

## ON ACADEMIC LAWYERS IN THE U.S. GOVERNMENT: WALTER’S WISDOM\*

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*Walter Dellinger was one of the most effective lawyers ever to work in the United States government. He was also a natural mentor, which made him a source of joy and wisdom for generations. In remembering Walter, we should recall his wisdom regarding the difference between academic and government lawyers, the government lawyer’s duty to explain, and the human qualities that, over a storied career, earn lawyers genuine affection and respect.*

INTRODUCTION .....	1321
I. ACADEMIC LAWYERS VS. GOVERNMENT LAWYERS.....	1323
II. THE GOVERNMENT LAWYER’S DUTY TO EXPLAIN .....	1329
III. “BEST VIEW OF THE LAW” VS. BEST PRINCIPLES .....	1331
IV. RESPECT .....	1332
CONCLUSION.....	1333

### INTRODUCTION

One afternoon thirty-six years ago, I was walking back to my postage-stamp-sized office at Yale Law School. In the narrow, neighboring corridor, I saw a sweaty middle-aged man sitting on a bench, wearing an Adidas tracksuit, apparently just back from a run. Incongruously, he was intently reading the *Yale Law Journal*, which at the time was being given out for free in our mailroom. I could not help but notice that the issue he was reading was the one that contained my most recent article.<sup>1</sup> I said nothing to him, and he was reading so

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1. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255 (1988).

intently that he said nothing to me. But about ten minutes later, after I had settled back into my office, there was a knock on the door and in popped Mr. Tracksuit. He said in that disarming southern drawl, “Harold, I’m Walter Dellinger. I loved your article.” And so our friendship began.

As others have recounted in this Symposium, Walter had absolutely no reason to seek me out or to compliment me, much less to help me with my career. But for the next three and a half decades, he did all of that and much more, simply out of the goodness of his heart. And as every speaker in this Symposium has recounted, he did all of this even while continuing to mentor and guide so many others.

Walter had a hilarious way of congratulating you, while at the same time, ever so gently slipping in the needle. In 2009, I was narrowly confirmed as the State Department’s Legal Adviser after months of opposition.<sup>2</sup> I got the necessary sixty Senate votes for cloture, then a smaller majority vote that finally secured my confirmation.<sup>3</sup> In the hours that followed, I received many congratulatory calls, but when Walter’s name flashed on my cellphone, he began simply: “If you were a treaty, you wouldn’t have made it!” How could I not laugh?

For this was the Walter Dellinger I knew. Walter was unique in a great many ways, but especially because he was one of the most effective academic lawyers ever to work in the U.S. government. In the years after his government service, he used the deep knowledge he had acquired as a government lawyer to influence the development of government and social policies from the outside. His professional talents were legendary; his legal judgment exemplary; and his political and policy instincts impeccable. But most distinctive, he was impossible not to love. I have sat in rooms where the people listening absolutely hated the substance of what he had to say. Still, they listened to, and at times even accepted, Walter’s views, because his personality was simply irresistible. He was unflaggingly courageous, generous, and delightful: three qualities always in short supply, and never found in such joyous combination. Eulogists often say we will not see someone’s like for another generation. I am not sure that we will *ever* see another quite like Walter again.

In that same post-confirmation phone call, after his initial congratulations, Walter switched to an avuncular, almost conspiratorial tone. In government, he told me, “Get ready. You will be criticized. Criticism comes with the territory. If you’re not getting criticized, you’re not doing your job. But if you can’t

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2. Derek Tam, *Koh Confirmed for State Department Post*, YALE DAILY NEWS (June 25, 2009, 12:00 AM), <https://yaledailynews.com/blog/2009/08/28/koh-confirmed-for-state-department-post/> [<https://perma.cc/5M65-ED7F>].

3. *Id.*; *Democrats Successfully Force Vote on Koh*, YALE DAILY NEWS, <https://yaledailynews.com/blog/2009/06/24/democrats-successfully-force-vote-on-koh/> [<https://perma.cc/M4JP-YX7L>] (last updated June 24, 2009, 10:45 PM).

defend your position, you should leave. So do your job, but develop a thick skin.”

But then, of course, Walter’s zinger: “By the way: people will think you got fat, but you’ll actually develop a thick skin.”

