

Obama's White House Counsels:  
Serving the President With No Margin for Error

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The office of White House Counsel is often a hazy concept to the general public. People hear the word "counsel" or lawyer" in the executive branch, and they think of lawyers in the Justice Department, and even politically savvy people may think, "oh, the Office of Legal Counsel in the Justice Department, the one that wrote the torture memo during the George W. Bush administration – that's it!"

But I like to explain the White House Counsel's office by focusing on geography: there are lawyers *inside* the White House, and there are lawyers *outside* of the White House. The lawyers *outside* of the White House are in the Justice Department (and in all other executive branch departments and agencies), while the White House Counsel is located *inside* the White House, as a presidential appointee and as a member of the White House staff. As such, the Counsel serves at the will of the president and is not subject to Senate confirmation (in contrast to presidentially-appointed lawyers in the Justice Department who *are* required to be Senate-confirmed).

As a government lawyer, the White House counsel provides legal advice to the president in his official capacity. Stated more precisely, the counsel is "the lawyer for the office of the presidency." *Presidents* come and go, after occupying the office for four or eight years, but the *office of the presidency* remains, from one temporary occupant to the next. The counsel's job is always a delicate and strategic balancing act, as "it sits at the intersection of law, politics and policy" (Borrelli, Hult, Kassop and Tenpas 2021). The immense challenge is to reconcile all *three*, without sacrificing too much of any *one*. Presidents make policy, but policies must be consistent with the law, and the counsel's baseline responsibility is to interpret the law for the president. Ultimately, the counsel's obligation, according to Obama counsel Bob Bauer, is to give the president "a reasonable, plausible legal analysis" that would permit the president to implement a proposed policy in a manner that complies with the law: in essence, the counsel seeks to "find a way" to provide the necessary legal advice that will enable the president to accomplish his policy objectives within the confines of the law (Bauer interview, July 5, 2016).

Bauer expanded on this explanation in a talk at NYU School of Law in March 2015, remarking that "There's no point at which sound legal analysis is set to the side for political

considerations. But like in any business, no lawyer counsels a client intelligently unless the lawyer thoroughly understands the client's 'business,' the industry, the context in which the client is operating. The White House counsel has to bring to bear an understanding of the policy and political background in talking about the choice among viable legal alternatives."

(“Former White House counsel Robert Bauer...2015)

But precisely because the office needs to be cognizant of political realities while dispensing sound legal advice to the nation's chief executive, and because the office's "client" is being scrutinized constantly by the public for every action the president takes and word he utters, the burden on the Counsel's office to "get it right" is crushing and unceasing (hence, the sub-title of this paper, "no margin for error").

The pace of the work is incessant, and the pressure to ensure against errors of substance or judgment, unrelenting. The office exists in a fishbowl, is subject to searing public criticism when it makes the slightest misstep, and yet prompts intense loyalty among those who have been privileged to serve in it. (Borrelli, Hult, Kassop and Tenpas, 2021)

President Obama had four White House counsels during his eight years in office, serving in the following order: Gregory Craig; Bob Bauer; Kathryn Ruemmler; and Neil Eggleston. Each one was a veteran Washington lawyer, and all had served previously in government positions. Thus, all came to the Counsel's office with an understanding of the requirements as well as the incessant demands of the job. And demanding it was! In any two-term presidency, the responsibilities and issues to be tackled by White House staffers will be wide-ranging: some are routine functions that every administration performs, while the greatest potential for self-inflicted wounds comes from the unpredictable crises and seemingly intractable policy and political challenges that arise inevitably in every administration. Because the Counsel's primary role is to provide sound legal advice to the office of the presidency, while being attentive to the political dynamics of the moment, this White House staff member provides input on just about every matter that a president confronts, and, often, when time is of the essence and information is incomplete and still incoming. Lloyd Cutler, the White House Counsel to both Presidents Carter and Clinton, expressed this well: "You're acting on the basis of not enough information and there's always this

gnawing fear that you've gotten something wrong or you've said something you shouldn't have said" (Borrelli, Hult, Kassop and Tenpas, 2021).

This paper will begin by briefly explaining the traditional functions that the Counsel's office performs. Next, it will examine a few areas in the Obama administration where the Counsel's office played an integral role. Specifically, it will examine 1) an initial set of executive orders issued in the first days of the new administration; 2) its record of judicial appointments; and 2) its actions in Libya in 2011.

