reasonably accurate, there should be no problem.[11] In contrast to legal advice, an attorney who helps implement an illegal program is herself lawless—she has become her President's co-conspirator. She is in the clutches of what Michael Walzer has described as "The Problem of Dirty Hands."[12]

Although this existentialist essay eschews the issue of how an Attorney General should act, the purpose is not to provide a free moral pass. An attorney who assists the President to implement an illegal project is morally complicit in the President's action and may be subject to moral condemnation. But it is complicated. Sometimes the action,

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[7] The essay is existentialist but not nihilist. *See* notes 18 & 170–79, *infra* and accompanying text.

[8] For a valiant effort suggesting a bewildering array of relevant factors, *see* Louis Seidman, *Powell's Choice: The Law and Morality of Speech, Silence, and Resignation by High Government Officials* (2008) (draft).

[9] MILES J. UNGER, MACHIAVELLI: A BIOGRAPHY 215 (2011) (translating Niccolo Machiavelli, The Prince Ch. XV).

[10] *See, e.g.*, DAVID LUBAN, TORTURE, POWER, AND LAW Ch. 8 (2014);

W. Bradley Wendel, Lawyers and Fidelity to Law 177–84 (2010).

[11] *See* WILLIAM R. CASTO, ADVISING THE PRESIDENT: ATTORNEY GENERAL ROBERT H. JACKSON AND FRANKLIN D. ROOSEVELT (2018). *See also* notes

83–86, *infra* and accompanying text.

[12] Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 Philosophy & Pub. Aff. 160 (1973). *See* CASTO, *supra* note 11, at 146–48.

though illegal, is the right thing to do. For example, in 1940 Great Britain stood alone against the Nazi Colossus, and President Franklin Roosevelt, with his Attorney General's assistance, illegally sold 50 obsolescent destroyers to the British.[13] The President and his Attorney General conspired to violate the law, but should they be morally condemned? Surely, the answer is no.

How does a particular Attorney General determine whether to facilitate Presidential lawlessness? Stuart Hampshire has persuasively argued that this difficult question cannot be answered through rational analysis.[14] To be sure, there are a number of factors relevant to the question. Respect for the rule of law is at the head of the list and in almost all cases, will influence a President and Attorney General to act lawfully. In a small number of situations, however, other considerations may outweigh respect for the law.[15] Weighing and balancing these considerations is not a rational process.

Based upon decades of experience in government, Lieutenant General Charles Pede[16] has provided advice that should make sense to practicing lawyers. He asks, "[H]ow do you know what the right thing is?"[17] He replies, "[Y]ou trust your gut. You talk with your trusted friend, perhaps you pray, you 'let things cook' for a while, but deep down, trust me, you'll know. It wells up in your gut and your gut tells you."[18] His advice based upon a lifetime of professional experience is a practical application of Hampshire's persuasive theoretical analysis. In giving this advice, General Pede was not addressing the difficult issue of conspiring to commit a crime.

Robert H. Jackson was the Attorney General who conspired to assist the British in their hour of desperate need, and his career illustrates approaches or tactics for dealing with a lawless President.[19] He is almost universally respected as a capable and honorable public

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[13] *See* notes 116–41, *infra* and accompanying text.

[14] Stuart Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY 23–53 (S. Hampshire ed. 1978).

[15] There is the matter of duty to the public, including weighing and balancing the consequences of following the law or not. Likewise, the attorney general will certainly consider a particular president's entitlement to respect, loyalty, and gratitude. There also are unsavory factors that come into play. Factors like self-aggrandizement, careerism, prestige, and a desire for future employment.

[16] General Pede is the Army's leading lawyer, its Judge Advocate General.

[17] Charles Pede, *Remarks on Being a Good Lawyer*, 52 TEX. TECH. L. R. 837, 843 (2020).

[18] *Id*.

[19] *See* CASTO, *supra* note 11.

servant.[20] More than once, Jackson had to deal with President Roosevelt's desire to cast the law aside.

The present essay draws upon H.L.A. Hart's *The Concept of Law* to develop a model for thinking about Jackson's service to his President.[21] Then the essay notes a few specific historical occasions in which western leaders have acted lawlessly.[22] After that, we turn to details of Jackson's service as a praxis for understanding the plight of an Attorney General serving a lawless President. Finally, the essay concludes by emphasizing the value and importance of passing moral judgment on the actions of an Attorney General.

## II. THE CONCEPT OF LAW

A little over fifty years ago, H.L.A. Hart wrote "the most influential book in legal philosophy ever written in English."[23] In *The Concept of Law*,[24] Hart, who was a legal positivist, constructed a general theory of what laws are. In particular and for the purpose of the present essay, he believed that any legal system had to have rules of recognition that are used to determine whether a particular rule is or is not a valid law. In the United States, these rules of recognition are laid out in our state and federal Constitutions. Hart believed that there is no necessary relationship between law and morality. He did recognize, however, that as a matter of local policy, some countries might choose to incorporate moral requirements in their rules of recognition.[25] A law that is duly created pursuant to the applicable rules of recognition is a valid law regardless of its morality. Rules that are "morally iniquitous" nevertheless are laws so long as they meet the test of a particular country's rules of recognition.[26]

Because Hart developed his concept in the aftermath of World War II, he inevitably had to consider the monstrosity of Nazi Germany. True to his concept, he insisted that the Nazi legal grotesqueries clearly were laws because they came from law makers constitutionally empowered to make them. They satisfied Germany's rules of recognition. At the same time, he believed that laws need not be followed merely because they

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[20] *See, e.g.*, George Garre, *On lawyers and leadership in government: lessons from "American's advocate", Robert H. Jackson*, 69 STAN. L. REV. 1795 (2017); Warner Gardner, *Government Attorney*, 55 COLUM. L. REV. 438 (1955).

[21] *See* notes 23–31, *infra* and accompanying text.

[22] *See* notes 34–46, *infra* and accompanying text

[23] HART, THE CONCEPT OF LAW at xi (3d ed. 2012).

[24] HART, THE CONCEPT OF LAW (3d ed. 2012).

[25] *Id.* at 247 (postscript).

[26] *Id.* at 206.

are laws. In his view, "[W]e should say, '[t]his is law; but it is too iniquitous to be applied or obeyed.'"[27] Some argued that grossly immoral laws are not laws at all, but Hart rejected this approach.[28] Instead of including morality in his general definition of law, he believed that separating the two concepts allowed for a more careful analysis of the problem of iniquitous laws. For example, how should we treat someone who has complied with, taken advantage of, or relied upon an evil law? They may well have acted immorally, but should we retroactively punish them for an action that was lawful at the time that it was taken?[29] In Hart's mind, retroactive—*ex post facto*—punishment for some of the Nazis' outrages was appropriate.[30]

Hart was also concerned with officials that are called upon to enforce laws. He specifically addressed "[T]he unfortunate official . . . who was called on to apply ['morally iniquitous' laws]."[31] The question for the unfortunate official was whether the laws are too iniquitous to be applied. Hart clearly rejected the notion that a law is an absolute mandate that an official must follow at all cost. In his mind, "[T]here is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience [to law]."[32]

### *A. Presidential Prerogative*

Hart and others have addressed the problem of laws that are iniquitous in and of themselves.[33] His concept, however, needs further elaboration. Suppose that, unlike the Nazi laws, a particular law is innocuous on its face and has been enacted to further a reasonable purpose. Suppose also that this law forbids particular official action that is necessary to avert a calamitous event. In such a case, many conscientious western leaders have believed—to use Hart's words—that

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[27] *Id.* at 208. *Accord*, GREENAWALT, *supra* note 6, at 279 (Nazi laws).

