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Presidential Power, Historical Practice, and Legal Constraint

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ESSAY

PRESIDENTIAL POWER, HISTORICAL PRACTICE, AND LEGAL CONSTRAINT

Curtis A. Bradley* & Trevor W. Morrison**

The scope of the President's legal authority is determined in part by historical practice. This Essay aims to better understand how such practice-based law might operate as a constraint on the presidency. In part because of the limited availability of judicial review in this area, some commentators have suggested that presidential authority has become "unbounded" by law and is now governed only or primarily by politics. At the same time, there has been growing skepticism about the ability of the familiar political checks on presidential power to work in any systematic or reliable fashion. Whether and how practice-based law might constrain the President are thus vital questions. As the Essay explains, no examination of those questions can succeed without careful specification of what legal constraint entails and how it relates to distinct but related phenomena like genuine disagreement about the content of the law. After attempting such specification, the Essay identifies various internal and external causal mechanisms through which law, including practice-based law, could constrain the President. The Essay argues, among other things, that one way that law might operate as a constraint is through the simple fact that issues of presidential power are publicly criticized and defended in legal terms. The Essay concludes by suggesting some avenues of possible empirical research.

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INTRODUCTION

Presidential power in the United States is determined in part by historical practice. Especially when the text of the Constitution is unclear or does not specifically address a particular question, the way in which the government has operated over time can provide what Justice Frankfurter famously called a constitutional “gloss” on presidential power.¹ This gloss often develops without significant judicial review. A variety of justiciability limitations—including the general disallowance of legislative standing, ripeness considerations, and the political question doctrine—are regularly invoked by courts as a basis for declining to resolve issues of presidential power, especially when individual rights are not directly implicated.² This has been particularly true in the area of foreign affairs, concerning issues such as the initiation of war, the use of “executive agreements,” and the termination of international commitments.³ Even

1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the president by § 1 of Art. II.”). See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* 411 (2012) (describing and assessing role of historical practice in determining distribution of constitutional authority between President and Congress); *infra* Part I.A.

2. See *infra* Part I.B.

3. See Bradley & Morrison, *supra* note 1, at 420–21.

when courts do get involved, they often defer to longstanding practice when discerning the President's constitutional (and statutory) authority.⁴

The customary nature of much of the law governing presidential power, together with the typically limited role of the courts, might inspire doubts about whether the apparent norms in this area truly are legal norms capable of constraining the President. Without either a clear text or an authoritative adjudicator, the argument might run, the President's authority is simply the product of the push and pull of the political process. To the extent that there appear to be stable arrangements with respect to this authority, they might simply be "non-normative equilibria" with no authoritative status. If so, any apparent consistency between presidential behavior and purported legal norms might simply be the result of political and policy considerations, not any constraint imposed by law. In recent years, a number of influential legal scholars have made claims of precisely this sort.⁵ Other leading scholars, meanwhile, take the proposition that the President is constrained by law as irrefutably correct.⁶ Yet specifying precisely *how* the President might be constrained by law is anything but straightforward,⁷ and it becomes all the more difficult once one appreciates the practice-based nature of much of the law of presidential power.

The relationship between law and presidential power is not merely a matter of academic debate. Whether, how, and to what extent presidential decisionmaking is subject to legal constraint is a central issue in the practice of modern government, as illustrated by two recent episodes. First, in March 2011, the Obama Administration initiated military operations against Libya without congressional authorization, and then continued them past the statutory sixty-day limit set forth in the War Powers Resolution. Critics treated this episode as evidence that the executive branch did not take seriously constitutional and statutory limits

4. See *infra* Part I.A. Although the principal focus of this Essay is on the constitutional law of presidential power, we also consider various statutory regimes as well. Historical practice informs presidential power under certain federal statutes as well as under the Constitution, and questions about the law's constraining effect can arise in both contexts.

5. E.g., Bruce Ackerman, *The Decline and Fall of the American Republic* (2010) [hereinafter Ackerman, *Decline*]; Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010) [hereinafter Posner & Vermeule, *The Executive Unbound*]. These and related arguments are discussed at greater length *infra* Part I.C.

6. E.g., Richard H. Fallon, Jr., *Constitutional Constraints*, 97 *Calif. L. Rev.* 975, 979 (2009) [hereinafter Fallon, *Constitutional Constraints*] ("[T]he thought that officials holding constitutionally constituted offices might be wholly unconstrained by the Constitution proves incoherent.").

7. Cf. *id.* ("The most important question is not whether the Constitution constrains, but how.").

on the use of military force.⁸ Despite a low likelihood that courts would resolve the dispute, however, the Obama Administration offered public legal justifications, based heavily on arguments from historical practice, for both the initial deployment of military force in Libya and its continuation past the sixty-day point.⁹ The felt need of the executive branch to justify itself in legal terms might be puzzling if the law were not playing any constraining role, but it is difficult to discern precisely what that role might have been.

Second, in the summer of 2011, a confrontation developed between the Obama Administration and Republican leaders in Congress over whether to raise the statutory debt ceiling to accommodate the government's increased borrowing. When a legislative extension of the ceiling appeared unlikely, some commentators suggested, based on either novel constitutional arguments or pure policy grounds, that the President could and should unilaterally exceed the debt ceiling.¹⁰ Others insisted that such unilateral action would be unconstitutional because it would usurp Congress's constitutional authority "[t]o borrow [m]oney on the credit of the United States."¹¹ President Obama did not attempt to address the issue unilaterally and instead continued to seek a legislative extension of the ceiling, which he ultimately obtained. Nor did the President attempt or even threaten a unilateral extension when the issue resurfaced in late 2012 and early 2013 in connection with the so-called "fiscal cliff," by which time such an action appeared to be off the table altogether. It might be that the President felt constrained not to pursue a unilateral extension by legal concerns about such a course of action, but it is also possible that political considerations would have driven the President to a similar decision.¹² In this context too, then, the role of law is unclear.

Episodes like these underscore the importance of thinking carefully not just about the general question whether the President is constrained by law, but more particularly about what it means to say that the President is so constrained, and how such constraints operate. On issues of executive power unlikely to come before the courts, one familiar idea—espoused by James Madison in *The Federalist Papers*—is that members of Congress have sufficient personal motivations and professional resources to protect Congress's institutional prerogatives

8. See *infra* notes 168–170 and accompanying text. The actions taken in Libya are more fully discussed in Part III.D.

9. See *infra* text accompanying notes 150–151.

10. See *infra* note 80 and accompanying text.

11. U.S. Const. art. I, § 8, cl. 2; see *infra* notes 81–82 and accompanying text.

12. For a fuller discussion of the debt ceiling and fiscal cliff issues, see *infra* notes 80–86 and accompanying text.

from executive incursions.¹³ A number of scholars have concluded, however, that such checking is not as consistent or robust as is often assumed, and that whether Congress curbs presidential power depends more often on partisan political considerations or situation-specific policy objections than on any systematic effort to protect institutional prerogatives.¹⁴ If Congress is not as reliable a check on presidential power as Madison and others envisioned, there is arguably a greater need for other mechanisms of constraint in this area, including legal constraints. In the absence of judicial review, however, it is fair to ask how the legal constraints might operate.

To the extent that a particular question of presidential power is recognized as a legal question, it is virtually inevitable that lawyers somewhere within the executive branch will provide advice on the question. On significant legal questions of presidential power, the lawyers will likely include individuals within the Justice Department's Office of Legal Counsel (OLC), which advises the White House and other executive departments on the legality of proposed executive programs and actions.¹⁵ Offices like OLC thus might provide part of the answer to the question of how, in the absence of judicial review or consistent congressional checking, legal constraints on the President could operate. But in the aftermath of controversies surrounding some of OLC's reasoning in the war on terror, including in the so-called "torture memos" in the early years of the Bush Administration, some scholars have come to doubt that OLC (or any other executive branch legal office) imposes genuine legal limits on the President.¹⁶

13. See *The Federalist* No. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.”).

14. See Bradley & Morrison, *supra* note 1, at 438–47 (describing various problems with Madisonian assumption about interbranch rivalry and summarizing literature); see also Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *Harv. L. Rev.* 657, 671 (2011) [hereinafter Levinson, *Parchment*] (“[A]ll indications are that political ‘ambition counteracting ambition’ has failed to serve as a self-enforcing safeguard for the constitutional structures of federalism and separation of powers in the way that Madison seems to have envisioned.”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2324–25 (2006) (“[T]he political interests of elected officials generally correlate more strongly with party than with branch. . . . [P]arty is likely to be the single best predictor of political agreement and disagreement.”).

15. See *infra* notes 32–38 and accompanying text (describing OLC's principal functions).

16. See *infra* notes 87, 101. Some of the criticisms of an Obama Administration white paper concerning the legality of targeted killings, which was leaked to the press in early 2013, were reminiscent of the criticisms of the torture memos. See, e.g., Scott Shane &

This Essay seeks to better frame the question of how law might constrain the President. Although we are not the first to focus on the relationship between law and presidential authority, our approach is more systematic than prior treatments. In addition, unlike some approaches, we treat law and politics as overlapping and interactive rather than as mutually distinct considerations. Thus, instead of inquiring whether politics *or* law constrains the President in a particular context, our approach identifies mechanisms by which politics and law operate in either reinforcing or countervailing ways. We also make two substantive contributions. First, building on our prior work, we explain how the practice-based nature of the law in this area—a feature not emphasized by others writing on the topic—poses particular challenges for any claim that the President is constrained by law. Second, we identify and explore a mechanism of potential constraint that has not been discussed extensively in the literature: the constraint associated with legal dialogue itself.

Importantly, we make no claim in this Essay about the *sufficiency* of any constraint that law currently imposes on the presidency. Whether the President is adequately constrained by law depends, first, on a substantive judgment about the appropriate scope of presidential power, and, second, on an empirical assessment of whether the law in fact keeps the President within those bounds. Both of those questions are beyond the scope of this Essay. Consequently, our analysis may not provide much comfort to those who are concerned about the growth of presidential power or about perceived presidential abuses. But one cannot meaningfully engage the normative question of how much the law ought to constrain the President without first having a clear sense of what such constraint might entail in an area where the law is deeply informed by practice, and how the constraint might operate. Our aim is to make headway on those conceptual and analytical questions. In doing so, we seek to provide a basis for greater precision when making claims or raising concerns in this area, and to highlight potential mechanisms of legal constraint that might otherwise go unnoticed.

Part I describes the law governing presidential authority and how this law is heavily informed by historical practice. It also explains some of the limits on judicial review in this area, and notes how commentators on both the right and left have charged that the President is not meaningfully constrained by law. Part II considers in some detail what it might mean to say that the President is constrained by law. As this Part shows, no examination of whether law constrains the President can succeed without careful specification of what constraint entails and how it relates to distinct but related phenomena like genuine disagreement about the

Charlie Savage, Report on Targeted Killing Whets Appetite for Less Secrecy, N.Y. Times, Feb. 5, 2013, at A11.

content of the law. Part III identifies various internal and external causal mechanisms through which practice-based law could constrain the President. Among other things, this Part explains that one way that law might constrain the President is through the simple fact that issues of presidential power are publicly criticized and defended in legal terms. This Essay concludes by noting some of the obstacles to determining empirically the extent to which legal dialogue or any other mechanism operates as a constraint on the President, and by identifying some possible avenues of future research.

I. LAW AND THE PRESIDENCY

A vast array of law—constitutional, statutory, regulatory, and judge-made—is relevant to the executive branch. The specific focus of this Essay is on the law, especially the constitutional law, governing presidential authority. This Part describes the prevalence of practice-based argumentation in decisions and debates concerning this body of law. It also considers some of the limitations on judicial review in this area. Finally, this Part explains how the combination of unwritten norms and limited judicial review can lead to skepticism about the extent to which the President is constrained by law as opposed to mere politics.

A. *Historical Gloss and Presidential Power*

Reliance on historical practice is a mainstay of decisionmaking and debates concerning the scope of presidential power.¹⁷ In part this is a function of the limited guidance provided by the constitutional text. Unlike Article I of the Constitution, which contains a long list of congressional powers, Article II sets forth relatively few specific presidential powers. The President is made the Commander in Chief of the armed forces, but the constitutional text does not explain what this authority entails.¹⁸ The President has the power to make treaties and to appoint various officials, but those powers are shared with the Senate.¹⁹ Other clauses in Article II, such as the provisions about receiving ambassadors and taking care that the laws are faithfully executed, argua-

17. Examples include debates over the initiation of military hostilities, the conclusion of executive agreements, and the removal of executive officers. For a detailed discussion of these examples, see Bradley & Morrison, *supra* note 1, at 461–85; see also, e.g., Louis Fisher, *Constitutional Conflicts Between Congress and the President* 19 (5th ed. 2007) (“Custom is a source of executive power—particularly when Congress fails to challenge and check.”); William Howard Taft, *Our Chief Magistrate and His Powers* 2 (1916) (“Precedents from previous administrations and from previous Congresses create an historical construction of the extent and limitations of their respective powers, aided by the discussions arising in a conflict of jurisdictions between them.”).