### **Functions of the Counsel's Office**

The traditional functions that the Counsel's office performs include: advising on the exercise of presidential powers (issuing executive orders, actions as commander-in-chief and on national security matters, determining assertions of executive privilege, pardons, etc.); overseeing presidential nominations to the executive and judicial branches; advising the president on actions relating to the legislative process; educating White House staff on ethics rules and records management; and managing relations with the departments and agencies, with especially careful attention to the Department of Justice.

The office carries out many routine tasks, but it also operates as a "command center" when crises or scandals erupt (Borrelli, Hult, Kassop and Tenpas 2021). An alert counsel will act as an "early warning system" for potential legal trouble spots before they surface. Past counsels have said that this requires "being at the right meetings at the right time and knowing which people have information or necessary technical knowledge in specific policy areas" (Borrelli, Hult, Kassop and Tenpas 2021). With the excessively polarized political atmosphere of recent years, the office has been thrust into a heightened public presence, in sharp contrast to the more traditional, low profile that it prefers to maintain. Because the work has a high-stakes nature to it, the counsel and her staff are all too aware that there is "no margin for error" as they navigate uncertain and often treacherous terrain. To compound the challenge – and to distinguish the counsel's role from that of most private attorneys – counsels can be required to make split-second decisions with less than full information, even as that information continues to change at a rapid pace (every lawyer's worst nightmare – and the counsel's working reality).

When asked about the frustration of having to make on-the-spot decisions with less than perfect information, Norm Eisen, who served in the Obama Counsel’s Office as the person overseeing ethics for the administration, commented:

Yes, it’s hard. The consequences are vast. If you get it wrong, it can be embarrassing and harmful to the president, to other stakeholders, to the nation. On national security issues, it can be dangerous, it can be a matter of life or death. (Eisen interview, July 5, 2016)

## **Where the Counsel Played an Integral Role in the Obama Administration**

### **A. First round of executive orders**

It has now become routine during the transition period for all presidents-elect to prepare a set of executive orders to be ready to roll out on their first days in office. Immediately following the 2008 election, President-elect Obama tapped a group of lawyers, headed by his incoming White House counsel, Gregory Craig, to perform this task. Craig commented on the process that goes into producing an executive order, and noted that it was essential to “talk to your political stakeholders on the Hill... talk to the people who are in the departments and the bureaucracies... so that when the executive order comes out, there’s going to be a minimum of surprise” (Craig interview, July 6, 2016). He noted that during the transition, his team had prepared 25-30 possible executive orders to present to Obama for his consideration. In the end, five executive orders were issued in the first two days of the new administration, with others following soon thereafter.

On January 21, 2009, the day after the inauguration, President Obama issued his first two executive orders: “Ethics Commitments by Executive Branch Personnel” (EO 13490); and “Presidential Records” (EO 13489). The following day, he issued three more, all pertaining to antiterrorism policies of detention and interrogation: “Ensuring Lawful Interrogations” (EO 13491); “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities” (EO 13492); and “Review of Detention Policy Options” (EO 13493).

There are important points to note here. First, it is common for incoming presidents to revoke or modify executive orders issued by their predecessor, and Obama followed this practice. The executive order on presidential records, EO 13489, revoked EO 13233, issued by former President George W. Bush on November 1, 2001, which had increased the power of former presidents and former vice presidents to claim executive privilege over their White House documents and had imposed new, burdensome restrictions on requests for presidential records that put obstacles in the way of scholars and journalists, who challenged (unsuccessfully) these new Bush provisions in court (EO 13489). Thus, Obama's order on presidential records rolled back the Bush provisions, restoring the records request process to its earlier pre-Bush version.

The three antiterrorism executive orders followed from promises that candidate Obama had made during the 2008 presidential campaign (and these three orders, also, reversed controversial policies from the Bush administration). EO 13491 revoked all executive orders issued from September 11, 2001 to January 20, 2009 on matters of detention or interrogation that were "inconsistent" with Obama's new order, and provided that Common Article 3 standards of the Geneva Conventions and the Army Field Manual were to be the minimum baseline for interrogation techniques and detainee treatment. Of special significance, this executive order prohibited any U.S. government employee from "rely(ing) upon any interpretation of the law governing interrogation...issued by the Department of Justice between September 11, 2001 and January 20, 2009" (EO 13491). This was an explicit overturning of the explosive August 1, 2002 legal opinion from the Office of Legal Counsel in the Department of Justice (aka "the torture memo") during the Bush administration that had authorized CIA officials to use "enhanced interrogation techniques" on terrorist detainees: thus, on his first full day in office, Obama followed through on that express campaign promise to prohibit the use of torture by any official in the U.S government.