#### I. ACADEMIC LAWYERS VS. GOVERNMENT LAWYERS

I learned more about Walter’s wisdom by reading one of his less noticed, but most insightful, articles, published in the *Miami Law Review* when he was still at the Justice Department.<sup>4</sup> As Assistant Attorney General of the Office of Legal Counsel (“OLC”), Walter had opined that the United States could send troops to Haiti without the consent and over the resistance of the incumbent military regime.<sup>5</sup> Ten law professors (including me) wrote an open letter criticizing OLC’s analysis.<sup>6</sup> One of us, Professor Laurence Tribe, added that “if Mr. Dellinger were still a law professor, he would agree on this with me.”<sup>7</sup> The *Washington Times*, in an editorial entitled “*Where Mr. Dellinger Stands and Where He Sits*,” accused him of hypocrisy if he had changed his views upon entering government.<sup>8</sup> In a later editorial, that same newspaper asked, “Has Mr. Dellinger changed his views since leaving the academy?”<sup>9</sup>

I sat in the room at the University of Miami Law School while Walter faced his critics. Clearly, the criticism from long-time professorial friends had stung him. So before discussing the war powers issues being debated, Walter began by denying that he had in fact changed his views.<sup>10</sup> Then accepting that claim for the sake of argument, he went on to probe a challenging, rarely discussed “[q]uestion of [p]rofessional [r]ole”<sup>11</sup>: whether “it would be wrong for [a legal academic] to take a different view [in the government] from the one I would have been expected to take as an academic.”<sup>12</sup> Walter then made the case

4. See generally Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIA. L. REV. 107 (1995) (responding to criticism regarding the president’s authority to order the deployment of troops to Haiti).

5. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173 (1994).

6. Letter from Law Professors to President Clinton (Sept. 27, 1994), in Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT’L L. 96, 127–30 (1995) (coauthored by Bruce Ackerman, Abram Chayes, Lori Damrosch, John Hart Ely, Gerald Gunther, Louis Henkin, Harold Hongju Koh, Philip B. Kurland, Laurence H. Tribe & William Van Alstyne).

7. Editorial, *Where Mr. Dellinger Stands and Where He Sits*, WASH. TIMES, Sept. 13, 1994, at A16.

8. *Id.*

9. Editorial, *The Democrats and War Powers*, WASH. TIMES, Sept. 19, 1994, at A20.

10. Dellinger, *supra* note 4, at 109 (“I am by no means convinced that I would have agreed with Professor Tribe had I been a law professor. I expect that I would have seen a distinction between the planned deployment in Haiti and the sending of half a million troops into battle against one of the world’s largest and best-equipped armies.”).

11. *Id.* at 108.

12. *Id.* at 109.

for why “there are powerful and legitimate institutional reasons why one’s views *might properly differ* when one sits in a different place.”<sup>13</sup>

He identified two reasons in particular. The first was *learning*: “It might well be the case that I have actually learned something from the process of providing legal advice to the executive branch—both about the law . . . and about the extraordinary complexity of interrelated issues facing the executive branch in general and the President in particular.”<sup>14</sup>

His second reason was *institutional*:

[U]nlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about [these issues, which have been addressed by official opinions] . . . [that] do count for something. When lawyers who are now at [my] Office . . . begin to research an issue, they are not expected to turn to what I might have written or said in a floor discussion at a law professors’ convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch’s legal positions.<sup>15</sup>

When Walter delivered his forthright defense, nearly thirty years ago, it did not go over well in the room. Frankly, I was skeptical about whether Walter’s defense was correct. But as I have contemplated his article in the years since—including during some ten years of government service, most while on leave from academia—I have concluded that, on this point, Walter had it right.<sup>16</sup> This Essay elaborates on reasons, including those first given by Walter in 1995, why the views of academic lawyers who come to serve in the government might legitimately “evolve.”

Let me start first with Walter’s institutional explanation: as a government lawyer, you are acting not in an individual role but in an institutional one, bound by institutional *stare decisis*.<sup>17</sup> In that role, you must take the institutional law as you find it, not as you would have written it yourself.<sup>18</sup> For example, when a law professor becomes a judge, everyone expects her to make her best efforts to follow the *stare decisis* of precedent issued by that court, not her personal

13. *Id.* at 110 (emphasis added).

14. *Id.* at 109.

15. *Id.* at 109–10.