18. U.S. Const. art. II, § 2, cl. 1.

19. U.S. Const. art. II, § 2, cl. 2.

bly sound more like obligations than powers.²⁰ Some scholars contend that the first sentence of Article II, which states that “[t]he executive Power shall be vested in a President of the United States of America,”²¹ implicitly grants the President a broad range of powers, but this claim is controversial, and, in any event, it highlights the text’s lack of specificity.²²

Responding in part to the limited textual guidance in Article II, Justice Frankfurter’s concurring opinion in the *Youngstown* steel seizure case famously emphasized the importance of historical practice to the interpretation of presidential power. As he put it:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.²³

In other decisions, the full Supreme Court has endorsed the significance of such practice-based “gloss.”

Consider, for example, *Dames & Moore v. Regan*.²⁴ The issue there was whether Presidents Carter and Reagan had the authority, as part of their resolution of the Iranian hostage crisis, to transfer billions of dollars in claims by U.S. citizens against Iran to a new arbitral body being established in The Hague. In concluding that the Presidents had this authority, the Court noted that “the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries” and that “there has . . . been a longstanding practice of settling such claims by executive agreement without the

20. U.S. Const. art. II, § 3 (“[H]e shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed . . .”).

21. U.S. Const. art. II, § 1, cl. 1.

22. For debate over the implications of the Article II Vesting Clause, compare Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L.J.* 231, 234 (2001) (arguing Vesting Clause grants President “a ‘residual’ foreign affairs power”), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *Mich. L. Rev.* 545, 551–52 (2004) (challenging claim that Vesting Clause grants President substantive powers). The extent to which historical practice is viewed as relevant to issues of separation of powers will of course be affected by one’s constitutional methodology, and strict originalists in particular are both less likely to find it relevant and more likely to find the constitutional text to be determinate. See Bradley & Morrison, *supra* note 1, at 424–25, 431–32; Alison L. LaCroix, *Historical Gloss: A Primer*, 126 *Harv. L. Rev. F.* 75, 81 (2013), http://www.harvardlawreview.org/media/pdf/forvoll26_lacroix.pdf (on file with the *Columbia Law Review*).

23. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

24. 453 U.S. 654 (1981).

advice and consent of the Senate.”²⁵ The Court further emphasized that “the practice of settling claims continues today” and that Congress had acquiesced in this practice, both by enacting supporting framework legislation and by “consistently fail[ing] to object . . . even when it has had an opportunity to do so.”²⁶

Historical practice is also an important component of the canonical three-tiered framework for assessing presidential power that Justice Jackson articulated in his *Youngstown* concurrence. Under that framework, the President’s power is at its highest when supported by express or implied congressional authorization, in an intermediate “zone of twilight” when Congress has said nothing, and at its lowest when Congress has expressly or implicitly prohibited the action in question.²⁷ Historical practice is potentially relevant in each of these categories. It can help an interpreter determine whether there is implicit congressional support or opposition for purposes of the first and third categories.²⁸ It is also potentially relevant to whether a presidential power is exclusive and thus valid even under the third category.²⁹ Perhaps most obviously, it can play a large role in the intermediate zone, in which the President and Congress “may have concurrent authority, or in which its distribution is uncertain.”³⁰ Indeed, as Justice Jackson noted, congressional inaction in the face of presidential activity “may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”³¹

Nonjudicial actors also frequently reference historical practice when making arguments relating to presidential power. This is certainly true of the work of OLC, which provides authoritative legal advice to the executive branch based on its best view of the law.³² OLC routinely issues

25. *Id.* at 679.

26. *Id.* at 680–82 & n.10; see also, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003) (concluding President had constitutional authority to settle international law claims “[g]iven the fact that the practice goes back over 200 years, and has received congressional acquiescence throughout its history”); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (noting, in case involving question about operation of President’s veto authority, that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character”). But cf. *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (declining to allow presidential memorandum to displace state law because, among other things, “[t]he President’s Memorandum is not supported by a ‘particularly longstanding practice’ of congressional acquiescence, . . . but rather is what the United States itself has described as ‘unprecedented action’” (citation omitted)).

27. See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

28. See Bradley & Morrison, *supra* note 1, at 419.

29. See *id.* at 421–22.

30. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

31. *Id.*

32. Trevor W. Morrison, *Constitutional Alarmism*, 124 *Harv. L. Rev.* 1688, 1713–15 (2011) [hereinafter Morrison, *Constitutional Alarmism*] (reviewing Ackerman, *Decline*,

opinions relating to issues of presidential power, and those opinions frequently refer to historical practice. To take a prominent recent example mentioned in the Introduction, in 2011 OLC relied heavily on a series of past presidential uses of military force, in which it claimed Congress had acquiesced, to support its conclusion that President Obama had the constitutional authority to conduct military operations in Libya without congressional authorization.³³ Another recent example is OLC's analysis of the applicability of executive privilege to certain Justice Department documents sought by the House Committee on Oversight and Government Reform as part of its investigation into a law enforcement operation known as "Fast and Furious."³⁴ OLC's analysis relied heavily on past assertions of executive privilege, as well as the rationales proffered to justify those assertions, to conclude that the documents in question were covered by the privilege.³⁵

To be sure, there is some variation in precisely how OLC invokes historical practice. For example, its Libya opinion cited historical practice to establish "the two political branches' practical understanding . . . of their respective roles and responsibilities with respect to national defense,"³⁶ whereas its executive privilege analysis cited historical practice to establish a consistent executive branch position over time, without asserting any agreement by Congress.³⁷ Careful normative assessment of those

supra note 5); see also Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 38–39 (2007) (noting OLC's success depends on ability to "preserve its fidelity to the law while at the same time finding a way, if possible, to approve presidential actions").

33. See Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Att'y Gen. Eric Holder, (Apr. 1, 2011) [hereinafter Krass Memorandum], available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (on file with the *Columbia Law Review*) (noting "the historical practice of presidential military action without congressional approval"). For a critique of OLC's reasoning, see Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, *Harvard Nat'l Security J.F.* 1, 3–4 (2011), http://harvardnsj.com/wp-content/uploads/2011/04/Forum_Glennon_Final-Version.pdf (on file with the *Columbia Law Review*) (contending "[i]n many of the precedents that provide the 'historical gloss' on which OCL so heavily relies, Congress objected" and many of them were not on point). This issue is distinct from whether the operation constituted "hostilities" under the War Powers Resolution. For discussion of that question, see *infra* Part III.D.

34. Letter from Att'y Gen. Eric H. Holder, to President Barack Obama (June 19, 2012) [hereinafter Holder Letter], available at <http://www.justice.gov/olc/2012/ag-ff-exec-priv.pdf> (on file with the *Columbia Law Review*). Although the formal document cited here is a letter from the Attorney General to the President, the fact that the letter appears on OLC's website, in a collection of OLC opinions, reflects that OLC is very likely the source of the substance of the analysis.

35. *Id.* at 2–4.

36. Krass Memorandum, *supra* note 33, at 7.

37. See Holder Letter, *supra* note 34, at 3 (noting "Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials

uses of historical practice would require close attention to the different ways in which historical practice is used and the different reasons underlying those uses.³⁸ Our point here is simply that, for one reason or another, reliance on historical practice is a common feature of OLC's work.

The executive branch's attention to historical practice is also reflected in presidential issuance of "constitutional signing statements." These statements, made when the President is signing a bill into law, call into question the constitutionality of one or more provisions in the bill and suggest that the President might not comply with the provisions, often on the ground that the provisions threaten to interfere with presidential authority.³⁹ As the executive branch has explained, "[p]articularly since omnibus bills have become prevalent, signing statements have often been used to ensure that concerns about the constitutionality of discrete statutory provisions do not require a veto of the entire bill."⁴⁰ Although issued by both Democratic and Republican Presidents,⁴¹ these statements are controversial, with some critics claiming that the rule of law and separation of powers are offended when a President reserves the ability to disregard part of a bill that he signs into law.⁴² It does not

from congressional subpoena" and citing multiple precedents from several different administrations).

38. For discussion of the importance of considering the specific reasons why historical practice is relied upon in general, as well as the distinction between reasons that depend on institutional acquiescence and those that do not, see generally Bradley & Morrison, *supra* note 1.

39. Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power, 23 *Const. Comment.* 307, 313–14 (2006). Signing statements are also used for other purposes, such as explaining to the public why the administration supported the law or directing officials within the executive branch about how the law should be interpreted or administered. Memorandum from Walter Dellinger, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), available at <http://www.justice.gov/olc/signing.htm> (on file with the *Columbia Law Review*).

40. Memorandum from President Barack Obama to the Heads of Exec. Dep'ts and Agencies (Mar. 9, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-on-Presidential-Signing-Statements (on file with the *Columbia Law Review*).

41. See Todd Garvey, Cong. Research Serv., RL 33667, Presidential Signing Statements: Constitutional and Institutional Implications 2–13 (2012), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf> (on file with the *Columbia Law Review*) (discussing presidential signing statements from Reagan Administration to Obama Administration).

42. See, e.g., Am. Bar Ass'n, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine 5 (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf> (on file with the *Columbia Law Review*). For debate over whether the President is constitutionally required to veto legislation containing provisions that he believes are unconstitutional, compare, e.g., Saikrishna Prakash, Why the President Must Veto Unconstitutional Bills, 16 *Wm. & Mary Bill Rts. J.* 81, 81–82 (2007) (arguing there exists

appear, however, that Presidents commonly disregard the provisions to which they object in signing statements. This was true even during the George W. Bush Administration, which had a reputation for being particularly aggressive in its issuance of signing statements.⁴³ Thus, instead of signaling an active intent to disregard the identified provision, signing statements may be better understood as attempts by the executive branch to prevent a claim that it has acquiesced in congressional intrusions on executive authority. In other words, these statements appear to be designed, at least in part, to prevent historical gloss from developing in a way that might limit presidential authority.⁴⁴

Legal scholarship relating to presidential power, especially in the area of foreign affairs, also frequently refers to historical practice. A number of scholars have referenced such practice, for example, in assessing whether and to what extent the President has the constitutional authority to initiate military operations in the absence of congressional authorization.⁴⁵ Other scholars have emphasized practice in considering

constitutional duty to exercise veto in this situation), with William Baude, *Signing Unconstitutional Laws*, 86 *Ind. L.J.* 303, 309 (2011) (arguing there is no such constitutional duty). For an opinion by OLC expressing the view that “there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional,” see Memorandum from Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice, to Abner J. Mikva, Counsel to the President (Nov. 2, 1994), available at <http://www.justice.gov/olc/nonexecut.htm> (on file with the *Columbia Law Review*).

43. See, e.g., Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 *Wm. & Mary Bill Rts. J.* 11, 13 (2007) (noting GAO report suggesting “general compliance by the Bush administration (like its predecessors) with even those elements of complex statutes the President had identified as constitutionally objectionable, rather than a bold flouting of Congress”); Nelson Lund, *Presidential Signing Statements in Perspective*, 16 *Wm. & Mary Bill Rts. J.* 95, 107 (2007) (noting “the GAO’s inability to find that the Bush administration failed to comply with even a single statutory provision as a result of objections articulated in a presidential signing statement”).

44. Bradley & Morrison, *supra* note 1, at 452–53; see also John Elwood, *No Constitutional Signing Statement for the Guantanamo Transfer Restrictions*, *The Volokh Conspiracy* (Jan. 9, 2011, 4:08 PM), <http://www.volokh.com/2011/01/09/no-constitutional-signing-statement-for-the-guantanamo-transfer-restrictions> (on file with the *Columbia Law Review*) (“[I]n my experience, most legislative provisions that are the subject of constitutional signing statements are implemented as written, and the signing statement is done mostly to ‘lay down a marker’ with Congress.”).

45. See, e.g., Henry P. Monaghan, *Presidential War-Making*, 50 *B.U. L. Rev.* (Special Issue) 19, 25–27, 29–31 (1970) (asserting historical practice has legitimized presidential war-making); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 *N.Y.U. L. Rev.* 1338, 1355–64 (1993) (reviewing John Hart Ely, *War and Responsibility: War Power and the Sirens of Formalism* (1993)) (arguing it is “the ‘court of history,’ an accretion of interactions among the branches, that gives rise to basic norms governing the branches’ behavior in the area”); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 *Yale L.J.* 845, 874–76 (1996) (reviewing Louis Fisher, *Presidential War Power* (1995)) (considering proper role of history in discerning

the circumstances under which the President may conclude international agreements without obtaining the consent of two-thirds of the Senate.⁴⁶ Even outside the foreign affairs area, academic debates about presidential authority—such as about the President’s power to remove executive officials from office⁴⁷—are greatly influenced by considerations of historical practice.