But it was EO 13492, providing that "The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than one year from the date of this order" that would haunt the administration for its entire eight years in office and would remain forever part

of Obama's legacy as a missed – or miscalculated – opportunity. Explanations for this failure included reasons both external and internal to the administration (EO 13492). They ranged from a) the suggestion that White House Counsel Greg Craig had been overly optimistic and naïve about the entrenched political obstacles to closing Guantanamo, wildly underestimating the consistent congressional and public opposition to closure if it would result in bringing detainees to the U.S. mainland to house them in domestic prison facilities (manifested in the public reaction as “NIMBY,” “not in my backyard”)(Gerstein and Allen 2009), to b) an “open secret” that Craig's dogged efforts to keep Guantanamo closure on the front burner were effectively undermined and dashed by Chief of Staff Rahm Emanuel's single-minded focus on making sure that no other administration policy would upstage the effort to *first* pass the Affordable Care Act (immortalized by Emanuel in the acronym, “AHC,” as in “after health care,”), meaning that *nothing* should stand in the way of getting Congress to pass this landmark legislation that would be the signature accomplishment of the Obama presidency.<sup>1</sup> The tension between Craig and Emanuel was well-known, and was likely to have been a contributing factor to Craig's departure from the White House before the end of the first year (Bruck 2016). The scorecard, thus, was: Craig was “out” with no closure of Guantanamo, while Emanuel remained, and the Affordable Care Act was passed by Congress in March 2010.

As in any administration, personality clashes are bound to arise, as are, also, differences over policy priorities. Both of those features were at work here, but the Craig-Emanuel conflict illustrates an additional

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<sup>1</sup>The conflict with Emanuel grew out of Emanuel's single-minded goal to insure the passage of health insurance reform early in Obama's tenure. Journalist Daniel Klaidman has written about Emanuel that “His job, as he saw it, was keeping the president focused on the Main Chance, reforming health care while fighting two wars and staving off a depression. Guantanamo was just a pain-in-the-ass distraction, he told Craig. ‘We are trying to bring in two 747s (the wars in Afghanistan and Iraq) at the same time we are trying to reform our national health care system, and right in the middle you want to send up a flock of Canadian geese, which is Guantanamo, which could take down one of those 747s’ (Klaidman 2012, 110). Also in Klaidman: “The rule of law agenda would have to wait, as the health bill soon overwhelmed many other initiatives, subordinating almost all other questions. White House staffers called it “triage,” the inescapable reality, as they saw it, of a president's having to choose among policy priorities. They used the abbreviation, AHC, or “after health care,” to refer to everything else they hoped to accomplish (Klaidman 2012, 2).

source of potential tension: a difference between a legal advisor and a political one over priorities to be pursued with the limited political capital a president possesses. Craig wanted to deliver a “win” for the White House that would restore the legal and moral high ground to the U.S. reputation after being tarnished by its predecessor by some of the Bush administration’s harshest post-9/11 policies, while Emanuel believed the administration’s scarce political resources would be better utilized to score a major policy success with the promise of enormous, long-term political benefits. Craig saw closing Guantanamo as a *legal* imperative, while Emanuel was singularly motivated to deliver a *policy* home run for the president, thus, underscoring that seemingly impossible challenge for the counsel to maintain a balance among “law, politics and policy” (Borrelli, Hult, Kassop and Tenpas 2021).

For his part, Craig defended the decision to promote an early Guantanamo closure, saying that, in fact, there were respected foreign policy officials who thought that the one year deadline was *too conservative* a time frame: “Colin Powell said it should be closed on your first day. In fact, yesterday, that’s what he said... the habeas lawyers said, at the most, 30 days” (Craig interview, July 6, 2016). He included Mike Mullen, Bob Gates, Janet Napolitano, and John McCain, also, who endorsed the one-year time frame as non-controversial. But Congress simply was not on board, and in May 2009, it passed the first of repeated bans that prohibited the use of funds for the purpose of transferring detainees to the U.S. mainland (Gerstein and Allen 2009). Congressional Democrats complained that the White House was not sufficiently proactive on Guantanamo, and that it never managed to produce a coherent plan for closure that Democrats could present to Congress (Bruck 2016).

On the upside, it should also be noted (and not overlooked!) that the Obama administration has been described as unusually “scandal-free,” and some credit for that may be traced back to the executive order addressing “Ethics Commitments by Executive Branch Personnel” (EO 13490), drafted by White House special counsel Norm Eisen (completely different from a Department of Justice special counsel) and issued as one of those first two orders on Obama’s first full day in office. That order imposed strict restrictions on “every appointee in every executive agency appointed on or after January 20, 2009,”



requiring them to sign a pledge acknowledging their obligation to comply with “revolving door bans” on appointees and lobbyists entering and leaving the administration as well as a total ban on gifts from lobbyists (EO13490). Issuing that order right at the very beginning of the administration was a clear signal of how ethics and transparency would be priorities for the new president, demonstrating the common maxim of “tone at the top.” *This* president expected integrity and transparency from his appointees, and, using a first-day executive order to publicize that expectation sent an unmistakable, strong message to all who would work for him. The result was that, over his eight years in office, his administration gained the enviable reputation of leaving office with no scandals to its name.