[28] Hart and Lon Fuller debated this issue in H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV, L. REV. 630 (1958).

[29] *See* HART, *supra* note 23, a*t* 210–12.

[30] Hart, *Positivism and Separation* at 619.

[31] HART, THE CONCEPT OF LAW at (3d ed. 2012).

[32] *See* HART, *supra* note 23, a*t* 210. For a powerful, detailed, and convincing proof of this idea, *See* GREENAWALT, *supra* note 6, at Ch. 4–8. Unfortunately, Professor Greenawalt's book deals primarily with the issue of civil disobedience and therefore is not a perfect match for problems confronting a public official. Nevertheless, Greenawalt provides a number of valuable insights to these problems.

[33] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 293–344 (rev. ed. 1999); *See* WENDEL, *supra* note 10, at 102–05.

"there is something outside the official system, by reference to which in the last resort,"[34] they must turn to decide whether to obey the law. Dilemmas like these are the stuff of presidential prerogative.

The idea that a leader sometimes should act lawlessly is centuries old. The easiest example is an existential crisis. When a nation's very existence is at stake, self-preservation easily trumps legal technicalities. Niccolo Machiavelli took Piero Soderini, gonfalonier of the Republic of Florence, to task for Soderini's failed defense of their Republic. When the enemy was almost at the gates, Soderini refused to violate the law and lost the Republic. Machiavelli believed that 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.[35] To be clear, Machiavelli was not saying that in an emergency, a leader might lawfully set aside applicable laws. Rather, he and others believed that in some situations, a leader should act unlawfully.

At the beginning of our Civil War, Abraham Lincoln followed the path that Machiavelli had marked. Congress was not in session and Lincoln had to act. He did so in violation of the law. Lincoln explained, "To state the question more directly, [a]re all the laws *but one* to go unexecuted and the [g]overnment itself go to pieces lest that one be violated[.]"[36] In private, he told Treasury Secretary Salmon P. Chase, "I will violate the Constitution, if necessary, to save the Union[.]"[37]

The same line of thought motivated Winston Churchill in Great Britain's death match with Nazi Germany. He willingly violated international law because "We have a right, and, indeed, we are bound in duty, to abrogate for a space some of the [c]onventions of the very law we seek to consolidate and reaffirm."[38] A few years later and a year before writing *Animal Farm*, George Orwell agreed: "When it is a

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[34] HART, THE CONCEPT OF LAW at 210.

[35] NICCOLE MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS, book 3, ch.3 (1531). *See also id*. Ch. 41.

[36] Abraham Lincoln, Message to Congress in Special Session, July 4, 1861. (emphasis original). Lincoln continued, "Even in such a case, would not the official oath be broken, if government should be overthrown, when it was believed that disregarding the single law, could tend to preserve it."

[37] HAROLD BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 120 (2015).

[38] Winston Churchill, War Cabinet Memorandum, Dec. 16, 1939, *reprinted in* 1 CHURCHILL WAR PAPERS 522–24 (M. Gilbert ed., 1993). *See* MICHAEL WALZER, JUST AND UNJUST WARS 242–50 (4th ed. 2006).

question of national existence, no government can stand on the letter of the law[.]"[39]

Thomas Jefferson also preached this wisdom: "To lose our country by a scrupulous adherence to written law, would be to lose the law itself."[40] This idea is so obviously correct that its mere statement carries the day.

*B. The Outer Limits of Prerogative*

When a leader faces an existential, national crisis, they clearly should set aside the law to save the very existence of their republic. The consequences of following the law (loss of the republic) are dwarfed by the consequences of violating it (saving the republic). In *the Concept of Law*, Hart (like Machiavelli, Lincoln, Jefferson, and Churchill) addressed an extreme case—an easy case. Enforcing the Nazi legal monstrosities is quite unacceptable.

The experiences of Soderini, Lincoln, and Churchill should not be viewed as a rule applicable only to existential crises. Rather, their experiences should be seen as obvious or easy cases. We may all agree that laws should be broken if needed to save the republic. Determining whether a crisis is existential, however, presents a difficult question. Even in "easy" cases, there may be substantial disagreement regarding whether there is an existential crisis.[41]

In the end, the matter inevitably turns on the President's political and moral judgment. Jefferson thoroughly understood that exercising prerogative power places the President in a difficult position. The "[L]ine of discrimination between cases may be difficult; but a good officer is bound to draw it at his own peril & throw himself on the

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[39] George Orwell, *As I Please*, LONDON TRIBUNE, Oct. 27, 1944, *reprinted in* The Collected Essays, Journalism, and Letters of George Orwell: As I Please, 263–65 (Sonia Orwell ed. 1968).

Orwell was commending his country's decision to lock up suspected Nazi sympathizers like Sir Oswald Mosely without charge. For a highly critical treatment of the British program by a highly respected historian, see A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS (1992). Thomas Jefferson believed that it might be proper for an executive officer to deprive a traitor of his legal rights. Thomas Jefferson to John Colvin; Thomas Jefferson to W.C.C. Clairborne.

[40] Thomas Jefferson to John Colvin, Sept. 10, 1810. *Accord*, Thomas Jefferson to Governor W.C.C. Clairborne, Feb. 3, 1807, *reprinted in* II THE WRITINGS OF THOMAS JEFFERSON 150–51 (A. Lipscomb ed., 1905). *See* BRUFF, *supra* note 37, at 70–72.

[41] For example, when Roosevelt sold the fifty destroyers, the United States arguably was not facing an existential crisis, and many Americans opposed the deal. *See* CASTO, *supra* note 11, at 74.

justice of his country and the rectitude of his motives."[42] This duty places a president in a difficult position. Nevertheless, Jefferson insisted that presidents are bound "to risk themselves on great occasions, when the safety of the nation or some of its very high interests are at stake."[43]

What happens when the existence of the threat is not so clear, or the political and moral stakes are not so high? What happens if it is not an easy case?[44] To clarify Hart's concept: The Nazi laws' primary iniquity flowed from the consequences of actually enforcing them—not from their mere existence.[45] Presumably, Hart believed that an official should weigh the consequences of enforcing the law against the consequences of non-enforcement. In the context of the Nazi monstrosities, weighing and balancing the consequences are easy.[46] But what if the imbalance of consequences is not so gross?

In 1810, Thomas Jefferson considered a hypothetical opportunity to purchase "the Floridas" for a reasonable sum in the absence of a Congressional appropriation of the purchase price.[47] He further hypothesized that Congress was not in session and that in any event obstreperous Senators would delay things until the deal fell through. Under the Constitution, no funds may be spent without a congressional appropriation.[48] In this situation, Jefferson believed that a president should violate the Constitution.

Jefferson's hypothetical clearly did not involve an existential crisis. He believed that the president should throw the Constitution overboard to get a good deal. For Jefferson, the limit to prerogative power was a matter of presidential judgment. He believed, however, that the power should not be exercised by "persons charged with petty duties, where consequences are trifling, and time [is] allowed for a legal course."[49]

Might a president violate the law as a matter of convenience? The idea is disconcerting and should be placed in context. As a matter of practice, many (most?; all?) of us act lawlessly when convenient. Think

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[42] *Id.*

[43] *Id.*

[44] Easy cases like the Nazi monstrosities are rare. *See* WENDEL, LAWYERS AND FIDELITY at 117–18.

[45] Of course, these laws' mere existence was an official endorsement of evilness, and these endorsements, in and of themselves, were despicable.

[46] *But see* note 57, *infra* (the loyal Nazi).