16. I continue to disagree, however, with certain substantive aspects of the war powers reasoning in Walter’s opinion. See HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION IN THE 21ST CENTURY 142 (2024) [hereinafter KOH, 21ST CENTURY NATIONAL SECURITY CONSTITUTION] (discussing Dellinger opinion).

17. *See id.* at 172.

18. *See, e.g.*, Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 YALE L.J.F. 541, 544–45 (2021).

musings as an independent law professor. When a criminal law professor becomes a prosecutor, no one expects that lawyer to follow his past legal writings as opposed to the institutional practices of his U.S. Attorney's Office. And if that prosecutor should then choose to represent a criminal defendant, again his institutional role changes. Everyone would naturally assume that the lawyer has changed institutional roles, and so as part of his zealous defense of his client, would draw from the controlling legal precedents those arguments that would best serve his client's goal of acquittal.

So I was bemused in the government, when someone claimed to find an inconsistency between a statement I had made as Legal Adviser in 2010 with a statement found in a footnote in an article I had written in the 1980s as a young, untenured law professor. I recall first thinking, like Walter, that the two statements were not actually inconsistent. Furthermore, as Walter taught about learning, perhaps I had thought and learned more about the subject in the intervening thirty years. But most fundamentally, my role, the factual context, and the stakes were very different. As an academic, I had been participating in a particular ongoing intellectual debate among scholars. Now, as a government lawyer, I was opining about what actions would be legal for the U.S. government to take to address a particular set of facts. As a professor, I was opining on a blank slate; but in the government, I had to take the law as I found it. I was opining within the institutional framework of the legal opinions that had historically ruled my office. If those office precedents had struck me as clearly incorrect, I could have applied accepted principles and organizational processes to get them overruled.<sup>19</sup> But if they struck me as reasonable, relevant, and applicable to the current situation, I felt obliged to follow them.

In the government, the stakes are almost inevitably higher. If you are wrong in the faculty lounge, you just get yourself another cookie. But in the real world, if you make the wrong call, people die. Similarly, when you enter the government, you must take the facts as you find them, not as you would have preferred them to be. Unlike professors, government lawyers cannot simply "manipulate the facts in the hypo." In my case, for example, before reentering government, I had been vocal in my opposition to the 2003 U.S. invasion of Iraq and the creation and use of military commissions after September 11, 2001.<sup>20</sup> But if you enter the government and inherit policies that

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19. See, e.g., Memorandum from David J. Barron, Acting Assistant Att'y Gen., to Attorneys of the Office of Legal Counsel, Best Practices for OLC Legal Advice and Written Opinions, at 2 (Jul. 16, 2010), <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> [<https://perma.cc/DR4S-QN2T>] [hereinafter 2010 OLC Best Practices Memorandum] (updating prior memorandum with the same title first issued on May 16, 2005) ("The Office [of Legal Counsel] should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.").

20. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1509–26 (2003).

you opposed as a private citizen, you do not have the option of turning back time. All you can do going forward is to try to make those problematic policies more workable, lawful, and transparent.

Second, and obviously, the views you state are not just your own. You do not speak only for yourself. You have clients, who you must zealously represent. You owe them your loyalty, and criticizing their policies publicly or distancing yourself from them would represent a conflict of interest.<sup>21</sup> You can only resign once, and if you plan to do so, you should not have taken the job in the first place.<sup>22</sup> If you plan to serve for multiple years, you necessarily pursue multiple objectives. Sometimes you must keep your powder dry on one issue to maintain your influence on another, in order to maximize your total impact.

Nor do you work alone. You are part of a team within your agency, in my case, the State Department's Office of the Legal Adviser, which now has more than 250 lawyers and over 160 years of institutional history.<sup>23</sup> In giving legal advice, you may speak not just for your agency but also for the entire U.S. government, representing the views of lawyers from, *inter alia*, Justice, Defense, Treasury, Homeland Security, the intelligence agencies, and the National Security Council.<sup>24</sup> Sometimes, stated legal opinions are based on extended

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21. *But cf.* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 20–21 (2012) (describing “unusual anticipation” leading up to Koh’s speech at the Annual Meeting of the American Society of International Law where “[m]any people inside the government wondered how Koh, a fierce Bush administration critic, would abide ‘the new normal’ that he warned about,” including the invasion of Iraq and the use of military commissions. There was “speculation in the legal academy and in the government that he might not be on board for the Obama counterterrorism program, and might even be preparing to resign”). To read the speech, see Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> [https://perma.cc/L2DM-Z3HV] [hereinafter Koh, 2010 ASIL Keynote].