As counsels with responsibility for executive orders, Craig played an influential role early on, though he stepped down under less-than-ideal circumstances, while Eisen was the administration’s “point-person” within the counsel’s office on ethics and transparency, and he was effective in communicating those imperatives to the president’s appointees.

#### B. Judicial appointments to the Supreme Court and lower federal courts

Every president looks to their constitutional authority to appoint federal judges with lifetime tenure as a chance to make a lasting contribution to the nation and to their own legacy, one that will endure long after that president vacates the Oval Office. The appointment of judges by Obama to the federal courts is largely a success story that will rank highly among his domestic policy legacy. However, it is an uneven story, and one with a glaring exception to an otherwise “good news” report. Obama left an impressive imprint on the judiciary, but that accomplishment ended with the disastrous debacle in 2016 of the unsuccessful nomination of Judge Merrick Garland to the Supreme Court vacancy left by Justice Scalia’s untimely death, and, thus, paved the way for President Trump to make the first of three Supreme Court appointments that have profoundly affected the direction of the Court’s subsequent decisions.

The Counsel’s office has the primary responsibility for compiling a list of prospective judicial candidates, for vetting those candidates, and, generally, for shepherding nominees through the judicial appointment process. Over the last few presidencies, the Counsel’s office has increased its influence and

has taken the lead role in this process, thereby, reducing the input of the Office of Legal Policy in the Department of Justice: thus, credit for success or blame for failure lies squarely with the counsel.

The administration had a slow start to its judicial appointment process, partially as a result of juggling two Supreme Court appointments within its first two years. Given that Supreme Court appointments usually take priority over all else, they are often characterized as “sucking up all of the oxygen in the room.” In Obama’s case, they occupied an inordinate amount of White House time, attention and resources at the very point when a new administration hopes to promote aggressively its legislative agenda. So, the Counsel’s office prioritized these two (successful) Supreme Court appointments, at the expense of giving its full attention in those first two years to lower federal court appointments (Slotnick, Goldman and Schiavoni 2015). It recovered somewhat in subsequent years, but also ran into a filibuster roadblock by Republican senators in 2013, ultimately overcome when then-Majority Leader Harry Reid finessed the death of the filibuster from the minority’s arsenal for lower court appointments via the “nuclear option” in November 2013. This controversial move benefited the Democrats – and paved the way for confirmation of many of Obama’s nominees, who had been subjected to long delays and obstructive tactics by the minority for the previous year – but the nuclear option came back to haunt Democrats when Senate Republicans in the next administration employed the same tactic to remove the filibuster for Supreme Court nominees.

Overall, the administration succeeded in generating a similar number of appointments of lower federal court judges as Obama’s most recent predecessors. Its hallmark, however, was its strong emphasis on increasing the diversity of the judiciary, an accomplishment that serves as its most distinctive and enduring feature, exceeding all previous presidents in that effort.

1. Supreme Court appointments of Sotomayor and Kagan

Obama had the good fortune in his first term to fill two vacancies on the Supreme Court, appointing Sonia Sotomayor in 2009, and Elena Kagan in 2010 with relatively comfortable confirmation votes of 68-31 for Justice Sotomayor and 63-37 for Justice Kagan (numbers that would be very unlikely in today’s

partisan environment). He received some backlash from liberal Democrats who criticized these appointments for being too moderate and more cautious than they might have been and for his reluctance to nominate more overtly progressive candidates to counterbalance the conservative justices appointed to the Court by Republican presidents (Yalof 2011).

A key role for White House counsels in the judicial appointments process is to prepare, well in advance of any vacancy announcements, lists of potential nominees for the Supreme Court and for all lower federal courts. Counsel Greg Craig had a list of prospective Supreme Court nominees ready to go when Justice David Souter announced his retirement from the Court in April 2009. Craig's list prioritized two demographic characteristics that Obama wanted to satisfy in his judicial appointments: women and candidates of Latino heritage. Obama brought four women candidates to the White House for interviews in May 2009: Sotomayor, Kagan, Seventh Circuit Court of Appeals Judge Diane Wood, and DHS Secretary Janet Napolitano (Yalof 2011). Clearly, Sotomayor satisfied *both* criteria that Obama wished to fulfill, and, thus, after her successful interview with the president, she emerged as his choice (Yalof 2011). With this historic appointment of the first Latina to the Supreme Court, Obama "checked" some political boxes: his 2008 presidential election victory was boosted by support from women, 56%-43%, Obama over McCain, and by heavy support from Latinos (the fastest growing group of Democratic Party voters), 67%-31%, Obama over McCain (Roper Center 2023). It did not hurt to reward those two important Democratic constituencies with these high-profile, lifetime appointments.