[47] *See Jefferson*, supra note 40 and accompanying text.

[48] U.S. CONST. art. I, § 9. *See also* notes 102–05, *infra* and accompanying text.

[49] *Jefferson, supra* note 38.

of a rolling stop or exceeding the speed limit.[50] The same goes for public officials. For example, we are familiar with the passive/aggressive police tactic of protesting some situation by meticulously complying with all department rules and regulations to bring the effective performance of duty to a grinding halt. The practice even has a name: rulebook slowdown.[51]

Rulebook slowdowns only work because as a matter of convenience and effective law enforcement, officers routinely disregard the lawful rules and procedures of their departments.[52] In the ordinary course of duty, the officers are doing what we do when we speed—what Jefferson recommended in acquiring the Floridas. They violate the law. We will see that President Roosevelt, like his predecessors, felt no absolute duty to abide by the law. The point of these hypothetical cases is simply to recognize that lawlessness in our society is common. Our society may punish these crimes, but frequently we do not.

To repeat, however, the present essay is not about whether presidents and their attorneys general should follow the law. This essay is concerned with the tactics that one Attorney General used to deal with his lawless President.

## III. JACKSON AND ROOSEVELT

Gratitude and loyalty were central to Jackson's relationship with his President. The two men had a passing relationship when Jackson first came to Washington, but Jackson was grateful for his President's stewardship of the nation. Roosevelt saved us from the Great Depression. By the time Jackson became Attorney General, Jackson was quite grateful and quite loyal to his President. Roosevelt was his "[H]ero, friend, and leader."[53] As Attorney General, Jackson viewed himself as "[P]art of a team . . . and necessarily partisan."[54]

When Jackson first came to Washington, he had only a casual acquaintance with the President.[55] In the beginning, gratitude played

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[50] *See* GREENAWALT, *supra* note 6, at 243 n.33; William Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709, 720, 722–23 (2012).

[51] *See* JEROME SKOLNICK & JAMES FYFE, ABOVE THE LAW: POLICE AND EXCESSIVE USE OF FORCE 120–21 (1994).

[52] There may be very good reasons for the police to ignore applicable rules and regulations regarding the performance of their duties. *See* GREENAWALT, *supra* note 6, at 356–67 (discussing "full enforcement" laws).

[53]ROBERT JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT xii (2005).

[54] JACKSON, REMINISCENCES 1102–03.

[55] His first office was general counsel of the Bureau of Internal Revenue. He obtained the appointment through the recommendation of Herman Oliphant, general counsel of the

the prominent role in the two men's relationship. But not personal gratitude. Rather, Jackson had a more general gratitude for Roosevelt's immense efforts to save the nation during the crisis of the Depression.

As Jackson steadily progressed upward in the Department of Justice, his general gratitude expanded to include personal gratitude. The President recognized Jackson's abilities and rewarded him for doing a good job. In 1938, Roosevelt appointed him Solicitor General. Then two years later, Jackson became Attorney General, and finally in 1941 the President moved him to the Supreme Court.

Jackson was a staunch New Dealer who wanted to see society's benefits distributed more generally among his fellow citizens. The best summary of his New-Deal philosophy appears in a 1935 letter to his sixteen-year-old son. He described his work as involving "[T]he old fight of those who have things well in their control against those who want the benefits of civilization a little more widely distributed."[56] He had seen the President rescue the nation from the Great Depression and implement programs to distribute national resources more widely. Jackson had great feelings of general and personal gratitude toward his "hero."

Gratitude is related to loyalty but is not the same thing.[57] There is a strong transactional undercurrent to gratitude. In exchange for what you have given me, I will give you my gratitude. In contrast, loyalty is more a matter of feeling: "Loyalty, like friendship, is the sort of thing one grows into rather than decides to have."[58] There is no doubt that over time, Jackson developed immense feelings of loyalty for his President.

At loyalty's core, the concept is amoral. For example, think of a loyal Nazi.[59] Albert Hirschman has established that loyalty plays an important and valuable role in the operation of all organizations, including the federal government.[60] Hirshman was primarily an economist, but his analysis fits a government organization tasked with

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Treasury Department, and Henry Morgenthau, Secretary of the Treasury. *See* GERHART, AMERICA'S ADVOCATE at 64–65.

[56] Robert Jackson to William (Bill) Jackson, Aug. 4, 1935, Jackson Papers, box 2, folder 5. A few years earlier, he said, "it is obvious that the contrast between our great collective wealth and individual want indicates a bad distribution of the advantages of industrialism." Robert Jackson, speech delivered before the Labor Council of Jamestown, NY, Oct. 21, 1931, Jackson papers, box 32, folder 6.

[57] *See* R.E. Ewin, *Loyalty and Virtues*, 42 PHILOSOPHICAL Q. 403, 407–09 (1992).

[58] *Id*. at 408.

[59] *See id*. at 404, 418.

[60] *See* ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

delivering public goods. Instead of positing how people should act, he developed a model explaining how exit, voice, and loyalty function in an organization. Loyalty obviously contributes to cohesive operation. A loyal member of an organization will implement a decision without qualm even though the member may disagree with the decision. Moreover, loyalty encourages the positive use of voice by members to correct problems within an organization.[61]

Hirschman also analyzed how loyal members may give effect to their disagreement with their organization's decisions. A member may simply exit or resign from the organization.[62] More significantly, a loyal member may give voice to her disagreement and attempt to modify or forestall implementation of a bad decision. Hirschman persuasively argues that a loyal member is more likely to exercise her voice depending on (1) the tradeoff between making the problem go away by resigning and the possibility that the organization could be improved and (2) the extent to which she thinks she can influence the organization.[63]

In fact, Jackson never resigned from the federal government, and there is scant evidence that he ever seriously considered doing so.[64] Because exit was not really an option, he was very likely to exercise voice within government. More significantly, he knew that he had real influence in molding government policies. In addition to influencing the shape of official policy, he probably felt that exercising his voice was intrinsically rewarding. It is personally gratifying to know that you have done the right thing.[65]

President Roosevelt encouraged his advisers to speak out, and he listened to them. Jackson was polite in his disagreements with the President. Jesse Jones, who was a part of Roosevelt's inner circle, remembered that when Jackson "[W]as not in full agreement with the President it was interesting to observe the finesse and polished courtesy in his discussions."[66] Jones continued, Jackson "[W]as usually able to avoid doing what he thought should not be done. I liked him very

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[61] *Id*. at 77–82.

[62] HIRSCHMAN, EXIT, VOICE, AND LOYALTY at 77 & Ch. 3. Jackson did not do so. *See* notes 152–58, *infra* and accompanying text.

[63] HIRSCHMAN, EXIT, VOICE, AND LOYALTY at 77 & Ch. 3.

[64] *See* notes 163–68, *infra* and accompanying text.

[65] Albert Hirschman, *"Exit, Voice, and Loyalty": Further Reflections and Survey of Recent Contributions*, 58 MILBANK MEM. FUND. Q. HEALTH & SOC.

403, 433–36 (1980).