None of this is to suggest, of course, that reliance on historical practice in discerning presidential authority is free from difficulty. One obvious danger is that, if structural and other factors limit Congress’s ability to resist assertions of presidential authority, this approach to constitutional interpretation might turn out to ratchet up presidential power over time. On the other hand, it may be that such a danger can be adequately checked by paying careful attention, when deciding what historical practices should count, to the actual dynamics of congressional-executive relations, including the conditions under which Congress can truly be said to have acquiesced in particular presidential actions.⁴⁸ The key point for present purposes is simply that reliance on historical practice is a standard part of modern constitutional argumentation and decisionmaking.

B. *Limitations on Judicial Review*

If courts routinely reviewed contested issues of presidential power, they could decide whether and when to credit historical practice in this area. They could also decide whether novel presidential assertions of authority were justified, before such assertions became established practice. But judicial review in this area is anything but routine. Courts obviously do review issues of presidential power in some instances, especially when individual rights are perceived to be at stake, as both *Youngstown* and the series of Supreme Court decisions concerning the “war on terror” illustrate.⁴⁹ When individual rights are not directly impli-

allocation of war powers).

46. E.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799 (1995); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *Yale L.J.* 1236 (2008); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 *Tex. L. Rev.* 961 (2001) [hereinafter Spiro, *Treaties*]; John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 *Mich. L. Rev.* 757 (2001).

47. E.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive* (2008); Harold J. Krent, *The Sometimes Unitary Executive: Presidential Practice Throughout History*, 25 *Const. Comment.* 489 (2009) (reviewing Calabresi & Yoo, *supra*).

48. See Bradley & Morrison, *supra* note 1, at 444–47, 448–52 (arguing for such focus on dynamics of congressional-executive relations).

49. For the relevant war on terror decisions, see *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), superseded by statute, *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600; *Hamdi v. Rumsfeld*, 542

cated, however, courts often abstain from addressing questions surrounding the allocation of authority between Congress and the President.

Judicial abstention is particularly common in the foreign affairs area. Consider, for example, the question of whether the President is constitutionally required to obtain congressional authorization before initiating military hostilities. Despite numerous presidential initiations of hostilities without congressional authorization in the post-World War II period, courts have generally refused to consider the issue.⁵⁰ Courts have similarly avoided addressing whether Presidents must obtain congressional or senatorial approval before terminating a treaty,⁵¹ and whether and to what extent Presidents may use executive agreements in lieu of treaties.⁵²

Courts invoke a variety of doctrines in support of this abstention. They enforce general standing requirements strictly, and, at least since the Supreme Court's 1997 decision in *Raines v. Byrd*,⁵³ they typically find that individual members of Congress lack standing to challenge presidential action.⁵⁴ Some lower courts also invoke ideas of "political ripeness," pursuant to which they will not intervene in interbranch disputes until the affected branch has exhausted its own political resources to address the purported problem, a requirement that is rarely if ever satisfied.⁵⁵ Another potential barrier to judicial review is the political question

U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004), superseded by statute, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

50. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000) (holding that members of Congress lacked standing to challenge President Clinton's use of military force in Yugoslavia); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (holding that members of Congress lacked standing to challenge President Obama's use of military force in Libya).

51. See, e.g., *Kucinich v. Bush*, 236 F. Supp. 2d 1, 17 (D.D.C. 2002) (dismissing complaint by members of Congress against President Bush for withdrawing United States from Anti-Ballistic Missile Treaty). The D.C. Circuit addressed the merits of a treaty termination in *Goldwater v. Carter*, but the Supreme Court vacated the decision on justiciability grounds. 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).

52. See, e.g., *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319 (11th Cir. 2001) (dismissing challenge to constitutionality of North American Free Trade Agreement).

53. 521 U.S. 811 (1997). In *Raines*, the Court indicated that members of Congress will ordinarily lack standing to complain that an action has caused them institutional injury unless they can show that their votes have been "completely nullified" by the action. *Id.* at 823-24.

54. See, e.g., *Campbell*, 203 F.3d at 19.

55. See, e.g., *Doe v. Bush*, 323 F.3d 133, 137 (1st Cir. 2003) (affirming dismissal of suit seeking to prevent President Bush from initiating military operations in Iraq); see also *Goldwater*, 444 U.S. at 997-98 (Powell, J., concurring in the judgment) (concluding challenge to presidential termination of treaty was "not ripe for judicial review" because

doctrine, which the lower courts apply with some frequency in the foreign affairs area.⁵⁶

Academic defenders of this judicial abstention have argued either that the political branches have adequate resources to protect their interests,⁵⁷ or that the courts lack sufficient competence to resolve separation of powers issues, especially in the foreign affairs and national security areas.⁵⁸ Other scholars have bemoaned this abstention as an abdication of the judicial role and have blamed it for contributing to what they perceive to be an undesirable growth in executive power in the modern era.⁵⁹ The bottom line is that many issues of presidential power are resolved, if at all, outside the courts. Moreover, even when the courts do intervene, they are likely to give significant deference to patterns of governmental practice, especially if the patterns are longstanding and appear to reflect interbranch agreement.⁶⁰

Congress had not attempted to use its resources to oppose President's treaty termination, and thus there was no "constitutional impasse" between branches).

56. See, e.g., *Goldwater*, 444 U.S. at 1002 (plurality opinion) (Rehnquist, J.); *Made in the USA Found.*, 242 F.3d at 1319.

57. See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process* 275 (1980) (arguing judicial review of boundaries of executive and legislative power is unnecessary because "[e]ach branch . . . has tremendous incentives . . . to guard its constitutional boundaries and assigned prerogatives" and "[i]f either branch perceives a constitutional violation of this kind, . . . [it] possesses an impressive arsenal of weapons to demand observance of constitutional dictates"); see also *Goldwater*, 444 U.S. at 1004 (plurality opinion) (emphasizing, in considering whether President had unilateral power to terminate treaty, that case involved "a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests").

58. See, e.g., Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 12 (2007) (arguing courts "should defer to government action" during national security emergencies); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 *Iowa L. Rev.* 941, 944 (2004) (arguing considerations of institutional competence support judicial abstention in foreign affairs area).

59. See, e.g., Ely, *supra* note 45, at 66–67 (1993) ("The judiciary shouldn't decide what wars we fight, but it can insure that Congress play its constitutionally mandated role in such decisions. It has become imperative that one way or another it do so."); Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* 7 (1992) (urging "U.S. federal courts [to] stop abdicating in foreign-affairs cases"); Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* ch. 6 (1990) (criticizing phenomenon of judicial deference in foreign affairs).

60. See *supra* text accompanying notes 23–31 (discussing cases showing significant judicial deference to longstanding practices of presidential and congressional power). An important exception is *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court held unconstitutional a "legislative veto" provision even though Congress had enacted many similar provisions since the 1930s. While emphasizing that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution," the Court also noted that "11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with

C. Skepticism About Legal Constraint

The general posture of judicial abstention in this area raises questions about whether presidential power is truly subject to legal constraints. It is often easier—or at least more familiar—to talk meaningfully about law if there is a reasonable prospect that the actions in question will face judicial review. Because the courts are unlikely to intervene in many controversies relating to presidential power—and because any such intervention is likely to be deferential to the actions of the political branches—some scholars are inclined to say that Presidents face (or will soon face) virtually no constraints at all. Part of the concern here is that Congress by itself often seems either unable or unwilling to provide adequate checks on executive power. Compounding the problem, in the view of some scholars, is that institutional arrangements within the executive branch are not able to constrain presidential decisionmaking. Bruce Ackerman, for example, claims to identify a range of developments in “politics and communications, bureaucratic and military organization,” as well as “executive constitutionalism,” that threaten to turn the presidency into “a vehicle for demagogic populism and lawlessness.”⁶¹

Other scholars contend that Presidents face some constraints on their actions, but depict those constraints in extralegal terms. Eric Posner and Adrian Vermeule, for example, argue that “law does little to constrain the modern executive,” and that whatever constraints Presidents do face are instead a matter of “politics and public opinion.”⁶² On this view, any seemingly stable arrangements affecting presidential power are simply “non-normative equilibria”⁶³ or focal points of coordination with no authoritative status.⁶⁴ If so, the existence of a particular arrangement might in some instances constrain presidential action, but it provides no strong normative justification for its continued existence if political or other extralegal factors pull in a different direction.

Some of this skepticism, especially when coming from the political left, is related to a more general concern about the growth of presidential power in the modern era, a concern reflected in the historian

this issue have gone on record at some point to challenge congressional vetoes as unconstitutional.” *Id.* at 942 n.13, 944.

61. Ackerman, *Decline*, *supra* note 5, at 4.

62. Posner & Vermeule, *The Executive Unbound*, *supra* note 5, at 15.

63. Fallon, *Constitutional Constraints*, *supra* note 6, at 993.

64. See, e.g., Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 *Harv. L. Rev.* 1791, 1836 (2009) (“We might also understand the settlement of non-textual constitutional issues as instances of successful coordination.”); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 *U. Pa. L. Rev.* 991, 1002 (2008) (“Precedents may just be patterns of behavior that parties recognize as providing focal points that permit cooperation or coordination.”).

Arthur Schlesinger's account of the "imperial presidency."⁶⁵ That concern was especially prominent during the George W. Bush Administration, which was thought by some to have used the post-September 11 security environment as an opportunity to make particularly broad claims of presidential power.⁶⁶ But concerns about presidential unilateralism have continued into the Obama Administration.⁶⁷ The skepticism may also trace to post-Watergate cynicism about the behavior of government officials, including the extent to which they are likely to act based on internalized norms.⁶⁸

Skepticism about the extent to which the presidency is constrained by law implicates a series of questions relevant to this Essay. Most generally, what is the relationship between law and politics in this area? Can historical practice-based understandings of presidential power carry legal status even if they are enforced by political means? What is the significance, if any, of the fact that historical practice relating to presidential power is often invoked by government actors in legal terms? To begin answering these and related questions, the next Part considers more specifically what it means to say that the President is constrained by law.

Of course, presidential power is not the only area in which there are questions about the existence and extent of legal constraint. Somewhat analogous issues are raised, for example, about the effect of international law on the behavior of nation-states, in light of the general absence in the

65. See generally Arthur M. Schlesinger, Jr., *The Imperial Presidency* (First Mariner Books 2004) (1973).

66. See, e.g., Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 9 (2007) ("The war on terrorism's climate of perpetual emergency provided a vehicle for turning [Vice-President Cheney's] vision of an unfettered commander in chief into a reality."); Schlesinger, *supra* note 65, at xvii ("Once again, international crisis has resurrected the Imperial Presidency."); Frederick A.O. Schwarz Jr. & Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* 200 (2007) ("With an arrogance born of historical amnesia, the Bush Administration invoked 9/11 to claim a power unprecedented on this side of the North Atlantic to suspend or wholly circumvent laws passed by Congress barring torture, detention without judicial review, and wiretapping without warrants.").

67. See, e.g., Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. Times, Apr. 23, 2012, at A1 ("[T]he Administration has been seeking ways to act without Congress."); Andrew Romano & Daniel Klaidman, *President Obama's Executive Power Grab*, Newsweek, Oct. 22, 2012, <http://www.thedailybeast.com/newsweek/2012/10/21/president-obama-s-executive-power-grab.html> (on file with the *Columbia Law Review*) (suggesting President Obama had shifted to unilateral action in face of congressional obstruction).

68. See, e.g., John P. MacKenzie, *The Appearance of Justice* 225–26 (1974) (linking increased public cynicism about national leaders to Watergate); James T. Patterson, *Grand Expectations* 782 (1996) (noting broad public perception that "Watergate . . . proved . . . the deviousness and arrogance of government officials who claimed to serve the public interest").

international arena of both authoritative judicial review and formal enforcement mechanisms.⁶⁹ Nevertheless, as we discuss in Part III, at least some of the potential legal constraints on presidential power reflect specific characteristics of U.S. legal culture and executive branch structure, and might not translate to other contexts. Therefore, while some of this Essay's conceptual analysis may be applicable to questions about the constraining effect of law more generally, our focus here is solely on presidential power.

II. UNPACKING THE IDEA OF LEGAL CONSTRAINT

To assess whether and how law, including practice-based law, might constrain the President, we first need to understand what it means for law to constrain. In this Part, therefore, we attempt to unpack the idea of legal constraint. We start by distinguishing noncompliance with law from reasonable disagreements about law. Next, we address the difficulty of "observational equivalence," whereby actions consistent with law may be taken for nonlegal reasons, and whereby actions inconsistent with law may occur even though law acted as a constraint. Finally, we explore several relationships that affect law's capacity to constrain: between law's role in constraining government action and its role in constituting (and thus enabling) government, between law and enforcement, and between law and judicial review.