## 2. Appointments to the lower federal courts

By the numbers alone, Obama added a comparable number of judges to the federal bench as his most recent predecessors (Obama, 331; George W. Bush, 340; Clinton, 387). But his appointments were notable for the following reasons: a) he boosted the diversity of the federal bench in ways that far exceeded previous presidents; 2) his appointments increased the ratio of all federal judges appointed by Democratic presidents over those appointed by Republican presidents, and 3) he "flipped" the partisan ratio on seven of the thirteen circuit courts of appeals. Given the fact that so few cases are decided each year by the Supreme

Court (approximately 70), it is the appeals courts that have what can be described as “the last word” on matters of federal law.

### **Increased the diversity of the federal judiciary**

Numbers tell the story here. Of the 329 lower federal court judges appointed by Obama, 42% were women (134), and 37% were racial or ethnic minorities (115 total: 62 Black; 35 Latino; 20 Asian American; 1 Native American, and 10 openly gay [right: I know the numbers don’t quite match up...but they are close enough, and you get the picture!]). He appointed more women and Latinos to the federal courts than any previous president, and he appointed more Asian-Americans (20) than all previous presidents combined, and more openly gay judges (10) than had ever served as federal judges (Yalof 2021; Gramlich 2021; Slotnick, Schiavoni and Goldman 2017).

### **Increased the ratio of lower court judges appointed by Democratic presidents to those appointed by Republican presidents**

When Obama left office in January 2017, his lower court appointments from the previous eight years gave a 4-3 advantage to judges appointed by Democratic presidents over those appointed by Republican presidents. Out of approximately 800 lower court federal judges at that time, 437 were Democratic appointees to 314 Republican appointees. This “edge” meant an increased chance of Democratic judges hearing proportionately more cases at the district court level and, even more significantly, a stronger likelihood that at least one if not more judges appointed by Democratic presidents would sit on three-judge panels at the appeals court level, increasing the odds of decisions favoring Democratic/liberal outcomes. Of special significance was the change in partisan make-up of the Fourth Circuit Court of Appeals and the all-important D.C. Circuit Court of Appeals. In 2009, at the start of Obama’s presidency, Republican appointees dominated the Fourth Circuit, 7-4 (4 vacant) and the D.C. Circuit, 6-3 (2 vacant). As a result of Obama’s appointments, judges appointed by Democratic presidents now dominated these courts: 9-6 on the Fourth Circuit, and 7-4 on the D.C. Circuit (Slotnick, Schiavoni and Goldman 2017).

## **“Flipping” appeals courts from Republican majority to Democratic majority**

The change (or “flip”) in the ratio of judges designated by the party of their appointing president on the Fourth Circuit and on the D.C. Circuit was magnified when we consider the effect of Obama’s appointments on all thirteen appeals courts. When Obama entered office in January 2009, only *one* circuit court out of thirteen had a majority of judges appointed by Democratic presidents, while *nine* had judges appointed by Republicans, and two courts were evenly divided. By the time he left office in January 2017, that ratio had “flipped” to *nine* appeals courts with a Democratic majority and *four* with a Republican majority (Slotnick, Schiavoni and Goldman 2017).

The leading political science scholars on judicial politics concluded that Obama “left a legacy including the transformation of the federal judiciary not only in terms of its gender/racial/ethnic diversity but also in terms of its ideological and judicial philosophical orientation” (Slotnick, Schiavoni and Goldman 2017). Had the nomination of Judge Merrick Garland to the Supreme Court succeeded, that “transformation” in ideological terms and the impact on Obama’s legacy would have likely been even greater. But Majority Leader McConnell’s iron grip on the Senate throughout 2016 to refuse to pursue a Garland confirmation process made that scenario impossible – and the rest is, as they say, “history.” But given the counsel’s primary and outsized role in the judicial appointment process, it is accurate to credit the four counsels over two terms with producing a major component of Obama’s legacy (Bendery 2017; Kassop 2023; Judicial Appointment History 2023; Judgeship Appointments by President 2022).