[66] JESSE JONES & EDWARD ANGLY, FIFTY BILLION DOLLARS: MY THIRTEEN YEARS WITH THE RFC (1932–1945) 307 (1951).

much."[67] In 1952, Jackson, who was then on the Supreme Court, drew upon his experience to advise a newly named Republican Attorney General. "I congratulate you," wrote Jackson, "upon being assigned to a post of great legal power and even greater moral influence."[68]

A decade earlier, Jackson had exercised great moral influence on a number of non-legal issues. For example, he stopped Mayor Fiorello La Guardia's scheme to avoid a subway strike by federalizing the New York subway system.[69] Jackson also single handedly desegregated the District of Columbia Bar Association's Law Library.[70]

One of Jackson's proudest exertions of moral influence was his extensive campaign to protect immigrants.[71] During World War I, the widespread mistreatment of German Americans appalled Jackson,[72] and he was determined to prevent a similar mistreatment of immigrants in 1940–1941 while war was raging in Europe.[73] He took special pride in assuring that the Roosevelt Administration avoided the mistakes from the prior war.[74]

Jackson attacked the problem of incipient nativism on all fronts. In a private conversation over lunch, he warned the President, "[T]here was somewhat the same tendency in America to make goats of all aliens that in Germany had made goats of all Jews."[75] He firmly stated, "I am utterly opposed to . . . persecuting or prosecuting aliens just because of alienage."[76]

He continued in the same vein at cabinet meetings and in private discussions with cabinet members.[77] Likewise, in more than twelve public speeches and national radio broadcasts, he constantly reminded

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[67] *Id.*

[68] Robert H. Jackson to Herbert Brownell, Jr., Nov. 24, 1952, Jackson Papers, box 9, folder 12.

[69] *See* CASTO, *supra* note 11, at 115–16. La Guardia's scheme was lawful, but Jackson said no.

[70] *Id.* at 116–19.

[71] *Id.* at 119–24.

[72] He "could not forget his experience in the last war. As a young man he learned to hate German baiting, which he saw run through the little town he lived in." FRANCIS BIDDLE, IN BRIEF AUTHORITY 108 (1961).

[73] *See* CASTO, *supra* note 11, at 119–24.

[74] JACKSON, REMINISCENCES at 120–21.

[75] Jackson, May 21, 1940 lunch, Jackson Papers, box 90, folder 6.

[76] *Id.* On the Supreme Court, four years later, Jackson voted to hold the internment of Japanese American citizens unconstitutional. Korematsu v. United States, 323 U.S. 214, 242 (1944) (dissenting opinion).

[77] *See* CASTO, *supra* note 11, at 122–23.

the nation of the importance of treating aliens with respect and dignity.[78]

In addition to moral suasion on policy issues, Jackson exerted enormous influence on legal issues. He had a sophisticated understanding of Roosevelt's willingness to abide by the law. Like most of us, the President's default mode was to act lawfully. Jackson explained that Roosevelt "[W]as of all men, one of the easiest to advise on *ordinary* matters. If he was told that the statute did not permit something, I never had difficulty with him. Even if he did not agree, he would accept your view."[79] Jackson continued, "If he thought you were loyal in your opposition, he listened to you. If he felt that someone was being disloyal, then he was quite unforgiving."[80]

In extraordinary situations, however, the law became just one of many factors influencing the President's decisions. If the stakes were high enough, the President was willing to override the law and do what he thought needed to be done.

Jackson knew that the President did not feel absolutely bound to follow the law. In Jackson's words, "[T]he [P]resident had a tendency to think in terms of right and wrong, instead of legal and illegal. Because he thought his motives were always good for the things that he wanted to do, he found difficulty in thinking that there could be legal limitations to them."[81] The President "was a strong skeptic of legal reasoning."[82]

After Jackson became a Justice, he hinted at his pragmatic view of the President's prerogative power during the Justices' private conference for the *Steel Seizure* Case.[83] The Supreme Court of the United States was reviewing President Truman's order to seize the nation's steel industry during the Korean War. Jackson noted, "President can throw Constitution overboard, but we can't."[84] His words

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[78] *Id*.

[79] JACKSON, REMINISCENCES at 917–18 (emphasis added).

[80] *Id*. at 918.

[81] *See* JACKSON, *supra* note 53, at 74.

[82] *Id*. at 59. Similarly, Francis Biddle, who succeeded Jackson as attorney general, remembered that the president "was never theoretical about things. What must be done to defend the country must be done. . . . The Constitution has never greatly bothered any wartime President." *See* BRUFF, *supra* note 37, at 223 (quoting Biddle).

[83] 343 U.S. 579 (1952). The background of the *Steel Seizure* decision is ably presented in MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (rev. ed, 1994).

[84] William O. Douglas, Conference Notes, May 16, 1962, William O. Douglas Papers, box 221, folder 3, Library of Congress.

were not simply a colloquial condemnation of Truman's action. He literally meant what he said.

Between 1940 and 1954, Jackson devoted careful and sustained thought to the Civil War case of *Ex parte Merryman*.[85] He wrote about the case at least four times.[86] In *Merryman*, Chief Justice Taney ruled that President Lincoln's suspension of the writ of habeas corpus was unconstitutional, but the President refused to comply with Taney's ruling. Jackson concluded that the President could throw the Constitution overboard but that the Court could not. He believed, "Had Mr. Lincoln scrupulously observed the Taney policy, I do not know whether we would have any liberty[.]"[87] At the same time, "[H]ad the Chief Justice adopted Mr. Lincoln's philosophy as the philosophy of the law, I again do not know whether we would have had any liberty."[88]

Consistent with this bipolar analysis, Jackson witnessed President Roosevelt, his hero, friend, and leader, follow President Lincoln's lawless path on more than one occasion.

## IV. SPECIFIC EPISODES

In considering how Jackson acted in response to specific episodes of presidential lawlessness, we must draw a clear distinction between Jackson's private legal advice and what Jackson did after his President reached a decision. In providing legal advice, Jackson was entirely loyal to his President. As a loyal adviser, he strove to give his President a realistic assessment of the law. He would tell Roosevelt "[W]hat his chances were, what his risk was[.]"[89] He believed that the "[B]est quality in a lawyer's advice is disinterestedness."[90] He continued, "[T]he value of legal counsel is in the detachment of the adviser from the

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[85] 17 F. Cas 144 (CC Md 1861).

[86] ROBERT JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 321–27 (1941); Robert Jackson, Draft *Hirabayashi* Opinion No. 870 (1943), *reprinted in* Dennis Hutchinson, *"The Achilles Heel" of the Constitution*, 2002 SUP. CT REV. 455, 468–74 (2002); Robert Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 109 (1951); ROBERT JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 76 (1962) (published posthumously).

[87] JACKSON, SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT at 76. Earlier, Jackson had written, "I do not know that the ultimate cause of liberty has suffered, and it may have been saved, by [Lincoln's] questionable arrests." Jackson's, Draft *Hirabayashi* Opinion at 474.

[88] *Id*.

[89] EUGENE GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 222 (1958) (quoting Jackson).

[90] H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF 86 (2014) (quoting Jackson).

advised[.]"[91] As a firm loyalist, he believed that the President needed a clear understanding of the pertinent legal constraints. He would never dupe his hero with inaccurate advice. When push came to shove, he would frankly advise that a program under contemplation was illegal.

But once the President made up his mind, Jackson switched horses. Jackson would then "support him as best I could."[92] In this situation, Jackson's best efforts included a willingness to assist in criminal conduct.

When the President decided to throw the law overboard, he exercised his prerogative power. When Jackson then conspired to assist in the President's unlawful program, he essentially rode on the President's coattails. Jackson deferred to the President's lawlessness and became a willing participant in the illegal, prerogative action. Both men were morally responsible for their decision and should be subject to our moral judgment. But not necessarily subject to our moral condemnation.