A. *Assessing Noncompliance*

Before considering what it means to say that the President is constrained by law, it is important to note that it can be difficult to assess whether particular presidential actions should count as legal compliance or noncompliance. As an initial matter, we need some way to distinguish noncompliance from genuine disagreement about what the law requires. It is rare for Presidents to acknowledge that they are acting inconsistently with the law. Instead, they typically argue that the law does not require what critics are contending. In the war powers area, for example, Presidents have long claimed that the Constitution grants them the authority to use military force unilaterally, at least in certain circumstances. The Obama Administration made that very claim regarding the military operations in Libya in 2011.⁷⁰ As that episode also illustrates, presidential uses of force without congressional authorization are never presented as exceeding legal boundaries, and critics' cries of

69. Compare, e.g., Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 13 (2005) (arguing international law "is not a check on state self-interest"), with Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 *U. Chi. L. Rev.* 469 (2005) (emphasizing importance of informal enforcement measures to operation of international law).

70. See Krass Memorandum, *supra* note 33.

illegality are virtually always contested. Obviously, the greater the indeterminacy of the law in question, the more likely it is that there will be disputes over what the law provides. If the dispute is genuine and reasonable, we do not think it makes sense to call the presidential action at issue noncompliant with the law.

On issues of presidential power, the role of historical practice can make it especially difficult to disentangle noncompliance with the law from disagreement about the law. The challenges lie on two levels. First, although historical practice is regularly invoked by courts and other interpreters addressing issues of presidential power, some critics of presidential action might maintain that historical practice should not play such a role. Originalist constitutional law scholars might insist, for example, that the constitutional law of presidential power should be based exclusively on the Founding generation's understanding of the constitutional text.⁷¹ Other scholars might object that, even if constitutional meaning is not fixed at the Founding, the historical gloss method of constitutional interpretation is objectionable because it unduly favors executive authority. These perspectives may lead to charges that particular exercises of presidential power are unlawful even if supported by what otherwise might be considered to be practice-based constitutional law. Of course, methodological disputes are common in constitutional law, so the problem is not unique to this topic. In any event, as summarized in Part I and as detailed in our other work, historical practice does in fact occupy a central role in debates about the constitutional law of presidential power.⁷² For purposes of this Essay, we assume that it will continue to do so.

The second level is substantive: To the extent that constitutional limits on presidential authority are informed by historical practice, on any given issue one first needs to have a view about the relevant practice before assessing whether the President has complied with the law. Thus, for example, if one concludes that the best description of practice-informed presidential power is that the President may use military force unilaterally for small-scale operations with discrete objectives but not for conflicts that are expected to require a substantial and protracted commitment of ground troops, one might find general presidential

71. This is just one illustration of a larger point that disputes over the legality of a given presidential action can involve not just disagreement about what a given set of legal authorities provides, but also disagreement about what counts as a legitimate source of law or legal meaning. Situations that might at first seem like legal noncompliance might be better seen as involving disagreements of this sort—for example, a disagreement over the extent to which moral or pragmatic considerations are part of the law. For a discussion of the analytical difficulties that can arise when law is viewed as encompassing a broad range of such considerations, see Frederick Schauer, *Legal Realism Untamed* 17 n.40 (Sept. 20, 2012) (unpublished manuscript) (on file with the *Columbia Law Review*).

72. See Bradley & Morrison, *supra* note 1, at 417–24.

compliance with the law in this area.⁷³ But if one has a different view of the practice-based constitutional law relevant to this issue, one may be more inclined to see certain presidential uses of military force as unlawful.⁷⁴ As with methodological disagreement, this sort of dispute about the relevant content of the law is not uncommon in other areas of law. For purposes of this Essay, we do not take a position on the content of practice-based constitutional law on specific issues. Instead, we simply assume that it is at least sometimes possible to distinguish between legitimate disagreement about the law and noncompliance with the law, even on issues of presidential power for which the law is heavily influenced by historical practice.

An additional complication arises when there are multiple sources of law that potentially relate to the same presidential action. In that situation, even if there is no dispute about the content of the underlying law, Presidents may claim that the otherwise governing law has been displaced by some other law. A statutory prohibition at Time 1, for example, might arguably be displaced by a congressional authorization at Time 2. Or a statutory restriction might arguably be unconstitutional, perhaps because it invades some exclusive presidential prerogative. Again, if presidential action is supported by a reasonable claim along these lines, we do not think it makes sense to label it noncompliance.⁷⁵ Of course, not all such claims will be reasonable, so the mere existence of a claim will not resolve whether the action complies with law.

We recognize that the above references to the “reasonableness” (or to “plausibility,” “debatability,” and so on) of various arguments introduce added complications. Legal compliance can mean different things in different contexts. In some circumstances, complying with the law could mean adhering to a view that is ultimately deemed to be the correct one. That orientation is common in circumstances subject to final resolution by a single authoritative decisionmaker, like a court.⁷⁶ But especially in areas not frequently subject to judicial review and more heavily influenced by historical practice—that is, areas like the one we focus on in this Essay—the orientation might more commonly focus on

73. See *id.* at 462–63.

74. See, e.g., Glennon, *supra* note 33, at 18–19 (disputing OLC’s argument that past practice supported legality of President Obama’s use of military force in Libya).

75. For the view that the President has the *authority* not to enforce laws that he deems unconstitutional, see generally Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994). For the view that he has a *duty* not to enforce such laws, see generally Saikrishna Bangalore Prakash, The Executive’s Duty to Disregard Unconstitutional Laws, 96 Geo. L.J. 1613 (2008).

76. It is not always how courts proceed, however. See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (requiring judicial deference under certain circumstances to reasonable interpretations of statutes by administrative agencies charged with implementing them).

legal reasonableness or plausibility. We do not attempt here to determine precisely what these weaker forms of legal persuasiveness might entail, or how they might differ among themselves. The key point is simply that they involve a lower degree of legal certainty and thereby allow for a broader range of discretion.

To be sure, some executive branch actors involved in assessing the law of presidential power might themselves claim to focus on some version of legal correctness. As noted above and discussed in greater detail below, OLC is an example.⁷⁷ But OLC is not a typical executive legal office, and only a small fraction of all the legal questions arising within the executive branch go to OLC. Moreover, whatever the orientation of the executive actor in question, relevant audiences (whether in Congress, the press, or the informed public more generally) might be more attuned to whether the President operates within the bounds of legal reasonableness or plausibility than to whether he adheres to a single “correct” view of the law. If nothing else, it seems likely that the negative consequences to a President of appearing to exceed the boundaries of what is plausible would be more severe than the negative consequences of asserting a plausible but not ultimately persuasive view of the law.

In situations where legal plausibility or some similar standard is the touchstone, determining noncompliance can be especially difficult. If the correct view of the practice-based law of presidential power is often hard to discern, determining what views are reasonable on such matters can be even more challenging. Such judgments will often (indeed, perhaps always) be debatable. But that difficulty is not unique to this topic; it is a feature of legal argumentation generally. In any event, the fact that the legality of a particular presidential action may be debatable does not mean that law cannot operate as a constraint in that context.⁷⁸ Even if the President is advised that there is a minimally plausible argument in favor of the action in question, the law might still constrain him not to act if the argument is perceived as being too weak. The *relative perceived strength* of a legal argument, in other words, might have a constraining effect.⁷⁹

77. See *supra* text accompanying note 32; *infra* text accompanying notes 127–130.

78. See Fallon, *Constitutional Constraints*, *supra* note 6, at 1006 (“From reasonable and conscientious disagreement, one cannot infer the absence of normative constraint.”).

79. Whether this scenario involves “law” acting as a constraint will depend to some extent on one’s definition of law. Under a Dworkinian conception of law, pursuant to which there is a single best reading of the legal materials, a mere plausibility constraint might not be a legal one. See, e.g., Ronald Dworkin, *Law’s Empire* 231 (1986) (suggesting there will be best legal interpretation in terms of fit with prior legal materials and principles). Even under that conception, however, one could reasonably describe the plausibility constraint as “law-related.”

Consider, for example, the confrontation that developed in the summer of 2011 between the Obama Administration and Republican leaders in Congress over whether to increase the statutory debt ceiling. When a legislative extension appeared unlikely, some commentators suggested, based on either novel constitutional arguments or pure policy grounds, that the President could and should unilaterally exceed the debt ceiling.⁸⁰ Others insisted that such unilateral action would be unconstitutional because it would usurp Congress's constitutional authority "[t]o borrow [m]oney on the credit of the United States."⁸¹ Historical practice was potentially relevant to the issue in that, as noted by Professor Erwin Chemerinsky, "[t]hroughout American history, the debt ceiling always has been set and raised by statute, not executive decision-making."⁸² President Obama did not attempt to address the issue unilaterally and instead continued to seek a legislative extension of the ceiling, which he ultimately obtained. In explaining his decision, Obama stated publicly that he had consulted with his lawyers about the argument that he had the authority to extend the debt ceiling unilaterally, and noted that "[t]hey're not persuaded that that is a winning argument."⁸³

80. See, e.g., Ronald Dworkin, *Can Obama Extend the Debt Ceiling on His Own?*, N.Y. Rev. Books (July 29, 2011, 11:58 AM), <http://www.nybooks.com/blogs/nyrblog/2011/jul/29/can-obama-extend-debt-ceiling-his-own/> (on file with the *Columbia Law Review*) (arguing President had authority based on provision in Fourteenth Amendment stating that "[t]he validity of the public debt of the United States . . . shall not be questioned," U.S. Const. amend. XIV, § 4); Eric A. Posner & Adrian Vermeule, *Op-Ed., Obama Should Raise the Debt Ceiling on His Own*, N.Y. Times, July 22, 2011, http://www.nytimes.com/2011/07/22/opinion/22posner.html?_r=0 (on file with the *Columbia Law Review*) (arguing President had authority to raise debt ceiling based on "the necessities of state" and his "role as the ultimate guardian of the constitutional order"); see also Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 Colum. L. Rev. 1175, 1205–14 (2012) [hereinafter Buchanan & Dorf, *How to Choose*] (arguing President has constitutional duty to execute spending laws enacted by Congress, to collect tax revenues pursuant to laws enacted by Congress, and to keep borrowing within limits specified in debt ceiling statute, and contending that, when those duties come into conflict, least unconstitutional (and hence most preferable) course of action is for President to honor Congress's wishes regarding spending and taxes by setting aside debt ceiling).

81. U.S. Const. art. I, § 8, cl. 2; see, e.g., Laurence H. Tribe, *Op-Ed., A Ceiling We Can't Wish Away*, N.Y. Times, July 8, 2011, at A23, available at <http://www.nytimes.com/2011/07/08/opinion/08tribe.html> (on file with the *Columbia Law Review*).

82. Erwin Chemerinsky, *The Constitution, Obama and Raising the Debt Ceiling*, L.A. Times Opinion L.A. (July 29, 2011, 11:41 AM), <http://opinion.latimes.com/opinionla/2011/07/erwin-chemerinsky-on-why-obama-cant-raise-the-debt-ceiling.html> (on file with the *Columbia Law Review*).

83. David Jackson, *Obama Says He Can't Raise Debt Ceiling on His Own*, USA Today The Oval (July 22, 2011, 5:30 PM), <http://content.usatoday.com/communities/theoval/post/2011/07/obama-speaks-at-university-of-maryland/1#UQBAoI6pVE8> (on file with the *Columbia Law Review*). Some accounts from former insiders accord with this account.

When the debt ceiling issues returned in late 2012 and early 2013, a similar scenario unfolded. Some commentators and Democrats in Congress suggested a variety of legal arguments that Obama could invoke in support of unilateral action.⁸⁴ But the President appeared once again to wave off these arguments, and executive branch officials cited legal considerations in support of that decision.⁸⁵

See, e.g., David Jarmul, Kind Words for Colleagues in Washington, *Duke Today* (July 14, 2012), <http://today.duke.edu/2012/07/powelldc> (quoting H. Jefferson Powell, after he had served as Deputy Assistant Attorney General, as saying “the administration did not embrace any of these magic fixes (I mean the sarcasm) and you might well assume that at least part of the reason is that the administration’s lawyers told the policymakers that the op-eds were not responsible legal arguments”).

84. See, e.g., Neil H. Buchanan & Michael C. Dorf, Nullifying the Debt Ceiling Threat Once and For All: Why the President Should Embrace the Least Unconstitutional Option, 112 *Colum. L. Rev. Sidebar* 237, 238 (2012), http://www.columbialawreview.org/wp-content/uploads/2012/12/237_Buchanan_Dorf.pdf (on file with the *Columbia Law Review*) (reiterating “least unconstitutional option” argument advanced in Buchanan & Dorf, *How to Choose*, supra note 80, in context of late-2012 standoff); Carlos Mucha, Op-Ed., *The Coin*, N.Y. Times Room for Debate (Jan. 13, 2012, 7:22 PM), <http://www.nytimes.com/roomfordebate/2013/01/13/proposing-the-unprecedented-to-avoid-default-platinum-coin-would-create-a-trillion-dollar-in-funds> (on file with the *Columbia Law Review*) (arguing Treasury Secretary should direct United States Mint to produce “a platinum numismatic [sic] coin with, say, a \$1 trillion denomination,” which “can then be deposited at the Federal Reserve, and the Fed will credit the account of the U.S. government for the face value of the coin”); Eric Posner, *The President Has the Power to Raise the Debt Ceiling on His Own*, *Slate*, Jan. 4, 2013, http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/01/debt_ceiling_president_obama_has_the_power_to_raise_the_debt_limit_without.html (on file with the *Columbia Law Review*) (arguing “[w]here Congress fails to provide him with consistent instructions, [the President] has the discretion to do what he believes is in the public interest,” including undertaking “some combination of cutting spending, borrowing beyond the debt limit, and perhaps even searching out new sources of revenue”); see also Jonathan Weisman, “Any Lawful Steps” Urged To Avert Default, *N.Y. Times*, Jan. 12, 2013, at A11, available at <http://www.nytimes.com/2013/01/12/us/politics/democrats-urge-obama-to-take-any-lawful-steps-to-avoid-default.html> (on file with the *Columbia Law Review*) (quoting letter from Senate Democratic leadership to President Obama, saying if Congress fails to raise debt ceiling, “we believe you must be willing to take any lawful steps to ensure that America does not break its promises and trigger a global economic crisis—without Congressional approval, if necessary”).