22. *But cf.* GOLDSMITH, *supra* note 21, at 21 (“Most of the gathered international lawyers expected Koh to distance himself, at least somewhat, from the Obama policies that mirrored Bush’s. What they heard instead was a vigorous defense of Obama administration counterterrorism policies, including the ones that mimicked Bush’s.”). What this recounting misses is that the entire point of that keynote address was to point out the ways in which the Obama administration’s counterterrorism policies had not mirrored, but instead *narrowed*, Bush’s legal claims. The speech did not distance itself from Obama’s policies, but rather Bush’s, explaining why the U.S. position was now more lawful because President Obama would only take actions that were more closely linked to the President’s specified authorities under both domestic and international law. *See generally* Harold Hongju Koh, *Keynote Address: The Emerging Law of 21st Century War*, 66 EMORY L.J. 487, 491–92 (2017) [hereinafter Koh, *Emerging Law*] (pointing out “six crucial differences” between the Obama and Bush counterterrorism policies).

23. *See generally* Harold Hongju Koh, *The State Department Legal Adviser’s Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747 (2012) (detailing the history of the State Department Legal Adviser’s Office).

24. Harold Hongju Koh, *National Security Legal Advice in the New Administration*, JUST SEC. (Nov. 16, 2016), <https://www.justsecurity.org/34507/national-security-legal-advice-administration> [https://perma.cc/3H4Z-T7MR].

alliance-wide discussions with counterpart legal offices from ministries around the globe.<sup>25</sup> So you cannot just say whatever you want; you must clear your statements, at times with more than 100 people.

Take, for example, the speech I gave to the 2010 annual meeting of the American Society of International Law (“ASIL”) regarding the Obama administration’s use of drones.<sup>26</sup> Some observers thought the speech was “dry and largely technical”;<sup>27</sup> others claimed instead that I was “agitated” and “visibly uncomfortable” with the substance of the administration’s position.<sup>28</sup> But whatever disquiet I may have displayed at the time was caused by something quite different: as I was rising to give the speech, the drone discussion at the end of the speech *was still being cleared* for interagency approval. So as I started the speech, I still did not know myself the exact words with which I would finish it! While I was delivering the first part of the speech, my State Department colleague entered the banquet room and handed up to me the fully cleared version of the final text. So whatever discomfort I may have displayed reflected only the awkwardness of having to read for the first time, word-for-word, text that I had not seen in full before, to ensure that my spoken words accurately reflected the entire U.S. government’s now fully cleared and nuanced legal position.<sup>29</sup>

Third, and significantly—as noted above—Walter never accepted his critics’ claim that his legal views had ever really changed. Sometimes, listeners criticize you for saying things that you in fact never said.<sup>30</sup> As Walter warned, sometimes, people *think* your legal views and guiding principles have changed when in fact they have not. But you know yourself far better than others know

25. See, e.g., Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 769, 770 (2012) (describing intra-alliance legal discussions that take place “away from the public gaze, within governments and between them, about what the appropriate principles are, and ought to be, in respect of such conduct”).

26. Koh, 2010 ASIL Keynote, *supra* note 21.

27. See, e.g., DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 217 (2012).

28. See, e.g., GOLDSMITH, *supra* note 21, at 21–22.

29. See CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY* 243 (2012) (“The [2010 ASIL] speech went through a heavy interagency vetting process; some portions were still being cleared for approval as [Koh] spoke, leading him to pause at spots to find the last-minute inserts.”).

30. For example, Professor Goldsmith recounts that, when told by the first questioner at my 2010 ASIL keynote address that “the Obama administration continues to see that there is such a conception as a global war on terror.” . . . Koh interrupted her [to say,] ‘I said a lot of things in my remarks; *that is not one of the things that I said.*’” GOLDSMITH, *supra* note 21, at 22 (emphasis added); accord Koh, *Emerging Law*, *supra* note 22, at 491 (“The Obama Administration does not believe in, or speak of, a ‘global war on terror.’ We are not engaged in an amorphous war on ‘terror,’ any more than we are engaged in an amorphous war against ‘drugs’ or ‘poverty.’ Instead, the United States currently engages outside of hot battlefields against particular transnationalist terrorist networks in military operations that are decidedly constrained by international law principles of state sovereignty, human rights, and humanitarian law.” (emphasis added)).