### *A. The Gold Clause Cases*

The President's tendency to think in terms of right and wrong rather than lawful and unlawful emerged early in his presidency. He was elected in the depths of the Great Depression, and he immediately warned the country that to resolve the crisis "[I]t may be that an unprecedented demand and need for undelayed action may call for temporary departure from the normal balance of public procedure."[93]

To remedy some of the hardships of the Depression, Roosevelt pushed through a devaluation of the dollar, which would ease pressure on the nation's debtors.[94] His controlled currency devaluation, however, was not possible under a standard gold clause included in virtually all debt contracts,[95] so Roosevelt had Congress nullify all the gold clauses. In response, the nation's creditors challenged the nullification as unconstitutional, and the litigation quickly reached the Supreme Court in the *Gold Clause* Cases.[96]

Jackson, who was then general counsel of the Bureau of Internal Revenue, was already in Roosevelt's inner circle. He knew that the

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[91] *See* JACKSON, *supra* note 53, at 60.

[92] *See* GERHART, *supra* note 89, at 222 (quoting Jackson).

[93] LOIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 261 (3rd ed. 1991) (quoting Roosevelt).

[94] *See* SEBASTIAN EDWARDS, AMERICAN DEFAULT: THE UNTOLD STORY OF FDR, THE SUPREME COURT, AND THE BATTLE OVER GOLD 78 (2018).

[95] *See id.* at 68–69.

[96] Norman v. Baltimore & Ohio RR Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 330 (1935); Perry v. United States, 294 U.S. 330 (1935).

"President was greatly concerned about the [outcome of the *Gold Clause* cases] and was quite determined that he just could not accept an adverse decision."[97] The President told others that he had actually drafted a radio speech to be given on the night of the day the court handed down the decision.[98] In the draft speech, the President planned to tell the nation that he would not abide by the Court's judgment.[99] Fortunately, the Court ruled 5–4 in the President's favor and averted the looming constitutional crisis.

*B. The National (now Reagan) Airport*

In 1938, Jackson became Solicitor General and, in that capacity, occasionally served as a pinch hitter for Attorney General Frank Murphy. That fall, he represented Murphy at a cabinet meeting, and the President was upset about the shortcomings of the capital's airport, which at that time was quite primitive. Jackson later remembered that the national aerodrome was simply "[A] pasture intersected by a highway. When a plane came in, they had to close the road to traffic and open it again after the plane had landed."[100] He continued, "It was dangerous, inadequate, and everyone regarded it as long behind the times."[101]

The President was "[P]retty much disgusted"[102] with this ridiculous situation. Congress had been working on the problem for over a decade and could not get its act together. Two federal agencies had sufficient funds to commence construction on a modern airport, but a technicality in appropriations law barred use of the funds. The President told Jackson, "I want you to get [with the agencies' attorneys] at once and knock their heads together until you get that money knocked out of them."[103] Jackson did so and construction quickly commenced.

In Jackson's words, "[W]ithout congressional authorization or appropriation, the present Washington airport was begun."[104] This action was criminal. Every attorney who has ever served the federal government in a transactional role knows that the President and

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[97] *See* JACKSON, *supra* note 53, at 55.

[98] EDWARDS, AMERICAN DEFAULT: THE UNTOLD STORY OF FDR, THE SUPREME COURT, AND THE BATTLE OVER GOLD at 167 (quoting FDR).

[99] JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 99 (2010) (quoting draft speech).

[100] *See* JACKSON, *supra* note 53, at 47.

[101] *Id*.

[102] *Id*.

[103] *Id*. at 48 (quoting the president).

[104] *Id*. at 48.

Jackson conspired to violate the Constitution and federal criminal law. The Constitution explicitly states, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[105] Moreover, the Anti-Deficiency Act,[106] passed in 1906, criminalized expenditures made without a statute authorizing the expenditures. Under this system, mere appropriation of funds is not enough. There also must be a statute authorizing the specific expenditures.[107]

Jackson assisted the President in violating the Constitution and the Anti-Deficiency Act, but he also advised that commencement of construction would be a crime. At least he knew that the President was aware of the legal problem. Apparently, in a jocular mood, the President "[A]sked me if he was likely to go to jail as a result."[108] Jackson quipped back, "I told him all that I could promise was to go to jail with him."[109]

For Jackson, assisting the President's criminal desire to commence construction of the national airport was an easy decision. He even joked about it. His decision was driven by a strong brew of loyalty, gratitude, and a knowledge that the President's plan would do no harm. Under Hart's model, the consequence of following the law would deprive the nation of a national airport, which was significant but hardly involved an existential threat. In contrast to the gain of having a national airport, the negative consequences of violating the law were slight to nonexistent. It was a no-harm, no-foul situation. In Jackson's words, it was an action that "invades no private right" and "took nobody's property."[110] Of course, whether Roosevelt made the right call in weighing and balancing the consequences was a presidential decision. Jackson understood the stakes, and these together with his immense loyalty and gratitude led him to support his "[H]ero, friend, and leader."[111] As a *post hoc* justification, Jackson later noted that without the President's "initiative, Washington probably would have faced World War II without an adequate airport."[112]

To be sure, Roosevelt blatantly usurped Congress's constitutional control over expenditures, but commencement of construction was literally blatant. Everyone knew about it. The President essentially

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[105] U.S. CONST. art. I, § 9.

[106] Pub. L. 59-28, 59th Cong., sess. 1, 1906, 34 Stat. 49, 31 U.S.C. § 1341. Another section provides that violation of the statute is a crime. 31 U.S.C. § 1350.

[107] *See* Richard Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998).

[108] *See* JACKSON, *supra* note 53, at 48.

[109] *Id*.

[110] *Id.*

[111] *See* note 53, *supra* and accompanying text.

[112] *See* JACKSON, *supra* note 53, at 48.

submitted his decision to the judgment of Congress and subjected himself to any legislative repercussions. The openness of an unlawful act is relevant to the morality of the act: "[I]ts main importance is its linkage with submission to the operation of the law."[113] Although the President usurped Congress's power, Congress acquiesced. There was no congressional complaint—no legislative backlash.

In addition to Jackson's no-harm, no-foul analysis and the openness of the President's actions, other considerations may have and probably did influence the President's and Jackson's decisions. For example, before Roosevelt decided to act illegally, he spent many years trying to persuade Congress to approve his plans for a modern airport.[114] In Jackson's words, "He had tried to get Congress to move, but [the matter] was bogged down by contests between different real estate interests."[115] Roosevelt resorted to lawlessness only after a serious and prolonged effort to comply with the Constitution.

Before leaving the National Airport episode, it should be noted that in addition to conspiring to break the law, Jackson breached his oath of office. He had sworn "to the best of my knowledge and ability, I will support and defend the Constitution of the United States [;] I will bear true faith and allegiance to the same; [and] I will well and faithfully discharge the duties of [my] office."[116] We do not know how Jackson viewed his breach, but if he viewed the violation as serious, he would not have joked about it. He probably thought that his oath did not change his fundamental no-harm, no-foul analysis—especially in a one-off situation.[117]

### *C. Destroyers for Bases*

In the summer of 1940, the triumphant German Wermacht swept all before it, and Europe was in shambles. When the French surrendered, Italy joined the war on Germany's side. Great Britain then stood alone[118] with only the English Channel to defend it against the all-

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[113] *See* GREENAWALT, *supra* note 6, at 239. *See also id*. at 238–40.

[114] For twelve years, Congress had been bogged down in a hopeless snarl of commissions, resolutions, committee reports, charges of official misconduct, and even a veto. See CASTO, *supra* note 11, at 22.

[115] *See* JACKSON, *supra* note 53, at 47.

[116] *An Act to prescribe and oath, and for other purposes*, 37th Cong., sess. 2, Ch. 128, July 2, 1862, 12 Stat. 502, 5 U.S.C. § 3331. The President's oath is much the same. U.S. CONST. art. 11, § 1.