85. See, e.g., Ian Katz, *Treasury, Fed Oppose Using Platinum Coin to Avoid Debt Ceiling*, *Bloomberg Businessweek*, Jan. 13, 2013, <http://www.businessweek.com/news/2013-01-12/treasury-fed-oppose-using-platinum-coin-to-avoid-debt-limit> (on file with the *Columbia Law Review*) (quoting Treasury Department spokesman as saying “[n]either the Treasury Department nor the Federal Reserve believes that the law can or should be used to facilitate the production of platinum coins for the purpose of avoiding an increase in the debt limit”); Press Release, Press Sec’y Jay Carney, White House Press Briefing (Dec. 6, 2012), <http://www.whitehouse.gov/the-press-office/2012/12/06/press-briefing-press-secretary-jay-carney-12062012> (on file with the *Columbia Law Review*) (“[T]his administration does not believe that the 14th Amendment gives the President the power to ignore the debt ceiling—period.”).

In light of the novelty of the issue, the conclusion of executive branch lawyers that there was no “winning argument” might not have reflected a belief that a unilateral extension of the debt ceiling was disallowed by a single correct view of the law. Instead, it is possible that they acknowledged some uncertainty in this area but were still skeptical about the unilateral authority arguments. That skepticism might have entailed a conclusion that the arguments exceeded the boundaries of even mere plausibility, or it might have entailed a judgment that the arguments, though minimally plausible to some executive lawyers, risked exposing the President to political sanctions from congressional or other opponents who might reasonably characterize the state of the law differently and claim that he had acted illegally. Either way, if the perceived weakness of the arguments contributed to the President’s decision not to attempt a unilateral extension, the law would have had a constraining effect even though its precise contours were uncertain.⁸⁶

To be sure, an administration determined to pursue a particular agenda aggressively might treat bare plausibility as the only legal constraint and also push the limits of plausibility beyond where others would go. Some observers might see certain actions of the George W. Bush Administration in the war on terror as examples of such an approach.⁸⁷ As a general matter, however, *if* in areas of legal uncertainty the relative weakness of a legal argument makes it less likely that the President will pursue the action in question, then uncertainty about the correct view of the law would not, by itself, prevent the law from operating as a constraint.⁸⁸

86. The trillion-dollar platinum coin proposal, see Mucha, *supra* note 84, highlights another complication relating to the constraining effect of law. It is possible that the executive branch thought that the proposal was legally defensible but that it would not be perceived that way by the public. Cf. Laurence H. Tribe, *The Priorities*, N.Y. Times Room for Debate (Jan. 13, 2013, 6:31 PM), <http://www.nytimes.com/roomfordebate/2013/01/13/proposing-the-unprecedented-to-avoid-default/prioritizing-debt-obligations-is-the-most-constitutional-plan> (on file with the *Columbia Law Review*) (describing platinum coin idea as “technically legal but wildly unrealistic”). If so, the “law” that constrains might in some instances not be the law as understood by legal experts.

87. See, e.g., Dana Priest, *Covert CIA Program Withstands New Furor*, Wash. Post, Dec. 30, 2005, at A1 (noting “the administration asked government lawyers to draw up new rules and reinterpret old ones to approve” banned or discouraged activities and quoting General Michael V. Hayden, then-Deputy Director of National Intelligence, as saying “[a]s a professional, I’m troubled if I’m not using the full authority allowed by law”). Of course, others will take the view that even under a standard of minimal plausibility, some of the Bush Administration’s actions—like finding “waterboarding” not to violate the federal anti-torture statute—went too far. That is in fact our view, but it is not central to the point made in this Essay.

88. Separate from the uncertainties linked to the content of the law, a further challenge to assessing noncompliance in this area is the possibility that, in some extreme circumstances, Presidents might claim a prerogative to violate the law in pursuit of some other overriding imperative. As Thomas Jefferson put it, “A strict observance of the written

Finally, it is important to acknowledge the risk of tautology when considering compliance with practice-based legal constraints. The more the law is defined by actual governmental practice, the more the behavior of government institutions will become definitionally “compliant” with the law. The tautology here is analogous to President Nixon’s infamous claim that “when the President does it, that means that it is not illegal.”⁸⁹ Significantly, however, this problem is not inevitable for a practice-based approach to law. Many accounts of how historical practice should inform the law of presidential power emphasize factors like consistency over time and acquiescence by Congress—factors that will not be present in all situations.⁹⁰ As we have explained elsewhere, it may also make sense in some contexts to impose requirements beyond those reflected in current doctrine, such as bipartisan acceptance or express congressional endorsement.⁹¹ In short, to say that historical practice informs the law of presidential power is not to say that *all* arguments based on purported practice necessarily prevail.

B. *Defining Constraint*

The mere fact that the President acts in accordance with law in particular cases is not enough to show that law constrains the executive. After all, the President might have taken the same action even if there were no legal rule on point—for example, out of political self-interest or

laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.” Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), *in* 12 *The Writings of Thomas Jefferson* 418 (Andrew A. Lipscomb ed., 1904). The idea is commonly traced to John Locke. See John Locke, *Second Treatise on Government* § 160 (C.B. Macpherson ed., 1980) (discussing “power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it”). Yet this idea of a “prerogative power” (which, in practice, is virtually never invoked) seems importantly distinct from ordinary noncompliance with the law. As traditionally conceived, assertions of the prerogative power entail openly acknowledging the unlawfulness of the action in question and subjecting oneself to the *ex post* judgment of Congress and the people. See David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 *Presidential Stud. Q.* 376, 387 (2012) (explaining Jefferson “emphasize[d] that an official who assumes the power to act illegally must seek exoneration from Congress”). Given those and other unique properties of the prerogative power, an account of noncompliance with the law probably should not include reasonable invocations of that power.

89. Excerpts from Interview with Nixon About Domestic Effects of Indochina War, *N.Y. Times*, May 20, 1977, at A16.

90. See Bradley & Morrison, *supra* note 1, at 432 & n.86 (noting various accounts of institutional acquiescence); see also Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 *U. Chi. L. Rev.* 377, 410–16 (2011) (book review) (emphasizing need for care in identifying circumstances under which historical practice should be credited).

91. See Bradley & Morrison, *supra* note 1, at 454–55.

some sort of tacit coordination. If so, the alignment between presidential action and law would simply be an instance of observational equivalence.⁹² Conversely, violations of the law do not necessarily show that law has no influence—it may just be that, in certain cases, the legal constraint was outweighed by other considerations. So merely observing presidential behavior and comparing that behavior to purported legal rules is insufficient.

Instead, our contention is that law should be understood to operate as a constraint on the President *when it exerts some force on decisionmaking because of its status as law*. This definition does not require that law will always be the deciding factor in motivating presidential behavior, but it does require that law have the *potential* to be the deciding factor. By contrast, if the legal status of a rule can never be the deciding factor in motivating presidential action—if, for example, the rule is always subordinated to policy or political considerations when it conflicts with them—then the rule does not operate as a constraint.

This test admittedly imposes a low burden. Law would count as a constraint under this test even if it affected decisionmaking only in situations in which nonlegal considerations were nearly balanced in favor of and against the proposed action. If the law had an effect only in those circumstances, it would obviously be a weak constraint at best.⁹³ For analytical purposes, however, we think it is important to distinguish between two issues: first, whether the presidency is constrained at all by law (and, in particular, practice-based constitutional law), and, second, the extent of such constraint. The principal focus of this Essay is on the first question. We recognize that even if this first question is answered affirmatively, the *importance* of law as a constraint will ultimately turn on the answer to the second question. A complete answer to the second question would require systematic empirical analysis that this Essay does not attempt, although the Conclusion does suggest some potential avenues for such analysis and research.

As discussed in Part III, the constraining effect of law could stem from either internal or external considerations. Obviously, if an actor has internalized the normative force of a legal rule, the rule is having an effect. This is what is sometimes referred to as the “Hartian” perspective, after the legal philosopher H.L.A. Hart.⁹⁴ But even if an actor has not internalized the rule, there is legal effect, we would contend, if sanctions

92. See Richard H. Pildes, *Law and the President*, 125 *Harv. L. Rev.* 1381, 1402 (2012) [hereinafter Pildes, *Law and the President*] (reviewing Posner & Vermeule, *The Executive Unbound*, *supra* note 5).

93. See Frederick Schauer, *The Political Risks (if Any) of Breaking the Law*, 4 *J. Legal Analysis* 83, 88 (2012) [hereinafter Schauer, *Political Risks*].

94. See Pildes, *Law and the President*, *supra* note 92, at 1404 n.69 (describing Hartian perspective as “the classic account of law as a practice that is experienced as normatively binding” (citing H.L.A. Hart, *The Concept of Law* (2d ed. 1994))).

for noncompliance are affected by the norm's legal status.⁹⁵ Thus, law can act as a constraint even if not internalized by the actor. That is, law can constrain even what Oliver Wendell Holmes referred to as a "bad man," as long as the existence or strength of the relevant sanctions is tied at least in part to the fact that the norm in question is a legal norm.⁹⁶

In many situations it will be possible to identify multiple reasons why the President took a given action. The existence of such mixed motives should not be enough, we would contend, to defeat the existence of a legal effect. It might often be the case, for example, that an action will be taken for both legal and political reasons. The question is whether the legal reasons are exercising any additional force beyond the political, not whether the legal reasons are the only reasons for the action. Nor should it defeat the existence of a legal effect if the sanctions themselves are political in nature. As discussed further below, the type of the sanctions should not matter. Instead, the issue should be whether the presence or severity of a given sanction is affected by the fact that the norm in question is understood (by those imposing the sanction) at least in part as a *legal* norm.

If a given sanction operates entirely on the basis of nonlegal considerations, however, we would not count it as showing a legal effect. Most informal sanctions are in a sense constituted by law—for example, members of Congress, the media, and private individuals have speech rights under the Constitution that allow them to criticize government action, and individuals who meet certain legal requirements have the right to vote against officials whose actions they dislike—but we do not think it is useful to describe sanctions as legal constraints merely because they are constituted by law in this fashion. By collapsing the traditional distinction between law and politics, such an approach would render the question whether the President is constrained by law uninteresting, since no one contends that the President is unconstrained by politics. Instead, we would suggest that it is more fruitful to ask whether the sanction at issue is not simply made possible by law in the constitutive sense, but also responsive, at least in part, to the legal status of the underlying norm it is enforcing.

95. But see Fallon, *Constitutional Constraints*, *supra* note 6, at 981 (describing perspective under which "it is only as refracted through individual minds and consciences that legal norms can be motivationally efficacious").

96. See Pildes, *Law and the President*, *supra* note 92, at 1392–93 ("[T]he premise . . . is that public officials obey the law not for normative reasons but only when the benefits of legal compliance in specific contexts outweigh the costs."); see also Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds . . . reasons for conduct . . . in the vaguer sanctions of conscience.").

None of this is to suggest, of course, that law and politics are completely separate, and in fact one of the central themes of this Essay is that the two are frequently intertwined. Among other things, law and politics often act in tandem either in support of, or in opposition to, presidential action. The point here is simply that it is important to think beyond the *purely* political aspect of sanctions.

C. Enabling and Constraining

Another framing question relates to the fact that law can play dual roles. Law not only constrains government but also constitutes and enables it. For example, a person can claim presidential authority in the United States in part by showing that he or she has complied with certain legal requirements for assuming the presidency. In that fundamental sense, law enables presidential action by legitimizing assertions of authority by those who satisfy its requirements. Inherently, these enabling rules also act as constraints: Individuals cannot claim presidential authority without complying with them. Constraints of this sort are often taken for granted, perhaps because they are so clearly tied to specific constitutional text and uniform historical practice that no one seriously contemplates flouting them. Individuals under the age of thirty-five do not attempt to run for President, and Presidents (since the Twenty-Second Amendment) do not attempt to serve more than two terms in office. In short, law inherently both empowers and constrains presidential action.⁹⁷ For that reason it is likely impossible to determine whether the President is more constrained or enabled by the law *in a general sense*, because the President depends on the law for his very existence within our constitutional system.⁹⁸ There is thus no realistic counterfactual against which to make the comparison.