you. Sometimes you have always believed something, but no one ever bothered to ask. For example, one academic colleague told me that he was surprised that a “pacifist like you” would oppose torture but defend, under certain circumstances, the use of drone warfare. But as I told him at the time, and others later reported, “Koh was not a pacifist; he believed the use of force to protect innocent life was both moral and legal under certain circumstances . . . .”<sup>31</sup> I had always believed, as I later wrote, that

all torture is illegal and the President cannot be torturer in chief—this is an absolute ban under all circumstances. But targeted killing in warfare can be lawful or unlawful, depending upon whether it is done according to the laws of war. If we are indeed in an armed conflict, we can lawfully engage in certain kinds of lethal warfare. You may not like targeted killing, but if you are a lawyer in the government addressing these matters, *it is your inescapable duty to draw the line between those uses of force that are or are not lawful.*<sup>32</sup>

In addition, too many observers fail to understand either the facts or the political imperatives that arise in any particular situation. The media, for its part, too often gets the facts or politics wrong. Some policy steps that observers would prefer might be either legally possible but politically impossible—what Walter liked to call “lawful but awful”—or vice versa. Take for example, the Obama administration’s 2011 interpretation of the War Powers Resolution (“WPR”) in Libya, which argued that the exchanges of fire fell below the level required to constitute “hostilities” sufficient to trigger the WPR’s sixty-day durational clock.<sup>33</sup> As I have detailed elsewhere, most critics of that interpretation did not grasp the basic fact that two weeks after the start of the operation—after the United States transitioned its operational control of the Libya mission to NATO—“the total number of United States munitions dropped in Libya [was] *less than 1 percent of those dropped in Kosovo.*”<sup>34</sup> Nor did those critics give enough legal weight to the political reality that the Obama administration’s interpretation of the statute was not opposed, but rather,

31. See SAVAGE, *supra* note 29, at 240.

32. Koh, *Emerging Law*, *supra* note 22, at 500 (emphasis added).

33. U.S. DEP’T OF DEF. & U.S. DEP’T OF STATE, UNITED STATES ACTIVITIES IN LIBYA 25 (2011), <https://man.fas.org/eprint/wh-libya.pdf> [<https://perma.cc/5TXQ-MDKT> (staff-uploaded archive)] (“The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of ‘hostilities’ contemplated by the Resolution’s 60 day termination provision.”).

34. Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 990 (2016) [hereinafter Koh, *The War Powers*] (citing *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 10 (2011) (statement of Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State)).



acquiesced in—and even encouraged—by the bipartisan senior leadership of the Congress.<sup>35</sup>

Fourth and finally, like Walter, my late boss, Justice Harry Blackmun, was also accused of “evolving” in his views.<sup>36</sup> He usually responded by saying that he had always believed in the position that he ultimately took on the Supreme Court, and that, if anything, the Court had moved to the right beneath him.<sup>37</sup> But in the end, he suggested—as Walter did—that it mattered less whether his views had changed than whether he had made the correct decision when faced with a difficult choice in his prominent official position. Justice Blackmun said to me, echoing Walter: “You know, at the end of the day, life is long and you *learn* things. So just make sure you are doing what you think is right *now*.” So that is what I have tried to do. Indeed, a number of us who attended this symposium have faced the challenge of being told by others that we have changed our views. In my own case, over five decades inside and outside the government, my guiding principles and legal views on all key issues have remained almost entirely unchanged.<sup>38</sup>

## II. THE GOVERNMENT LAWYER’S DUTY TO EXPLAIN

By appearing at the Miami Law School forum to face his critics, Walter also taught me an important lesson about transparency. It is not enough in

35. See *id.* at 995 (“[T]he key congressional leaders—including Speaker John Boehner, former Speaker Nancy Pelosi, Senate Majority Leader Harry Reid, Senate Minority Leader Mitch McConnell, and Senate Foreign Relations Committee Chair John Kerry—all took pains to agree that continuation of U.S. military action in Libya did not violate the War Powers Resolution.”). But see Dawn Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 HOUS. L. REV. 1065, 1065–66 (2016) (arguing that Koh’s proposed War Powers framework “would expand presidential war powers and diminish congressional constraints”).

36. See, e.g., Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 717 (1983) (citing Justice Blackmun’s “remarkable transformation” over twelve years on the Court).