### **C. U.S. Intervention in Libya in 2011**

On foreign policy, Obama’s decision to intervene in Libya in 2011 was, by his own public admission, his “worst mistake” (Tierney 2016). That was a *policy* conclusion, based on his reflection that although the U.S. involvement in NATO air strikes over Libya were successful as a military operation in taking out Muammar Qaddafi from power, Obama, in retrospect, admitted that the U.S. had no coherent plan for “the day after,” for how a new government would be formed and how reconstruction of the country would proceed. He was determined to avoid any appearance of “nation-building” by the U.S. in

post-Qaddafi Libya, but the lack of planning resulted, tragically, in a deadly political instability and competition for power inside the country among rival militia groups and the prominence of ISIS (Tierney 2016).

But the other “story” of the decision by the U.S. to intervene in Libya was the public revelation of an extraordinary internal debate among administration lawyers over the legal requirements governing military action by the U.S. in a conflict where there were no American lives or property at stake and where the justification for intervention was for humanitarian purposes and a general interest in promoting regional peace and security.

Two *New York Times* reporters, Charlie Savage and Mark Landler, broke the story wide open in mid-June 2011 when they chronicled the disagreement between two separate camps of administration lawyers who offered conflicting views on the constitutional and legal advice to give to the president (Savage and Landler 2011). At issue was whether, under the War Powers Resolution of 1973, U.S. military involvement in Libya constituted “hostilities,” the operative criterion under the 1973 law that would require the administration to obtain congressional authorization to continue its military involvement *beyond* the initial 60-90 days of U.S. participation. The unfolding of this debate over executive branch legal interpretation provides a revealing view of just how influential a White House counsel can be in matters as consequential as advising the president on his authority to commit U.S. military forces to combat.

The relevance of the War Powers Resolution to the U.S. actions in Libya occurred at two points in time: at the initial commitment of the U.S. to air strikes in Libya in March 2011 under NATO’s lead and supported by a UN Security Council Resolution that authorized a no-fly zone over Libya; and at the 60-90 day point, beyond which the law required the U.S. to either cease operations or get statutory authorization from Congress to extend U.S. actions in Libya (the 1973 law contains *some* “wiggle room” in that it provides for a 60-90 day period before the requirement of congressional action kicks in. The 60-day point was reached on May 20, although the real crunch came as the administration approached the 90-day point

in June). Both points hinged on an interpretation of whether the U.S. was engaged in “hostilities,” a term that is not defined in the law.

When Obama ordered U.S. military forces to begin to carry out air strikes in Libya in March, he relied on his constitutional authority as Commander-in-Chief, as well as the UN resolution (although there is much skepticism among constitutional scholars as to whether a UN resolution qualifies as “authorization” for a U.S. president to order the use of military force: both the Constitution and the War Powers Resolution specifically refer to “*congressional* authorization.” Many scholars reject the idea that the U.N., an international organization, can serve as a legitimate proxy for Congress [e.g., Fisher 1997; Fisher 2012]).

Obama did not ask Congress for authorization at the start of this military action, although, as required by the law, he notified Congress in March that he had ordered the U.S. to undertake military action in Libya. Caroline Krass, assistant attorney general in charge of the Office of Legal Counsel (OLC) in the Department of Justice, provided a memorandum opinion that concluded that the president had constitutional authority to use force in Libya on the basis of his determination that this action would be in the national interest (Krass 2011). But as the 90-day point was approaching, Congress warned the administration that it needed to comply with the War Powers Resolution’s requirement for specific statutory authorization if it intended to continue operations in Libya. It was at this point that the debate among the lawyers ensued over whether the law required the administration to seek approval from Congress.

Lawyers in the Obama administration generally developed legal advice on national security matters through regular meetings of an interagency “Lawyers Group,” headed by the Legal Adviser for the National Security Council and composed of senior lawyers from relevant national security agencies. This group deliberated when matters called for its advice, and it had the objective of reaching consensus on the national security legal advice it would present to the president whenever that need arose (De Rosa 2018).

But when it came to coordinating legal advice to Obama on Libya, that process was strained and stretched, provoking opposing advice from two pairs of lawyers.

On one side were the White House Counsel Bob Bauer and the State Department Legal Adviser Harold Koh, who argued that the War Powers Resolution did not apply in these circumstances because 1) there were no longer “hostilities” involving U.S. forces, since NATO took over full responsibility for the no-fly zone back in early April; 2) U.S. operations in Libya at this point were of “limited nature, scope and duration;” 3) there were no U.S. ground forces under serious threat; and 4) the War Powers Resolution was not intended to apply in circumstances short of “hostilities” (Koh 2011).