Relatedly, it may not be possible to say with confidence whether particular law-focused entities within the executive branch have a constraining or enabling effect on the President overall. Consider OLC, for example. OLC's reputation for reasonably independent, detached

97. See Fallon, *Constitutional Constraints*, supra note 6, at 979 ("To be a president or a member of Congress or a justice of the Supreme Court is to serve in an institution that is constituted and empowered by the Constitution and, as a result, necessarily constrained by it."); Levinson, *Parchment*, supra note 14, at 711 ("[L]egal regimes are capable of constraining powerful political actors because they are also, and even more so, *enabling* for these actors.").

98. See, e.g., Fallon, *Constitutional Constraints*, supra note 6, at 979 ("As both a conceptual and a practical matter, the alternative to constrained presidents, congressmen, and justices is not unconstrained officials, but rather no presidents, congressmen, or justices at all."); Goldsmith & Levinson, supra note 64, at 1838 ("There is no sense in assessing the effect of constitutional law by contrast to what the President would do 'in the absence of constitutional law,' since neither the President nor his capability to do anything would exist at all without constitutional law.").

legal analysis gives its work special weight. But there is no constitutional requirement that OLC even exist, and the President could in theory choose not to seek OLC's legal advice on any given question.⁹⁹ Thus, the fact that OLC does exist—and that Presidents regularly seek its advice on high-profile legal questions—may suggest that, on balance, OLC enhances the overall ability of Presidents to take their preferred actions. The mechanism for that enhancement is that, when embarking upon a controversial course of action, the President is in a better position to defend the action's legality if he can point to an OLC opinion upholding it.¹⁰⁰ Contrary to what some scholars could be read to suggest,¹⁰¹ however,

99. See Eric Posner & Adrian Vermeule, *Libyan Legal Limbo: Why There's Nothing Wrong with Obama Ignoring Some of His Own Legal Advisers on Libya*, *Slate*, July 5, 2011, http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html (on file with the *Columbia Law Review*) (“A president need not have or consult any legal advisers at all; nothing prevents Obama from shutting down OLC and the other executive branch legal offices altogether and deciding the administration's legal positions for himself.”). Professors Posner and Vermeule go too far in saying that “nothing prevents Obama from shutting down OLC.” A combination of statutory and regulatory provisions provides for OLC's existence. See 28 U.S.C. § 506 (2006) (“The President shall appoint, by and with the advice and consent of the Senate, 11 Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties.”); 28 C.F.R. § 0.25 (2012) (listing matters assigned to OLC, including “[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet”). In light of these provisions and OLC's well-established history, Congress (and especially the Senate Judiciary Committee, which oversees the Department of Justice) surely expects that OLC will continue to exist. A presidential decision to shut down OLC would likely provoke substantial congressional backlash. Moreover, dismantling OLC would return its legal advisory function to the Attorney General, in whom such authority has been vested by statute ever since the Judiciary Act of 1789. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93 (creating office of Attorney General of United States and assigning to it certain responsibilities, including giving “advice and opinion upon questions of law when required by the President . . . or when requested by the heads of any of the departments, touching any matters that may concern their departments”). That function is now codified at 28 U.S.C. §§ 511–513. The President of course is not obliged to follow the Attorney General's legal advice, but it would be practically impossible for him to shut down *that* office.

100. See Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 *Harv. L. Rev. F.* 62, 64 (2011), http://www.harvardlawreview.org/media/pdf/vol124_forum_morrison.pdf [hereinafter Morrison, *Libya*] (on file with the *Columbia Law Review*) (“[S]ignaling and maintaining a willingness to treat OLC's legal advice as presumptively binding enhances the credibility of a president's claims of good faith and respect for the law, which in turn can help generate public support for his actions.”).

101. See, e.g., Ackerman, *Decline*, *supra* note 5, at 106 (characterizing OLC as “a legal apologist for presidential power”); Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 *Harv. J.L. & Pub. Pol'y* 213, 228–29 (2012) [hereinafter Posner, *Deference to the Executive*] (“The OLC does not constrain the executive but enables him to accomplish goals that he would not otherwise be able to accomplish.”).

this does not establish that OLC invariably enhances presidential power. An OLC opinion affirming the President's policies may be fairly said to empower him on that issue. But OLC does not always say yes,¹⁰² and the absence of an OLC opinion in the President's favor likely makes it more difficult for him to pursue that course of action than if there were no OLC at all.¹⁰³ Whether that amounts to an overall restriction or enhancement of presidential power may be impossible to judge.

More fundamentally, the mere fact that law in general—and certain legal offices like OLC in particular—both enable and constrain presidential action in an aggregate sense does not speak in any meaningful way to whether law constrains the President in specific exercises of his authority. The latter question, we believe, is what most people have in mind when considering whether law constrains the President, and it is the focus of this Essay. That is, we ask whether, when the President takes a particular action, the law acts as a constraint. But it is also worth emphasizing that the ability of legal argumentation to enable presidential authority at the wholesale level may itself corroborate the possibility of legal constraint at the retail level. If all law relating to presidential authority were merely epiphenomenal, it is not clear why legal argumentation would have any capacity to enhance such authority.¹⁰⁴

D. *Relationship Between Law and Enforcement*

One of the grounds of skepticism about whether the presidency is constrained by law concerns the frequent lack of formal enforcement mechanisms. There is an extensive jurisprudential literature on whether and to what extent enforcement is necessary in order for norms to qualify as law.¹⁰⁵ Modern perspectives on law, in the tradition of H.L.A. Hart, tend to de-emphasize the importance of external enforcement and focus instead on internal perceptions, a point we return to in Part III. For present purposes, we simply note two things. First, a norm need not be perfectly enforced in order to constrain. Of course, as the legal realists emphasized, one cannot get an accurate picture of the law by looking

102. See Morrison, *Constitutional Alarmism*, supra note 32, at 1715–21 (finding significant number of opinions “predominantly against the White House”).

103. See Morrison, *Libya*, supra note 100, at 69–70 (discussing costs to presidential credibility of regularly departing from OLC's analysis, and of failing to seek OLC's opinion on issues that would ordinarily go to OLC).

104. Cf. Posner, *Deference to the Executive*, supra note 101, at 230 (suggesting OLC enables exercise of executive power by “convey[ing] information to the President about the constraints on executive power that are imposed from outside the executive branch”).

105. See generally Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 *Yale L.J. Online* 293 (2011), <http://yalelawjournal.org/images/pdfs/1029.pdf> (on file with the *Columbia Law Review*).

only at the law on the books rather than the law in action.¹⁰⁶ Our point here, however, is simply that the lack of *perfect* enforcement of a legal rule does not mean the rule does not exist, or that it does not constrain. The fact that homicides continue to be committed in the United States—and that not everyone who commits such a crime is apprehended and prosecuted—does not remove or render meaningless the legal prohibition against homicide.

Second, enforcement need not be formal. Domestic criminal laws, of course, are typically implemented through a range of formal enforcement mechanisms, such as state-sanctioned incarceration. Even such formal modes of enforcement, however, are probably enhanced by informal mechanisms such as public shaming and exclusion. For example, the formal punishment-based deterrence against committing an offense like embezzlement is likely enhanced by a desire to avoid public embarrassment and a worry about the difficulty of obtaining future employment.¹⁰⁷

Even when the likely enforcement mechanisms are entirely informal, we think they should count for purposes of evaluating whether law operates as a constraint. For some issues of presidential power, there are very few potential modes of formal enforcement (impeachment may be the only formal mode), and the likelihood that they would be employed to sanction any particular presidential act is generally very low. But there may still be enforcement through informal mechanisms such as congressional backlash and public disapproval. If those enforcement measures are triggered or intensified at least in part by the legal status of a norm, then we believe one can meaningfully describe them as a type of legal enforcement. On this point it is worth noting that, outside of the area of constitutional law, it is generally accepted that law can act as a constraint even when it takes the form of customary norms, and even when it is subject primarily to informal enforcement. There is a rich literature, for example, on the customary “law merchant” in medieval Europe, the enforcement of which was based heavily on reputation.¹⁰⁸ Gillian Hadfield and Barry Weingast have recently supplemented that literature with modeling that shows how legal norms in general can be effective

106. See, e.g., Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222, 1222 (1931) (noting “some rules [are] mere paper”).

107. See generally John Braithwaite, *Crime, Shame and Reintegration* 101–02 (1989) (noting that individuals “having high employment and educational aspirations” are particularly vulnerable to stigma of illegality); Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 *J. Crim. L. & Criminology* 325 (1980).

108. E.g., Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (2006); Avner Greif, Paul Milgrom & Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 *J. Pol. Econ.* 745 (1994).

even in the absence of centralized enforcement.¹⁰⁹ As applied to presidential power, this analysis suggests, once again, that the interrelationship of law and politics does not by itself negate the importance of law.

E. Relevance of Judicial Review

As the discussion of enforcement should make clear, we do not believe that judicial review is a prerequisite to concluding that law, including practice-based constitutional law relating to presidential power, operates as a legal constraint. In this respect, we depart from some understandings of British (and, more broadly, Commonwealth) constitutional law. Britain has an unwritten constitution, and British commentators—most famously, A.V. Dicey—have distinguished between constitutional law and “constitutional conventions” largely on the basis of judicial enforceability.¹¹⁰ On Dicey’s account, British constitutional law includes only judicially enforceable rules, while constitutional conventions “consist of conventions, understandings, habits, or practices which . . . regulate the conduct of the several members of the sovereign power . . . [but] are not in reality laws at all since they are not enforced by the Courts.”¹¹¹ As depicted by Dicey, the substantive domain of constitutional conventions overlaps substantially with that of the practice-based norms with which this Essay is concerned. For several reasons, however, we do not think that this similarity precludes calling those norms “law.”

First, in denying the label “law” to constitutional conventions, Dicey was not relegating them to an undifferentiated realm of mere politics. Instead, he was identifying a set of practices fairly described as constitutional in nature, which could be thought to carry a special normative force because of their constitutional status even though they were not legally enforceable in the courts. Second, Dicey developed his account against the background of an Austinian conception of law that viewed formal sanctions as a crucial element of law, a conception that has been substantially disputed by modern legal theorists, most notably H.L.A. Hart.¹¹² To the extent that the Austinian conception holds less sway today, there is less need to draw a sharp distinction between law and conventions. Third, it is worth noting that not all modern Commonwealth

109. Gillian K. Hadfield & Barry R. Weingast, *Law Without the State: Legal Attributes and the Coordination of Decentralized Collective Punishment*, 1 *J.L. & Courts* 3 (2013); Gillian K. Hadfield & Barry R. Weingast, *What is Law? A Coordination Model of the Characteristics of Legal Order*, 4 *J. Legal Analysis* 471 (2012).

110. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* ch. 14 (3d ed., London, MacMillan & Co. 1889).

111. *Id.* at 24.

112. H.L.A. Hart, *The Concept of Law* ch. 3 (Peter Cane et al. eds., 2d ed. 1994).

legal theorists embrace that sharp distinction.¹¹³ Of particular significance here, many scholars today suggest that conventions can play a limited role in litigated controversies and thus are not strictly extrajudicial.¹¹⁴ Finally, whatever the proper label in Britain or other Commonwealth countries, in the U.S. context the notion that constitutional law is not law unless it is judicially enforceable does not fit with the political question and other nonjusticiability doctrines, which readily accept that constitutional law extends beyond what the courts do.¹¹⁵

To better accord with understandings of U.S. law, it may be useful to distinguish between constitutional conventions that have a legally normative character and those that do not, regardless of whether they are subject to judicial review.¹¹⁶ Under this conception, what makes a convention nonlegal is not simply the unwillingness of courts to enforce it. Rather, it is that members of the relevant community do not understand its breach to be a violation of the law, even if they understand it to be improper behavior. So, for example, a violation of the convention of senatorial courtesy for judicial appointments, or perhaps even of the pre-Twenty-Second Amendment convention against Presidents serving more than two terms, might be viewed as normatively improper but not necessarily unconstitutional. Whether the convention qualified as law, in

113. See, e.g., Ivor Jennings, *The Law and the Constitution* 74 (5th ed. 1959) (arguing conventions “are rules whose nature does not differ fundamentally from that of the positive law of England”); see also Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* 12–13 (1984) (discussing this issue).

114. See, e.g., N.W. Barber, *The Constitutional State* 90 (2011); Marshall, *supra* note 113, at 13–17. As Adrian Vermeule describes, “[C]ourts may not directly enforce conventions against other political actors, in the sense that courts may not invoke freestanding conventions to override written legal rules. However, courts may indirectly recognize and incorporate conventions in the course of performing their . . . duty of interpreting written laws or rules of common law.” Adrian Vermeule, *Conventions of Agency Independence*, 113 *Colum. L. Rev.* (forthcoming June 2013) (manuscript at 15) (on file with the *Columbia Law Review*).