37. For example, many who were surprised by Justice Blackmun’s powerful pro-LGBTQ+ rights dissent in *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting), never read his Eighth Circuit opinion twenty years earlier in *Marion v. Gardner*, 359 F.2d 175 (8th Cir. 1966), reversing the denial of Social Security disability benefits based on the beneficiary’s sexual orientation, *id.* at 181–82. In that decision, then-Judge Blackmun wrote, “History and common knowledge teach us that many persons with homosexual tendencies have been economically productive and, indeed, have achieved marked success in many fields.” *Marion*, 359 F.2d at 182.

38. Both inside and outside the government, for example, I have taken the same positions against detentions at Guantánamo and denial of refugees’ asylum rights. I have argued for the illegality of torture; opposed illegal and defended legal uses of force under U.S. and international law; advocated for extraterritorial application of human rights law; and argued for the value of transnational legal process and transnational public law litigation in internalizing international law norms into domestic law. And throughout, I have argued in favor of preserving the proper balance of constitutional powers under the National Security Constitution. See KOH, 21ST CENTURY NATIONAL SECURITY CONSTITUTION, *supra* note 16, at 6. I have offered detailed legal defenses with regard to all of these issues and have read no persuasive rebuttals of my written opinions as a government lawyer, which I continue to believe are correct. See *infra* note 45 and accompanying text.

government to believe in the correctness of your legal opinion. You must *explain to the public what you believe* and why you believe it is correct. This means that inside the government, government lawyers have a duty to explain and to make their opinions public.<sup>39</sup> This is particularly important for international lawyers, who must determine whether governments are following international law rules out of *opinio juris*, an internal government belief that its official actions are lawful.<sup>40</sup> If you head a government legal office, as both Walter and I did, you must nurture an institutional tradition and a bureaucratic jurisprudence of honest, reasoned decision-making.<sup>41</sup> And you must articulate and follow these principles to protect your own office from charges of ad hoc decision-making.<sup>42</sup> If you are overruled inside the government, you should make your views widely known inside, whether or not your dissent ever reaches the public eye.<sup>43</sup> If your opinions get distorted, clarify what you really mean. Finally, as Walter taught by example, wherever possible, take the criticism yourself, but give the credit to those in your office.<sup>44</sup>

Outside the government, your obligation to explain continues. Once you leave government service, you should explain your views in detail and see if you

39. Harold Hongju Koh, *The Legal Adviser's Duty To Explain*, 41 YALE J. INT'L L. 189, 195 (2016) ("Providing a public justification is a necessary step to explain why others should agree that actions taken by those government officials are consistent with international law. As a prudential matter, such public explanations prove to be critically important in bringing along the rest of the country and prospective allies in establishing the legitimacy of a public action.")

40. See Bethlehem, *supra* note 25, at 770 ("Insofar as these [intra-alliance legal] discussions have informed the practice of states and their appreciations of legality, they carry particular weight, being material both to the crystallization and development of customary international law and to the interpretation of treaties.")

41. See 2010 OLC Best Practices Memorandum, *supra* note 19, at 1–2. See generally WALTER E. DELLINGER, DAWN JOHNSEN, RANDOLPH MOSS, CHRISTOPHER SCHROEDER, JOSEPH R. GUERRA, BETH NOLAN, TODD PETERSON, CORNELIA T.L. PILLARD, H. JEFFERSON POWELL, TERESA WYNN ROSEBOROUGH, RICHARD SHIFFRIN, WILLIAM MICHAEL TREANOR, DAVID BARRON, STUART BENJAMIN, LISA BROWN, PAMELA HARRIS, NEIL KINKOPF, MARTIN LEDERMAN & MICHAEL SMALL, *PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL* (2004), reprinted in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 app. 2 at 1603–11 (2007) (describing ideals which should steer the office, drafted by attorneys who worked in OLC during the Clinton, George W. Bush, and Obama administrations).

42. See Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 513–15 (1993).

43. See, e.g., Jaya Ramji-Nogales, *How an Internal State Department Memorandum Exposes "Title 42" Expulsions of Refugees as Violations of Law: From Kamala Harris' Letter to the Koh Memo*, JUST SEC. (Oct. 5, 2021), <https://www.justsecurity.org/78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law> [https://perma.cc/RAS9-3ZCD]; Marko Milanovic, *Harold Koh's Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties*, JUST SEC. (Mar. 7, 2014), <https://www.justsecurity.org/8010/harold-kohs-legal-opinions-position-extraterritorial-application-human-rights-treaties> [https://perma.cc/ZRG3-4TPF].