On the other side, rejecting these arguments and maintaining, alternatively, that Obama was, indeed, required to obtain approval from Congress to continue military operations were Jeh Johnson, general counsel in the Department of Defense, and OLC attorney Krass (whose position at the 90-day mark differed from her earlier one at the initiation in March of the use of force in Libya by the U.S.).

There were two controversies that divided these two camps of lawyers. The immediate issue centered on the technical question of exactly which military activities constituted “hostilities.” White House Counsel Bauer and State Department Legal Adviser Koh took a narrow view of the definition, thus, leading to their conclusion that the precise military circumstances existing in mid-June 2011 did *not* meet their definition of “hostilities.” Department of Defense counsel Johnson and OLC attorney Krass believed exactly the opposite, and they advocated for Obama to seek congressional authorization (Savage 2011).

But, in addition to the interpretive dispute over whether conditions satisfied the requirement of “hostilities,” as envisioned in the law, the more looming disagreement with more deep-seated implications that precipitated a robust exchange among the lawyers (and spilled over into the wider community of legal scholars) was actually over the *standard* and the *process* for providing legal advice to the president in national security decision-making. Here, there had been a clear break with the traditional practice, and the change in this process had been driven by White House Counsel Bauer, based on his personal approach to advising the president.



### **“Reasonable, plausible legal analysis” vs. “Best view of the law”**

Bauer operated on his view that the counsel, especially when rendering national security legal advice, “owed it to the president to give him a ‘reasonable, plausible legal analysis’” that would enable the president to undertake his preferred policy (Bauer interview, July 5, 2016). Bauer’s “reasonable, plausible legal analysis” ran directly contrary to the traditional principle under which OLC had operated, memorialized in a “best practices” memorandum from OLC in 2010, which was that OLC “must provide advice based on its best understanding of what the law requires—not simply an advocate’s defense of the contemplated action or position proposed by an agency or the Administration” (Barron 2010). Thus, the two sides maintained a clear difference in the appropriate standard of legal advice that executive branch lawyers owed to the president: “reasonable, plausible legal analysis” articulated by Bauer, and endorsed by Koh, versus “the best view of the law,” the traditional OLC view followed by Krass and joined by Johnson.

Added to these divergent views of the *standard* of advice was another disagreement over the appropriate *role* of OLC in the national security legal advising process. Here, too, Bauer ran a process that had differed from past practice by controlling it this time from the White House (Isikoff 2011). Previously, OLC had been the “lead” unit in requesting views from those government agencies and officials with a role in national security policymaking, especially, from the State Department Legal Adviser and the general counsel of the Department of Defense, and then sifting and coordinating those views as it prepared its legal opinion on the matter to share with all participants.

Instead, this time, press accounts reported that Bauer initiated the request for the views of State and Defense, along with OLC’s views, also. The change here, then, was that OLC was now one of a number of executive branch units that were included in discussions, but OLC no longer occupied the primary (or, at least, initiating) role it had enjoyed in the past (Isikoff 2011).

When confronted with criticism of what appeared to be his “demotion” of the role of OLC, Bauer explained that OLC was informed and included throughout the legal advising process in the Libya incident. The key for him was the following:

“I was not going to lock the President out of options by saying, ‘it’s OLC’s decision.’ Because I didn’t think it *was* OLC’s decision. I thought that OLC should be consulted, and I thought they should be fairly represented to the President. And all the legal views from every corner of the government that had an interest in the outcome *were* fairly represented in this process...But I was completely comfortable, as White House Counsel taking a position on this that was other than the position that, “Well, we have to let OLC decide” ... because I didn’t think that was actually the best way to serve the President’s interests in those circumstances.”  
(Bauer interview, July 5, 2016)

Bauer further explained this approach in his talk at NYU School of Law in March 2015, saying that

at the very end of the day, there are judgments that are made by the president of the United States, and those are his judgments to make. The White House counsel helps the president understand what differences among the agencies are. What is critically important is that the process by which those judgments are elicited is an open process in which there is ample discussion with all components of the government. (Former White House counsel Robert Bauer... 2015)

Bauer’s re-orienting of the national security legal advising process for the Libya intervention exposed and fueled an intense debate among legal scholars. Former OLC lawyers defended the office’s traditional role (Morrison 2011; Goldsmith 2018), while Obama Deputy Counsel Mary DeRosa disagreed that OLC’s role had, in fact, been diminished or undermined in the Libya process. Rather, DeRosa offered a slightly more nuanced “take” on OLC’s role: she agreed with Bauer that OLC was part of the discussion and, ultimately, the consensus, in the Lawyers Group, and she also noted that “if there is disagreement among the lawyers, OLC is still “the last word,” and its view will be transmitted to the president, who always has the authority to reject it, but will do so very rarely” (DeRosa interview, September 13, 2016). DeRosa served as Bauer’s Deputy Counsel for National Security.