[117] *Cf*. GREENAWALT, *supra* note 6, at 279–81.

[118] But the British were not entirely alone. They also had their empire with countries like India, Australia, Canada, New Zealand, and South Africa. ALAN ALLPORT, BRITAIN AT BAY 52–59 (2020).

powerful Nazis. The British desperately needed destroyers to fend off an anticipated invasion. The recently retired United States Chief of Naval Operations explained, "In the narrow waters between England and the Continent, large warships cannot operate safely. . . . [Therefore,] [t]he British must depend in great measure upon destroyers to guard their homes from war."[119]

Throughout the summer, the British pleaded with President Roosevelt time and again for fifty obsolescent destroyers that were in active United States service.[120] Roosevelt went back and forth in his mind on whether to help the British in their hour of desperate need. Finally, in August he decided to trade the fifty ships for valuable base rights in the western Atlantic and Caribbean.

Churchill's pleas for destroyers began in earnest in May of 1940.[121] Roosevelt was initially dubious of the idea, and Jackson's initial informal legal advice was that there were significant legal impediments.[122] As the summer progressed, Roosevelt's thinking gradually changed, and by the middle of August he resolved to trade the destroyers to the beleaguered British. There was, however, a problem. The President did not have legal authority to sell a part of our Navy, and Congress would not give it to him.

But the President decided to help the British anyway. Roosevelt negotiated a very good deal for the destroyers: fifty old ships in exchange for valuable base rights.[123] The British did not especially like this *quid pro quo* and objected that it was "a rather hard bargain."[124] Nevertheless, beggars can't be choosers.

Jackson struggled to find a legal basis for selling off part of the Navy. His first approach was to toss the hot potato to Admiral Harold "Betty" Stark, the Chief of Naval Operations. An old, post-Civil War statute authorized the Navy to strike ships "unfit for further service"

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[119] William Standley, "Adm. Standley Plea to Aid Britain," Washington Post, Aug. 11, 1940, *reprinted* in 6 Vital Speeches of the Day 688. (text of Standley's speech).

[120] *See*, CASTO, *supra* note 11, at Ch. 5. For two good general treatments, see PHILIP GOODHART, FIFTY SHIPS THAT SAVED THE WORLD (1965); ROBERT SHOGAN, HARD BARGAIN: HOW FDR TWISTED CHURCHILL'S ARM, EVADED THE LAW, AND CHANGED THE ROLE OF THE AMERICAN PRESIDENCY (1995).

[121] Winston S. Churchill to President Roosevelt, May 15, 1940, 2 CHURCHILL WAR PAPERS 45–46 (M. Gilbert ed. 1995).

[122] *See* BRUFF, *supra* note 37, at 247.

[123] In addition, Roosevelt sought a pledge from the British that in the event the Germans conquered the British Isles, Britain would send its fleets across the Atlantic to continue the fight. *See* SHOGAN, *supra* note 120, BARGAIN at 204–05, 226–27.

[124] KENNEDY TO HULL, FRUS 1940 vol. 3: 67–68. *See generally* SHOGAN, *supra* note 120, at Ch. 10.

from the Naval Register and then sell them.[125] Jackson was preparing a legal opinion to this effect, but Admiral Stark refused to make the required finding of unfitness. The admiral insisted that "such an opinion would be false else the British would not be so anxious to get the same destroyers."[126] The admiral's refusal torpedoed the deal and left it dead in the water.

Jackson was dismayed. At this time, Earnest Cuneo, an American attorney who served as a liaison between the federal government and the British intelligence services, visited Jackson and "found him sad and disturbed. He was off to a [cabinet or lunch] meeting where he had to give the president very disappointing news: the transfer of the 50 destroyers to Britain was unconstitutional."[127]

Cuneo told Jackson that unless he "reverse[d] himself [,] he'd be asked for his resignation."[128] It did not help that Roosevelt told Jackson the same thing. Unless he found a way out of this legal difficulty, Jackson's head "will have to fall."[129] Nonetheless, Jackson kept his head. He came up with a frivolous statutory analysis purporting to establish the President's authority to sell the destroyers.

In desperately concocting a legal analysis to support his President, Jackson might have argued that in national security matters the President had constitutional authority to disregard otherwise applicable statutes. Indeed, a near final draft opinion, provided "In view of your constitutional power as Chief Executive and as Commander in Chief of the Army and Navy, many authorities hold that the Congress could not by statute limit your authority in this respect [i.e., foreign affairs and national security matters]."[130] The draft immediately continued, "I find it unnecessary, however, to pass upon that question."[131]

Someone—either Jackson or surely with Jackson's knowledge—struck this suggestion of an almost limitless constitutional power. Instead, Jackson's final public opinion relied upon a clearly erroneous

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[125] 34 U.S.C. §§ 491–92 (1940).

[126] JAMES LEUTZE, BARGAINING FOR SUPREMACY: ANGLO-AMERICAN NAVAL COLLABORATION, 1937–1941, at 118 (1977) (quoting Stark).

[127] Ernest Cuneo, "For the Record: Crusader to Intrepid," 88, Ernest Cuneo Papers, box 111, FDR Library, Hyde Park, NY.

[128] *Id.*

[129] *See* CASTO, *supra* note 11, at 70. (quoting Roosevelt).

[130] William Casto, *Attorney General Robert Jackson's Brief Encounter with the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 383–95 (2010) (reprinting the draft opinion).

[131] *Id.*

interpretation of the applicable statute.[132] A frivolous statutory construction not subject to significant expansion is superior to a limitless constitutional power.

In assessing Jackson's frivolous statutory analysis, we should frankly recognize that laws may be ambiguous. Moreover, the meaning of an ambiguous statute may be difficult to ascertain. In this regard, there is a respected strand of legal thought that no legal analysis can be conclusively condemned as wrong.[133] After a distinguished career in the law, Kingman Brewster concluded "That every proposition is arguable."[134] This analysis makes more theoretical sense than practical sense. Pushed to its extreme, this legal nihilism destroys the project of having laws to guide people.

The present essay is written on the assumption that under traditional legal analysis, some legal arguments may be properly rejected as simply contrary to law. At least, some legal arguments are so weak that they should be dismissed as frivolous or clearly erroneous.

In the case of the national airport, any notion that federal funds may be spent without prior congressional authorization should be dismissed as frivolous. Similarly, we will see that Jackson, himself, believed that the President's wiretap program was illegal.[135] Likewise, Jackson's opinion on the President's technical authority to convey title to the fifty destroyers was frivolous.[136]

In addition to loyalty, which never should be discounted, a number of factors likely influenced Jackson's decision to support his President. Because a Nazi invasion was imminent, the British needed the destroyers as soon as possible, but there was clear evidence that seeking congressional approval would take an utterly unacceptable amount of time.[137] In President Jefferson's words, no "time [was]

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[132] Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 OP. ATT'Y GEN. 484 (1940) (Att'y Gen. R. Jackson). *See* CASTO, *supra* note 11, at Ch. 5 & 6.

[133] *See, e.g.*, the insightful comments of Professor Alice Ristroph in *Is Law? Constitutional Crisis and Existential Crisis*, 25 CONST. COMM. 431 (2009). Similarly, in the context of the Cuban Missile Crisis, Professor Abram Chayes noted 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." ABRAM CHAYES, THE CUBAN MISSILE CRISIS 27 (1974).

[134] DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 192 (2007) (quoting Brewster).

[135] *See notes* 147–48*, infra* and accompany text.

[136] *See* CASTO, *supra* note 11, at 71–73.