115. See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 618 (2007) (Kennedy, J., concurring) (“Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.”); *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (“The issue [before the Court] is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.”). Nor does limiting the category of constitutional law to that which is enforced by the courts accord with the scholarly emphasis in recent years on constitutional law outside the courts. E.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking the Constitution Away from the Courts* ch. 1 (1999).

116. Other scholars who have focused on U.S. constitutional conventions have not taken account of this potential distinction. See, e.g., Akhil Reed Amar, *America’s Unwritten Constitution* ch. 9 (2012); Herbert W. Horwill, *The Usages of the American Constitution* ch. 12 (1925).

other words, would depend on whether the convention met certain accepted rules of recognition.¹¹⁷

To be sure, it may be difficult to distinguish between legally normative conventions and other normative conventions, since the courts may not enforce either one, and the informal sanctions for their breach may be similar. Presumably, however, debates about alleged breaches of legally normative conventions will be surrounded by analysis couched in legal terms, whereas debates about potential breaches of other conventions will not. Relatedly, if the convention is understood as legal in character, then within the executive branch it is likely that lawyers will play a fairly important role in interpreting and applying it. The legal quality of the norm, in other words, may be reflected in the identity of the personnel with primary responsibility for analyzing and implementing it. The identity of the personnel could in turn affect the likelihood of constraints, as discussed below in Part III. Moreover, because they are based on evolving practice, the status of conventions is likely not fixed, and thus some nonlegal conventions presumably could evolve into legal norms, and, conversely, some conventions understood as legal might lose that character over time. The key point is that the distinction would not turn on the existence or nonexistence of judicial review.

Insisting on a sharp distinction between the law governing presidential authority that is subject to judicial review and the law that is not also takes for granted a phenomenon that merits attention—that Presidents follow judicial decisions.¹¹⁸ That assumption is generally accurate in the United States today. To take one relatively recent example, despite disagreeing with the Supreme Court's determination in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions applies to the war on terror, the Bush Administration quickly accepted it.¹¹⁹ But the reason why Presidents abide by court decisions has a connection to the broader issue

117. H.L.A. Hart famously argued that legal systems depend on having shared “rules of recognition” for determining which norms are legally binding. Under this view, “custom is law only if it is one of a class of customs which is ‘recognized’ as law by a particular legal system.” Hart, *supra* note 112, at 44–45. See generally *The Rule of Recognition and the U.S. Constitution* (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (considering application of rule of recognition to U.S. constitutional law).

118. See Roger Fisher, *Bringing Law to Bear on Governments*, 74 *Harv. L. Rev.* 1130, 1132 (1961) (“Whether or not governments are theoretically capable of legal limitation, they do regularly submit to adverse court decisions.”); Levinson, *Parchment*, *supra* note 14, at 661 (“Casting courts as constitutional enforcers merely pushes the question back to why powerful political actors are willing to pay attention to what judges say; why ‘people with money and guns ever submit to people armed only with gavels.’” (quoting Matthew C. Stephenson, “When the Devil Turns . . .”: The Political Foundations of Independent Judicial Review, 32 *J. Legal Stud.* 59, 60 (2003))).

119. See Mark Mazzeti & Kate Zernike, *White House Says Terror Detainees Hold Basic Rights*, *N.Y. Times*, July 12, 2006, at A1.

of the constraining effect of law. An executive obligation to comply with judicial decisions *is itself part of the practice-based constitutional law of the United States*, so presidential compliance with this obligation may demonstrate that such law can in fact constrain the President. This is true, as we explain further in Part III, even if the effect on presidential behavior is motivated by concerns about external political perceptions rather than an internal sense of fidelity to law (or judicial review).¹²⁰

A final complication is that, with respect to issues of presidential power, there are few situations in which the prospect of judicial review is actually zero. If the Supreme Court can decide *Bush v. Gore*¹²¹ and the war on terror cases, it can decide a lot.¹²² Areas of presidential power that typically see little judicial involvement might become areas of greater involvement under certain conditions. Moreover, the likelihood of judicial review is probably affected by the extent to which courts perceive the President to be stretching traditional legal understandings. As a result, it might be more accurate to describe the constitutional law of presidential power as judicially underenforced, rather than unenforceable. Even outside the separation of powers area, there is an extensive literature on the legal status of underenforced constitutional norms. For a variety of reasons, including justiciability limitations, immunity doctrines, and judicial deference to coordinate institutions, it has long been understood that the Constitution is not fully enforced by the courts. Nevertheless, courts and scholars commonly accept that judicially underenforced constitutional norms retain the status of law beyond the extent of judicial enforcement.¹²³

120. Cf. Fallon, *Constitutional Constraints*, *supra* note 6, at 1018 (“[I]f we ask why elected officials . . . accede so readily to claims of judicial authority . . . , part of the answer can be traced to the external constraint that public expectations impose. . . . [T]he public has been socialized to believe that judicial interpretations are legally binding.”).

121. 531 U.S. 98 (2000).

122. The Supreme Court also recently signaled a narrow view of the political question doctrine, even in the area of foreign affairs. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (describing political question doctrine as “narrow exception” to judiciary’s “responsibility to decide cases properly before it”).

123. See, e.g., Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 *Harv. L. Rev.* 1274, 1299 (2006); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212, 1221 (1978); see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129, 137–38 (1893) (observing “much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one”). But cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 904–05 (1999) (emphasizing connection between constitutional rights and remedial substantiation, while noting “[p]erhaps . . . constitutional rights may have an effect on government behavior independent of formal, state-imposed sanctions for noncompliance”).

III. POSSIBLE MECHANISMS OF CONSTRAINT

Having specified in the previous Part what counts as legal constraint in our view, this Part considers how legal constraints might work with respect to the presidency. It first examines two familiar potential mechanisms of constraint: the internalization of legal norms by relevant actors within the executive branch and the threat of external sanctions for violating those norms. This Part then discusses the implications of an obvious but less-discussed phenomenon—the fact that executive officials frequently engage in public dialogue about the President’s constitutional authority, including his practice-based authority. It concludes by analyzing the debate over the military intervention in Libya, mentioned earlier, in order to highlight some of the challenges associated with empirically studying the ways in which the presidency may be constrained by law.

A. *Norm Internalization*

Perhaps the most obvious way that law can have a constraining effect is if the relevant actors have internalized the legal norms, whether those norms are embodied in authoritative text, judicial decisions, or institutional practice. As a general matter, the internalization of legal norms is a phenomenon that can potentially take place wherever the law is thought to operate, in both the private and public sectors. But precisely how that internalization operates, including how it affects actual conduct, depends heavily on institutional context. When speaking of legal norm internalization as it relates to the presidency, it is important first to note that Presidents act through a wide array of agencies and departments, and that presidential decisions are informed—and often made, for all practical purposes—by officials other than the President. In most instances involving presidential power, therefore, the relevant question is whether there has been an internalization of legal norms *by the executive branch*.

The executive branch contains thousands of lawyers.¹²⁴ The President and other executive officials are regularly advised by these lawyers, and sometimes they themselves are lawyers. Although lawyers serve in a wide variety of roles throughout the executive branch, their

124. Estimates of the number of lawyers working in federal government vary. See, e.g., David Fontana, Executive Branch Legalisms, 126 Harv. L. Rev. F. 21, 21 (2012), http://www.harvardlawreview.org/media/pdf/forvol126_fontana.pdf (on file with the *Columbia Law Review*) (“Every business day approximately 20,000 lawyers head to their jobs in the federal government.”); Erin Delmore & Marisa M. Kashino, How Many Lawyers Are There?, *Washingtonian*, Dec. 1, 2009, <http://www.washingtonian.com/articles/people/how-many-lawyers-are-there> (on file with the *Columbia Law Review*) (stating, in late 2009, Office of Personnel Management reported “the number of practicing lawyers in all executive departments and agencies across the country [was] 31,797”).

experience of attending law school means that they have all had a common socialization—a socialization that typically entails taking law seriously on its own terms.¹²⁵ Moreover, the law schools attended by virtually all U.S. government lawyers are American law schools, which means that the lawyers are socialized in an ethos associated with the American polity and the American style of law and government.¹²⁶ These lawyers are also part of a professional community (including the state bars to which they are admitted) with at least a loosely shared set of norms of argumentative plausibility.

Certain legal offices within the executive branch have developed their own distinctive law-internalizing practices. This is particularly true in places like OLC, which, as noted above, provides legal advice based on its best view of the law. OLC has developed a range of practices and traditions—including a strong norm of adhering to its own precedents even across administrations—that help give it some distance and relative independence from the immediate political and policy preferences of its clients across the executive branch, and that make it easier for OLC to act on its own internalization of legal norms.¹²⁷ Another example is the State Department Legal Adviser’s Office, which often takes the lead within the executive branch on matters of international law and which has developed its own set of traditions and practices that help protect it from undue pressure from its clients.¹²⁸

More broadly, government legal offices may internalize legal norms even if they do not regularly focus on identifying the best view of the law. For example, an office committed not to seeking the best view of the law but to providing professionally responsible legal defenses of certain already-determined policy positions could still operate under legal constraints if it took the limits of professional responsibility seriously.

125. See Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 *U. Chi. L. Rev.* 777, 827 (2012) (reviewing Posner & Vermeule, *The Executive Unbound*, supra note 5) (“[L]awyers trained in this [legal] tradition currently staff the length and breadth of the executive branch.”).

126. This socialization includes exposure to legal ethics, which all ABA-accredited law schools are required to teach. See Am. Bar Assoc., *2012–2013 ABA Standards and Rules of Procedure for Approval of Law Schools*, Standard 302(a)(5) & Interpretation 302-9 (2012).

127. See generally Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 *Colum. L. Rev.* 1448 (2010). But see Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *Mich. L. Rev.* 676, 728 (2005) (questioning ability of Office of Solicitor General and OLC to constrain presidential decisionmaking in absence of likelihood of judicial review).

128. See Fontana, supra note 124, at 45 (suggesting Legal Adviser’s Office, like OLC, has “legitimacy created by long-standing tradition”); Harold Hongju Koh, *The State Department Legal Adviser’s Office: Eight Decades in Peace and War*, 100 *Geo. L.J.* 1747, 1749 (2012) (contending “a rich set of traditions, customs, expectations, and norms . . . together ensure [the Legal Adviser’s Office’s] quality, integrity, and relevance”).

That may well describe the typical posture of agency general counsel offices across the executive branch. As noted above, although it can be difficult to identify with consistent precision the outer boundaries of legal plausibility, a commitment to remaining within those boundaries is a commitment to a type of legal constraint.

If executive branch legal offices operate on the basis of certain internalized norms that treat law as a constraint, the next question is whether those offices have any effect on the actual conduct of the executive branch. In the case of OLC, there are two key points. First, although OLC possesses virtually no “mandatory” jurisdiction, there is a general expectation that, outside the litigation context, legal questions of special complexity, controversy, or importance will be put to OLC to address.¹²⁹ Second, established traditions treat OLC’s legal conclusions as presumptively binding within the executive branch, unless overruled by the Attorney General or the President (which happens extremely rarely).¹³⁰ Combined, these practices make OLC the most significant source of centralized legal advice within the Executive Branch.

Still, OLC addresses only a very small fraction of all the legal questions that arise within the executive branch, and a complete picture of the extent to which executive officials internalize legal norms (or are affected by others who internalize such norms) must extend well beyond

129. See Morrison, *Constitutional Alarmism*, *supra* note 32, at 1733 (suggesting issues that should go to OLC include “(1) legal issues that OLC has a history of addressing and on which it therefore has an accumulated jurisprudence and expertise; (2) significant issues of executive power; and (3) programs or policies likely to trigger substantial public attention and/or controversy”); Memorandum from Walter E. Dellinger et al., *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004), reprinted in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. Rev.* 1559 app. 2 at 1610 (2007) [hereinafter *Dellinger Memorandum*] (stating OLC should be consulted “on all major executive branch initiatives and activities that raise significant legal questions”).