44. See, e.g., Dellinger, *supra* note 4, at 107 n.\* ("Although I assume sole responsibility for this essay, its conclusions emerged from extensive discussions among the Deputy Assistant Attorneys General who have served with me . . . and with the outstanding senior career attorneys at OLC who have long dealt with war powers issues . . .").

draw persuasive rebuttals.<sup>45</sup> You should work on issues you could not do enough to resolve or improve while in the government. Each time I left the government, I thought long and hard about the issues I had not done enough on while inside government and resolved to do more on the outside, including the death penalty, LGBTQ+ rights, gun control, climate change, and ending America's "Forever War," which has raged since the terrorist attacks of September 11, 2001. Once outside, you should try to influence the current inside decision-makers to finish what you could not get done inside, as Walter did, through articles, speeches, interviews, amicus briefs, op-eds, blogposts, and the like.

### III. "BEST VIEW OF THE LAW" VS. BEST PRINCIPLES

Finally, what would Walter say about the theme of this law review symposium: the "Best Path" for American constitutional law?<sup>46</sup> Unlike some, I am not convinced that there is always a "best view of the law."<sup>47</sup> What proves to be the "best" view in any particular case may depend on what you are trying to optimize: clients' wishes, policy objectives, protection of innocents, or something else. What may not be your preferred legal position may nevertheless best serve your clients' objectives, lead to the best policy outcome, and/or save the most innocent lives. As I learned in the 2011 Libya war-powers episode, a government lawyer owes professional obligations to her clients and to those who will suffer if you make your decision the wrong way. If you must navigate conflicting currents, you should choose the legal answer with which you, your clients, and those most negatively affected can best live. At the time, and still today, reading the War Powers Resolution in Libya—as the facts

45. See, e.g., Koh, *The War Powers*, *supra* note 34, at 971. For additional examples of such explanations, see generally Koh, *Emerging Law*, *supra* note 22; Harold Hongju Koh, *Triptych's End: A Better Framework to 21st Century International Lawmaking*, 126 YALE L.J.F. 338 (2017); Harold Hongju Koh, *International Law in Cyberspace*, 54 HARV. INT'L L.J. ONLINE 1 (2012); Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257 (2015); Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT'L L. 525 (2013); Harold Hongju Koh, Sterling Professor of Int'l L., Yale L. Sch., Remarks at the Oxford Union: How to End the Forever War? (May 7, 2013), <https://law.yale.edu/sites/default/files/documents/pdf/Faculty/KohOxfordSpeech.pdf> [<https://perma.cc/2GT4-MAKX>]; Harold Hongju Koh, *Finally Ending America's Forever War, Part I: Diagnosis*, JUST SEC. (Sept. 11, 2023), <https://www.justsecurity.org/88131/finally-ending-americas-forever-war-part-i-diagnosis/> [<https://perma.cc/9PDP-942L>]; Harold Hongju Koh, *Finally Ending America's Forever War, Part II: Prescription*, JUST SEC. (Sept. 12, 2023), <https://www.justsecurity.org/88164/finally-ending-americas-forever-war-part-ii-prescription/> [<https://perma.cc/S6GD-CM8U>].

46. Symposium, *Walter Dellinger and the Path of Constitutional Law*, 102 N.C. L. REV. 1317 (2023).

47. See, e.g., Bob Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175, 175 (2018) (challenging the "best view" standard as "empirically unsustainable" and "theoretically unjustified"); Bob Bauer, *Power Wars Symposium: The Powers Wars Debate and the Question of the Role of the Lawyer in Crisis*, JUST SEC. (Nov. 18, 2015), <https://www.justsecurity.org/27712/powers-wars-debate-question-role-lawyer-crisis/> [<https://perma.cc/KRB5-QGWL>] (discussing use of the "best view" standard at the Office of Legal Counsel).

suggested and Congress's leadership accepted—to support my clients' decision to save tens of thousands of innocent lives, seemed to me the “best view” of the law.<sup>48</sup>

A final caveat: my experience has taught me that being a government lawyer is different from being a constitutional historian. As I discuss in *The National Security Constitution in the 21st Century*, even if you do the right thing as a government lawyer, looking back as a scholar with a broader sense of constitutional history, you may still regret that Democratic presidents with slim legislative majorities had to continue the path of constitutional law in the direction of reactive executive unilateralism.<sup>49</sup>

But at the end of the day, as a scholar and public servant, you still need North Stars by which to steer. I remain guided by my “North Stars”: who include Justice Blackmun, Walter Dellinger and my late teacher, Professor and Legal Adviser, Abe Chayes. After his U.S. government service, Abe sued the United States at the World Court, saying: “[T]here [is] nothing wrong with [a lawyer] holding the United States to its own best standards and best principles.”<sup>50</sup> When all is said and done, that is both the most and the least we can do.