[137] The British pleaded for immediate assistance. *See* CASTO, *supra* note 11, at 78–79. Jackson understood, however, that congressional approval would take "six to eight months." JACKSON, REMINISCENCES at 877.

allowed for a legal course."[138] In addition, President Roosevelt openly announced the deal and submitted himself to the vicissitudes of political blow back. Finally, insofar as congressional power over the disposal of property was concerned, the destroyers deal was another no-harm no-foul situation. President Roosevelt canvassed Congress and found no serious opposition to his unilaterally making the deal without formal congressional approval.[139]

About a decade later, Jackson justified the deal by weighing and balancing the consequences. He "thought that Hitler's government was of such a nature that we couldn't get along with it."[140] Moreover, if the British were conquered, we would be "face to face with Hitler without an ally."[141] He "hated the thought of war."[142] Nevertheless, "when it came to offering aid to England, I didn't have any difficulty. Emotionally I hated it all, but it had to be done."[143]

*D. Wiretapping*

Helping the President to violate the Anti-Deficiency Act and the restrictions on the sale of destroyers were relatively easy political decisions. When Jackson first became Attorney General, he faced a far more difficult problem. In 1940, World War II was raging in Europe, but the United States was technically neutral. President Roosevelt tilted our neutrality as far as possible to favor Great Britain. As part of his policy, the President sought to ferret out Nazi and Communist[144] spies in the United States.

Wiretapping was important in combatting espionage, but wiretapping was illegal under the Communications Act of 1934.[145] In the context of a heated political controversy involving the Federal Bureau of Investigation (FBI), Jackson looked into the issue and banned the FBI from wiretapping. Weak arguments could be made sustaining the FBI's power.[146] For example, some advised Roosevelt that the Constitution empowered the President to ignore the Communications Act, but Jackson consciously rejected this nearly

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[138] *See* note 47, *supra* and accompanying text.

[139] *See* CASTO, *supra* note 11, at 79.

[140] JACKSON, REMINISCENCES at 877.

[141] *Id*. at 913.

[142] *Id*. at 912.

[143] *Id*. at 914.

[144] In 1940, the USSR and Germany were allied. *See* ROGER MOORHOUSE, THE DEVIL'S ALLIANCE: HITLER'S PACT WITH STALIN, 1939–1941 (2014).

[145] Pub. L. No. 416, § 605, 48 Stat. 1064, 47 U.S.C. § 605 (1940).

[146] *See* CASTO, *supra* note 11, at 36–37.

limitless argument.[147] Like in the case of the destroyers-for-bases deal,[148] Jackson was leery of broad constitutional claims. Jackson concluded—based upon two recent Supreme Court decisions[149]—that the Act clearly outlawed government wiretapping. He never changed his mind and restated his clear conclusion in the next year and the early 1950s.[150]

Roosevelt, however, insisted on wiretapping. Jackson went "over the situation carefully" with the President and presumably argued against wiretapping.[151] He advised that wiretapping was illegal, but the President persisted. Jackson's first approach to Roosevelt's prerogative decision was to adopt Fabian tactics of delay. He told Treasury Secretary Morgenthau "that he was not going to do anything about [renewing wiretapping] until after Congress goes home."[152]

In addition, Jackson told the President that he would not engage in wiretapping unless the President gave him a written directive to do so.[153] Unfortunately for Jackson, FBI Director J. Edgar Hoover was intent on renewing wiretapping and mounted an internal guerilla campaign against Jackson's ban.[154] Finally, Hoover went to Treasury Secretary Morgenthau and told him that he "desperately" needed the ban lifted.[155] Morgenthau relayed the message to the President, and Roosevelt immediately replied, "Tell Bob Jackson to send for J. Edgar

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[147] Robert Jackson, "Attorney-Generalship" at 31, Robert H. Jackson papers, box 189, folder 3.

[148] *See* notes 121–23, *supra* and accompany text. Similarly, when Jackson advised Roosevelt on constitutional authority to remove a director of the Tennessee Valley Authority, he drastically deemphasized the president's constitutional authority in the public advisory opinion. See CASTO, *supra* note 11, at 20–22.

[149] United States v. Nardone, 302 U.S. 379 (1937) (Nardone I); Nardone v. United States, 308 U.S. 338 (1937) (Nardone II).

[150] *See* Robert Jackson to the Secretary of the Navy, June 9, 1941, 1 Supplemental Opinions of the Office of Legal Counsel 447–56 (1941), *discussed in* CASTO, *supra* note 11, at 44; *See* JACKSON, *supra* note 53, at 68.

[151] The next year, Roosevelt wanted Jackson to write an opinion that an obscure provision of the Lend Lease Act was unconstitutional. *See* CASTO, *supra* note 11, at Ch. 9. The two men "discussed [the issue] over and over," and Jackson finally told the President, I could not sponsor such an opinion. Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1355–56 (1955); JACKSON, REMINISCENCES at 916. In the end, Roosevelt wrote his own legal opinion.

[152] *See* CASTO, *supra* note 11, at 37 (Morgenthau quoting Jackson).

[153] *Id.* at 37.

[154] *Id.* at 35–37.

[155] *Id*. at 35 (Morgenthau quoting Hoover).

Hoover and order him to do it and a written memorandum will follow."[156]

Jackson agreed to supervise administration of the President's unlawful decision, but he did not like it.[157] He later related, "I had not liked this approach to the problem [because] wiretapping was a source of real danger if it was not adequately supervised."[158] Quoting Oliver Wendell Holmes, he said, "wiretapping is a dirty business."[159] Jackson saw wiretapping as a significant civil rights issue and described the President's lawless decision as evidence that Roosevelt was not a particularly "strong champion of so-called civil rights."[160] The President's decision was especially pernicious because the unlawful program was secret and therefore not subject to effective political review.

Although Jackson reconciled himself to facilitating the President's unlawful intrusion into his fellow Americans' privacy, that does not mean that he was content with his wrongdoing. Bernard Williams has noted that even if an official, on balance, is satisfied with a decision to harm others for consequential reasons, the problem does not vanish. There is a "moral remainder, [an] uncancelled moral disagreeableness."[161]

In Jackson's case, he sought to rectify his misconduct through an enduring effort to convince Congress to amend the wiretapping statute so that the government had a limited authorization to wiretap. In a sense, he was atoning for his sin.[162] He was assuaging his moral remainder. His efforts, however, were quite unrewarding. He related

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[156] *Id*. at 36 (President's secretary quoting the President).

[157] Senator Norris speculated that Jackson might resign. Raymond Clapper memorandum, May 30, 1940, Raymond Clapper Papers, Library of Congress, box 81, folder "May 1940".

[158] *See* JACKSON, *supra* note 53, at 68. Francis Biddle, who at the time was solicitor general, later recalled, "Bob didn't like it and not liking it, turned in over to Edgar Hoover without himself passing on each case." *See* BIDDLE, *supra* note 72, at 167. Hoover kept two separate books on the illegal wire taps. He cleared some taps with Jackson, but he conducted a large number of taps without Jackson's knowledge. CASTO, ADVISING THE PRESIDENT at 38.

[159] JACKSON, REMINISCENCES at 967 (*quoting* Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J. dissenting)).

[160] *See* JACKSON, *supra* note 53, at 68.

[161] Bernard Williams, *Politics and Moral Character*, in PUBLIC AND PRIVATE MORALITY, 55, 63 (Stuart Hampshire ed., 1978). For a valuable elaboration, *See* WENDELL, *supra* note 10, at 171–75.