After the Obama administration ended, both engaged in a scholarly exchange of law review articles that clarified and distinguished each one’s position. Bauer described the “best view” standard as “an empirically unsustainable account of how lawyers in fact perform in a crisis setting, and as a theoretically unjustified constraint on the range of legal options that a president’s legal advisers should be expected to offer” (Bauer 2018). In short, he found OLC’s “best view” standard unrealistic in its belief that there could

be a single view that was “best,” and, also, that post-Watergate, OLC intended to project an image of itself as independent of political and policy pressures, a portrayal that he thought was not borne out in reality. Consequently, Bauer proposed an alternative lawyering model for national security crises that was consistent with the approach he used for Libya, though fleshed out a bit more precisely: he advocated a legal advisory process during national security crises that flowed from “the development of legal positions grounded in reasonable, good faith readings of the law, subject to thoroughgoing transparency requirements” (Bauer 2018). The controversial aspect of Bauer’s proposed model was its willingness to openly claim that legal advice to the president need not be (and should not be) so sterile as to be divorced from political and policy realities: perhaps, he was simply being sufficiently candid to “say the quiet part out loud.”

## **Conclusions**

This paper examined three instances of influence by White House counsels during the Obama administration. There is no way that only three examples can provide a comprehensive evaluation of the effectiveness of this White House staff office, but they tried to offer a small, though admittedly selective, window into the influence the counsel’s office *can* wield across a variety of presidential priorities. Each of the examples presented here – executive orders, judicial appointments and legal advice during a national security crisis – contributed to Obama’s legacy in a mix of ways. His first round of executive orders established a spotlight on ethics and transparency and, also, made a splash, right out of the opening gate, in rolling back controversial Bush administration policies, as he had promised during the campaign that he would do, if elected.

The failure to close Guantanamo will linger as a taint on his legacy, and it illustrates well the subtitle of this paper, that there is “no margin for error” in the work of the counsel’s office. Obama’s success in appointing a significant number of judges to the lower federal courts, distinctive for their substantial contribution to increasing the ethnic, racial and gender diversity of those courts, is a tribute to the four counsels who supervised that continual process over eight years, while the doomed effort to nominate then-

Judge Garland to the Supreme Court offers a grim counterbalance to Obama’s otherwise admirable record of judicial appointments. Future research will want to explore the rationale for the decision to pursue the Garland effort, when the odds at that time left no doubt that the nomination could not succeed. This, too, is another “error” – and a big one. Although the decision to forge ahead with the nomination was the president’s choice, the pre-eminent role of the Counsel’s office in the Supreme Court nomination process leaves little doubt that it was a major player in the strategic calculations that went into that effort. Finally, the internal executive branch debate among administration lawyers during the Libya military action provided a rare glimpse into the “black box” that comprises how legal advice to a president in a national security matter gets formed. The Counsel’s office was the driver here in smoothing a legal path for the president to accomplish his policy objective, but at the cost of opening a rift with other administration lawyers with whom the Counsel’s office would have a continuing relationship.

Perhaps, a fitting place to end may be with a few comments on how counsels view their place and role among the White House staff. A sentiment echoed by more than one Obama counsel was that White House lawyers needed to “stay in their lane,” dispensing legal advice only, and that they should avoid the temptation to wade into policy discussions. Neil Eggleston, Obama’s last counsel, commented that “if I told a policy person she was wrong on a policy matter, then, she could tell me I was wrong on a legal issue. I made a decision that I would only ever have a lawyer hat on because that was the best way to protect my lawyer domain” (Eggleston interview, June 3, 2020). To that, Bauer added that “I wanted to make sure that the office was oriented to the conception of the White House Counsel’s Office as a legal services provider” (Bauer interview, July 5, 2016). Finally, Bauer emphasized the importance of personal relationships between the counsel and other members of the White House staff: “Because you want the people you’re working with to come to you with their questions ... you need traffic in and out of that office, and just a general sense that you are someone whose advice they should solicit and they can profitably solicit” (Bauer interview, July 5, 2016). Stay in your lawyer lane, and cultivate relationships of trust and confidence with other staff members: that seems wise advice for White House counsels to follow in order to maximize their

effectiveness and to minimize their chances for that all too destructive and demoralizing unforced “error” that could be waiting just around the corner.

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