#### IV. RESPECT

Throughout his exemplary career, that is exactly what Walter Dellinger did. Walter taught us all to be “Happy Warriors.”<sup>51</sup> In his post-confirmation phone call, he told me: “Remember that your job is *fearless advice; fearless advocacy; zealous defense*,” a cogent summary of a government lawyer's duties. But Walter did more than simply perform those duties. He was the antithesis of the stereotypical dour government bureaucrat. Instead, he lived his years of government lawyering with a panache that others simply lacked.

48. Professor Laurence Tribe of Harvard originally questioned the Obama administration's legal position in Libya, but later wrote me in October 2011 to say, “It's true that I was among the people who were unpersuaded by your and the W[hite] H[ouse]'s legal view of what constitute ‘hostilities,’ and I know hindsight can be 20/20, but in retrospect I have to say that your view of the matter may have been the wiser one.” Koh, *The War Powers*, *supra* note 34, at 996 n.80 (e-mail from Laurence H. Tribe to Harold Hongju Koh).

49. KOH, 21ST CENTURY NATIONAL SECURITY CONSTITUTION, *supra* note 16, at 339.

50. Stuart Taylor, Jr., *The American Accuser*, N.Y. TIMES (Apr. 11, 1984), <https://www.nytimes.com/1984/04/11/world/man-in-the-news-the-american-accuser.html> [<https://perma.cc/LL4P-9JH3> (dark archive)] (“When he was asked by Nicaragua to sue his own country, Mr. Chayes . . . said, . . . ‘[I]n the end I thought that there was nothing wrong with holding the United States to its own best standards and best principles.’”).

51. William Wordsworth, *Character of the Happy Warrior*, POETRY FOUND., <https://www.poetryfoundation.org/poems/45512/character-of-the-happy-warrior> [<https://perma.cc/U56C-2HUT>] (“Who is the Happy Warrior? . . . [A person] inspired; [who], through the heat of conflict, keeps the law In calmness made, and sees what he foresaw . . .”).

I close with this story, which captures the *joie de vivre* that Walter brought to his government service. In 1999, Walter invited me to the December holiday party at my old office, the Office of Legal Counsel at the Justice Department. If you have attended such events, you know that they are often pedestrian affairs: held in people's offices, with the desks moved temporarily back, a punch bowl on top, and tinny music playing from a tape deck. There were few people there and the mood was somber. Most of all, there was no Walter. He was at an important White House meeting, they told me.

But as I was contemplating whether to slip out, around the corner of the high-ceiling Justice Department corridor flew Walter, riding down the hall on an old-fashioned Schwinn bike. He pedaled toward us, leaped off, and channeling Kevin Bacon in *Footloose*, screamed, "You call this a party? Let's dance!"<sup>52</sup> And within a few minutes everyone was dancing uproariously to Aretha Franklin, with Walter at the center, singing "R-E-S-P-E-C-T."<sup>53</sup>

#### CONCLUSION

That was the Walter Dellinger I knew. One of a kind. Where others trudged, he flew and danced. He was so generous with his wisdom—"Walter's Wisdom"—but even more so with his generosity and his love. There was never bitterness or pettiness in Walter, just love and joy and fun.

So that is the message that we should take away from this Symposium: don't just miss Walter. Emulate his joy and courage. And most of all: let us all keep learning from Walter's Wisdom!

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52. Boxoffice Movie Scenes, "Let's DANCE!" | Kenny Loggins *Footloose* Ending Scene, YOUTUBE (May 27, 2023), <https://www.youtube.com/watch?v=e-OG0EyJyV8> [<https://perma.cc/M4CL-BL43>].

53. ARETHA FRANKLIN, *Respect*, on I NEVER LOVED A MAN THE WAY I LOVE YOU (Atl. Recs. 1967).

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