[162] *See* TIM DARE, THE COUNSEL OF ROGUES?: A DEFENSE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 149–50 (2009); *See* WENDELL, *supra* note 10, at 171–75.

that it was "an extremely unpleasant experience and caused me a great many enemies."[163] He "was going down the middle of the road and being shot from both directions."[164] The moral remainder of his misconduct and the need to atone gave him the personal courage to persist in walking his unpleasant path. Unfortunately, he never reached his destination. In 1941, Roosevelt moved him from the attorney generalship to the United States Supreme Court.

*E. Resignation*

When a high-level cabinet official like the Attorney General becomes dissatisfied with the government's actions, resignation or exit is a theoretical alternative to voice within the administration. A high-level officer might resign under protest or just simply resign.

As a historical fact, high-level officials almost never resign in protest. The authors of a well-known study[165] found that just seven high-level officials resigned in protest during the period 1900 to 1969. Given Jackson's willingness to facilitate the President's unlawful projects, a resignation by him in protest is virtually inconceivable.

Nor does it appear that Jackson ever seriously considered a simple resignation without protest.[166] Because he exerted significant influence over Roosevelt's decisions, he was highly unlikely to resign. In addition, his job was significantly different from high-level management positions in private enterprise. In the private sector, an employee may make a clean break by simply resigning and moving on to other employment. After resigning, they would have little interest in the well-being of their erstwhile employer. Making a clean break with the federal government is different. After a resignation, a cabinet officer

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[163] JACKSON, REMINISCENCES at 983.

[164] Jackson, "Attorney-Generalship" at 33.

[165] EDWARD WEISBAND & THOMAS FRANCK, RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIVE (1975).

[166] In May 1940, Jackson was extremely upset by one of Roosevelt's fireside chats in which the president warned the nation of a Fifth Column of Nazi and Communist provocateurs and sympathizers who would attack our nation from within. *See* CASTO, ADVISING THE PRESIDENT at 121–22. He told the president in private, "I am utterly opposed to . . . persecuting or prosecuting aliens just because of alienage." *See* note 74, *supra* and accompanying text. In an interview with a respected reporter, Jackson "showed real heat" and worried that antiunion interests might use the issue "to break down labor." Raymond Clapper, "Communism, Fifth Column Attorney General Robt Jackson," May 27, 1940, Raymond Clapper Papers, box 9, folder 6, Library of Congress. He assured the reporter, "I'm not going to stay here and do another Mitchell Palmer red raids. . . . I'll quit the job before I'll do that." *Id.; See* CASTO, *supra* note 11, at 121–22 (Palmer raids). In the event, Roosevelt did not encourage attacks on possible Fifth Columnists.

remains a citizen and continues to be interested in the public goods that the government provides to them and others.[167]

There was also the matter of Jackson's immense loyalty to his President. At the end of Jackson's first year as Attorney General, Jackson was entirely dissatisfied with his position. He particularly hated the administrative and political aspects of the job. He told a close friend: "What is ahead is just plain damned disagreeable service."[168] He even wrote, "I may at any time find it impossible to go on."[169] But loyalty carried the day, "it simply was not possible to walk out on the President, as long as he wanted me."[170]

## V. CONCLUSION

As a practical matter, the law does not provide a realistic legal sanction against an attorney general who enters a criminal conspiracy with the president. Michael Walzer has explained, that in these situations "rules are broken for reasons of state, and no one provides the punishment."[171] Practice seems to be consistent with Walzer's assumption. For example, in the case of our illegal torture program under President George W. Bush, officials bent over backwards to avoid sanctioning the attorneys who wrote a frivolous legal opinion to facilitate unlawful torture.[172]

There are cogent political reasons for not punishing attorneys general. Although a candidate in a hotly contested election might wildly insist that his opponent should be sent to jail, this idea—without regard to the legality of the opponent's conduct—is utterly unacceptable. A tradition that the winner in a presidential campaign should launch a criminal investigation against the loser would be disastrous. In a somewhat comparable situation, President Gerald Ford did the nation an immense favor by pardoning former President Richard Nixon.[173]

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[167] *See* HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES at 102, 104–05.

[168] Robert Jackson to George Neibank, Dec. 4, 1940, Jackson Papers, box 11, Neibank folder.

[169] *Id*.

[170] JACKSON, REMINISCENCES at 1081.

[171] Walzer, *Political Action: The Problem of Dirty Hands*, at 179.

[172] William Casto, *Advising the President: Robert H. Jackson and the Problem of Dirty Hands*, 26 GEORGETOWN J. LEG. ETH. 183, 210–11 (2013).

[173] At that time, I was appalled by the pardon. But in retrospect, President Ford did the right thing. He spared the nation from continuing the Watergate chaos, and he prevented the establishment of an unwise precedent.

These same considerations would be applicable to the prosecution of a former attorney general.[174]

In theory, a lawless President and their lawless Attorney General are subject to impeachment and removal from office. This possibility, however, is at best remote. Emile Borel's Infinite Monkey Theorem comes to mind.[175] In our history, only three Presidents were impeached, and not one was removed. In this regard, there is a powerful non-constitutional structural impediment to removal. In the *Steel Seizure* Case, Justice Jackson noted that the President "heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own."[176] Since the impeachment of a President or their Attorney General is inevitably political, it is fortunate that in practice the two-thirds requirement for removal[177] requires the assent of Senators from the President's party.

Because in practice there are no legal sanctions against attorneys general for misconduct in office, we should not be chary about passing moral judgment on their actions. When Robert Jackson held that office, he saw himself as "part of a team . . . and necessarily partisan."[178] Today's Attorneys General operate much the same way but perhaps with less restraint than Jackson demonstrated. In truth, the Attorney General has become, more or less, one of the President's many political operatives. At least that is true of some. The attorney general simply happens to be an attorney. Like any other political flack, the attorney general is morally responsible for the president's agenda that the attorney general advocates and facilitates.

Outside of litigation,[179] the coincidental fact that an attorney general happens to be a lawyer serving a client should not restrain our moral judgment. When Robert Jackson helped the President and future Presidents violate the Communications Act and intrude upon his and our citizens' privacy, he did the wrong thing, and his misconduct should

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[174] If a President seeks indictment of his own Attorney General, these considerations are not relevant.

[175] Emile Borel, *La Mécanique Statistique et Irréversibilité*, 3 J. PHYS. THEO. APP. 189–96 (1913). *See also* ARTHUR EDDINGTON, THE NATURE OF THE PHYSICAL WORLD 72 (1927).

[176] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (concurring opinion). *See* JACKSON, *supra* note 53, at 17.

[177] U.S. CONST., art. I, § 3.

[178] *See* note 52, *supra* and accompanying text.

[179] In litigation, an attorney's actions are formally subject to other attorneys' counteractions. In addition, litigation is subject to theoretically neutral arbitration by judges and juries.

be condemned. Likewise, when he helped send illegal aid to the British, he did the right thing and should be praised.

President Jefferson understood that a President who acts unlawfully should be subject to moral and political judgment. He must "throw himself on the justice of his country and the rectitude of his motives."[180] A lawless attorney general should be subject to the same moral and political judgment.

Each particular action by an attorney general should be assessed using moral scales, but an overall assessment should be more forgiving. As one of our great ethical thinkers once said, "He who is without sin among you, let him first cast a stone at her."[181] Like all of us, Jackson was a sinner, but our general judgment should be based upon his overall conduct. In this latter sense, he was a good and honorable Attorney General. The same cannot be said of all of his successors.

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[180] *See* Jefferson to Colvin, *supra* note 40 and accompanying text.

[181] John 8:7 (King James).