130. See Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice, to Att’ys of the Office of Legal Counsel, Dep’t of Justice, *Best Practices for OLC Legal Advice and Written Opinions 1* (July 16, 2010) [hereinafter *2010 OLC Best Practices Memorandum*], available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> (on file with the *Columbia Law Review*) (stating OLC “provide[s] controlling advice to Executive Branch officials on questions of law”); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Att’ys of the Office of Legal Counsel, *Best Practices for OLC Opinions 1* (May 16, 2005) [hereinafter *2005 OLC Best Practices Memorandum*], available at <http://www.fas.org/irp/agency/doj/olc/best-practices.pdf> (on file with the *Columbia Law Review*) (“[S]ubject to the President’s authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch.”); *Dellinger Memorandum*, *supra* note 129, at 1603 (“OLC’s legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President.”).

that office.¹³¹ Looking across the executive branch more broadly, there may be a practical imperative driving at least some measure of legal norm internalization. The executive branch is a vast bureaucracy, or series of bureaucracies. Executive officials responsible for discharging the government's various policy mandates cannot act effectively without a basic understanding of who is responsible for what, and how government power is to be exercised—all topics regulated by law, including practice-based law.¹³² Some of the understandings produced by those allocations are probably so internalized that the relevant actors cannot even imagine (at least in any serious way) a different regime.¹³³

Even on the more high-profile policy questions that receive the attention of the White House itself, the internalization of law may have a constraining effect. There are lawyers in the White House, of course, including the Office of Counsel to the President (otherwise known as the White House Counsel's Office). Some commentators—most notably Bruce Ackerman, as part of his general claim that the executive branch tends toward illegality—have characterized that office as populated by “superloyalists” who face “an overwhelming incentive to tell [the President] that the law allows [him] to do whatever [he] want[s] to do.”¹³⁴ If that were an accurate portrayal, it would suggest that there is little to no internalization of the law in the White House Counsel's Office. But there are serious descriptive deficiencies in that account.¹³⁵

131. As David Fontana has noted, “[O]n many issues, civil service lawyers are functionally and/or formally the final actor in the executive branch,” and “even when a legal issue does reach the political lawyers, it usually arrives on their desk after civil service lawyers have already framed the issue in important ways, and it is difficult to diverge from these civil service framings.” Fontana, *supra* note 124, at 42.

132. See Pildes, *Law and the President*, *supra* note 92, at 1407 (observing that, as matter of “internal organizational efficacy, as well as effective cooperation with other parts of the government, law serves an essential coordination function”).

133. For a general discussion of how law can affect what people take for granted and how they understand their potential actions, see Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 *Wis. L. Rev.* 475.

134. Ackerman, *Decline*, *supra* note 5, at 12, 176.

135. See Morrison, *Constitutional Alarmism*, *supra* note 32, at 1731–41. Among other things, Ackerman's account misses the fact that in some areas—executive privilege, for example—the White House Counsel's concern for protecting the constitutional prerogatives of the office of the presidency can lead it to advise the President to assert his authority more robustly than he deems desirable as a political matter. See Maryanne Borrelli et al., *The White House Counsel's Office*, 31 *Presidential Stud. Q.* 561, 562 (2001) (quoting A.B. Culvahouse, former White House Counsel under President Reagan, as saying Counsel is “the last and in some cases the only protector of the president's constitutional privileges,” and “[a]lmost everyone else is willing to give those away . . . inch by inch . . . to win the issue of the day, to achieve compromise”). In this way, politics does not always push in the direction of violating legal limits on presidential power. The relationship between law and politics in the White House and elsewhere is more complicated than that.

Still, the White House Counsel's immediate proximity to and close working relationship with the President and his senior political advisors surely do cause politics to suffuse much of the work of that office in a way that is not true of all of the executive branch.

The more fundamental point, however, is that it is in the nature of modern government that the President's power to act often depends at least in part on the input and actions of offices and departments outside the White House. That commonly includes the input of legal offices from elsewhere across the executive branch.¹³⁶ Many of those offices are headed by political appointees, and thus politics are not likely to be wholly absent from their work either. But many of those offices are also populated primarily by nonpolitical "career" civil servants, whose work as government lawyers across presidential administrations likely increases the internalization of relevant legal norms. To the extent that the input and actions of such offices affect the President's ability to act, he may be constrained by law without regard to whether he or his most senior White House advisers think about the law.

Internalization of legal norms may at least partially explain the now-famous standoff during the George W. Bush Administration between high-ranking lawyers in the Justice Department and various White House officials over the legality of a then-secret warrantless surveillance program. The program was deeply important to the White House, but the Attorney General, Deputy Attorney General, and head of OLC all refused to certify the legality of the program unless certain changes were made. When the White House threatened to proceed with the program without certification from the Justice Department, the leaders of the Department (along with the Director of the FBI and others) all prepared to resign. Ultimately, the White House backed down and acceded to the changes.¹³⁷ Some substantial part of the explanation for why the Justice Department officials acted as they did seems to lie in their internalization of a set of institutional norms that not only takes law seriously as a constraint, but that insists on a degree of independence in determining

136. For a discussion of the reasons why the White House does not routinely rely on the legal advice of the White House Counsel's Office on questions that will ordinarily go to OLC—and why it is not in the interests of the White House to do so—see Morrison, *Constitutional Alarmism*, *supra* note 32, at 1741–42; Morrison, *Libya*, *supra* note 100, at 63–64, 70–74.

137. This episode, including a standoff between White House and Justice Department officials at Attorney General John Ashcroft's hospital bedside, was recounted in subsequent congressional testimony by James Comey, who had been Deputy Attorney General at the time of the incident. See *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 213–20 (2007)* (statement of James B. Comey, former Deputy Att'y Gen. of the United States). For further discussion of the confrontation between the Justice Department and the White House on this issue, see Barton Gellman, *Angler: The Cheney Vice Presidency* 286–320 (2008).

what the law requires.¹³⁸ Buckling under pressure from the White House was evidently inconsistent with the Justice Department officials' understanding of their professional roles.

B. *External Sanctions*

In addition to the constraining influence arising from the internalization of legal norms by executive branch lawyers and other officials, law could constrain the President if there are "external" sanctions for violating it. The core idea here is a familiar one, often associated with Holmes's "bad man"¹³⁹: One who obeys the law only because he concludes that the cost of noncompliance exceeds the benefits is still subject to legal constraint if the cost of noncompliance is affected by the legal status of the norm. This is true even though the law is likely to impose *less* of a constraint on such "bad men" than on those who have internalized legal norms, and even though it is likely to be difficult in practice to disentangle internal and external constraints.

Importantly, external sanctions for noncompliance need not be formal. If the existence or intensity of an informal sanction is affected by the legal status of the norm in question, compliance with the norm in order to avoid the sanction should be understood as an instance of law having a constraining effect. In the context of presidential compliance with the law, one can plausibly posit a number of such informal sanctions. One operates on the level of professional reputation, and may be especially salient for lawyers in the executive branch. If a lawyer's own internalization of the relevant set of legal norms is insufficient to prevent him from defending as lawful actions that he knows are obviously beyond the pale, he might respond differently if he believed his legal analysis would or could be disclosed to the broader legal community in a way that would threaten his reputation and professional prospects after he leaves government.¹⁴⁰ (This concern might help further explain the OLC and

138. For example, Barton Gellman has reported a conversation between President Bush and Acting Attorney General James Comey, where President Bush said to Comey, "I decide what the law is for the executive branch," to which Comey replied, "That's absolutely true, sir, you do. But I decide what the Department of Justice can certify to and can't certify to, and despite my absolute best efforts I simply cannot in the circumstances." Gellman, *supra* note 137, at 318.

139. See Holmes, *supra* note 96, at 459; see also *supra* notes 95–96 and accompanying text.

140. See, e.g., Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 *Colum. L. Rev.* 507, 546 (2012) ("Attorneys in the OLC, both careerists and their political supervisors, wish to maintain the OLC's reputation as being above politics, in part, because their future career prospects are tied to it."); Morrison, *Constitutional Alarmism*, *supra* note 32, at 1725 ("Disclosing OLC's work implicates its lawyers' professional reputations, which in turn encourages them to avoid behavior that would cast them in a bad light.").

other Justice Department officials' resistance to the White House in the warrantless surveillance example discussed above.)

Although fear of harm to their professional reputations may indeed help constrain government lawyers, if that were the only operative external sanction in this context it would be fair to ask whether it translated into a real constraint on the President in high-stakes contexts. But it is not the only potential sanction. A related and perhaps more significant sanction may operate directly on political leaders within the government, including the President himself: partisan politics. If being perceived to act lawlessly is politically costly, a President's political rivals will have an incentive to invoke the law to oppose him. Put another way, legal argumentation might have a salience with the media, the public at large, and influential elites that could provide presidential opponents in Congress and elsewhere with an incentive to criticize executive actions in legal terms. If such criticism gains traction in a given context, it could enable the President's congressional opponents to impose even greater costs on him through a variety of means, ranging from oversight hearings to, in the extreme case, threats of impeachment. Thus, so long as the threat of such sanctions is credible, law will impose an external constraint—whether or not the President himself or those responsible for carrying out his policies have internalized the law as a normative matter. The prospect of political sanctions might help explain, for example, why modern Presidents do not seem to seriously contemplate disregarding Supreme Court decisions.¹⁴¹ And if Presidents are constrained to follow the practice-based norm of judicial supremacy, they may be constrained to follow other normative practices that do not involve the courts.

Work by political scientists concerning the use of military force is at least suggestive of how a connection between public sanctions and law compliance might work. As this work shows, the opposition party in Congress, especially during times of divided government, will have both an incentive and the means to use the media to criticize unsuccessful presidential uses of force. The additional political costs that the opposition party is able to impose in this way will in turn make it less likely that Presidents will engage in large-scale military operations.¹⁴² It is at least conceivable, as the legal theorist Fred Schauer has suggested, that the political cost of pursuing an ultimately unpopular policy initiative (such as engaging in a war) goes up with the perceived illegality of the

141. Cf. Levinson, *Parchment*, *supra* note 14, at 661 (explaining “an effective system of constitutional law must be in some sense self-enforcing *regardless* of judicial review” because powerful political actors need some reason to adhere to judiciary’s pronouncements).

142. See, e.g., William G. Howell & Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* 155 (2007); Douglas L. Kriner, *After the Rubicon: Congress, Presidents, and the Politics of Waging War* 147 (2010).

initiative.¹⁴³ If that is correct, then actors will require more assurance of policy success before potentially violating the law. This should count as a legal constraint on policymaking even if the relevant actors themselves do not see any normative significance in the legal rule in question.

Moreover, even if Madisonian checks and balances do not work systematically, in at least some instances Congress (or a particular house of Congress) is likely to use its institutional authority to resist what it perceives to be unlawful presidential behavior. For example, consider the phenomenon of “congressional-executive agreements,” which are international agreements concluded by the United States with the support of a majority of both houses of Congress rather than the two-thirds advice and consent of the Senate that Article II of the Constitution specifies for treaties. A large percentage of the international agreements entered into by the United States since the 1930s have taken the form of congressional-executive agreements,¹⁴⁴ but there is substantial debate and uncertainty about the extent to which the congressional-executive agreement process is constitutionally interchangeable with the Article II treaty process.¹⁴⁵ For some subject areas, bipartisan leadership in the Senate has insisted that the Constitution requires resort to the Article II process, and in these instances Presidents have generally acceded to the Senate’s position. This is particularly evident in the area of arms control,¹⁴⁶ although it seems likely that there would be similar senatorial

143. See Schauer, *Political Risks*, *supra* note 93, at 84–85. But cf. Frederick Schauer, *Is Legality Political?*, 53 *Wm. & Mary L. Rev.* 481, 505 (2011) (suggesting possibility that “the practice of following the law just because it is the law . . . is far less rewarded by the electorate and in public political life than is commonly supposed”).

144. See Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate* 38–39 (Comm. Print 2001).

145. Compare, e.g., Ackerman & Golove, *supra* note 46 (arguing in favor of full interchangeability, based on controversial theory of constitutional change), with Spiro, *Treaties*, *supra* note 46 (arguing historical practice does not support full interchangeability).

146. See Bradley & Morrison, *supra* note 1, at 473–74. With the exception of an interim agreement in 1972, all major arms control agreements since World War II have been concluded as Article II treaties. In providing its advice and consent to various such treaties, the Senate has issued accompanying declarations stating that significant arms control agreements should be concluded only pursuant to the treaty power and not by congressional-executive agreement. See, e.g., Spiro, *Treaties*, *supra* note 46, at 997 (quoting S. Exec. Rep. No. 102-22, at 81 (1991)). In response to Senate pressure in 1997, President Clinton abandoned plans to conclude an update to the Treaty on Armed Conventional Forces in Europe by means of a congressional-executive agreement and instead submitted it to the Senate for approval as an Article II treaty. See Phillip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 *Berkeley J. Int’l L.* 55, 56 (1998). In 2002, when President Bush suggested an intent to conclude a nuclear arms reduction agreement with Russia and was vague about the form it would take, the ranking Democratic and Republican members of the Senate Foreign Relations Committee wrote to him insisting that any such agreement needed to be submitted to the Senate. See Thom Shanker, *Senators Insist on Role in*

resistance to congressional-executive agreements in certain other subject areas such as human rights.¹⁴⁷ In at least some instances, in other words, institutional checks will operate to facilitate the constraining effect of law.

C. *Existence of Legal Dialogue*

Although this Essay has divided its discussion of internal and external constraints, in many contexts they probably do not operate independently. In particular, it seems plausible that practices followed out of fear of external sanctions can become internalized as a result of habit, or what has been called the “normative power of the actual”—that is, the tendency of people to give normative significance to that with which they are familiar.¹⁴⁸ Conversely, the internalization of a norm associated with a practice can plausibly affect the likelihood that actors with an interest in the practice will impose external sanctions for violations. Beyond these general points of interrelation, the internal and external accounts of legal constraint might operate interdependently through the existence of something that has received relatively little treatment in the literature on presidential power: the simple fact that public debate about presidential action frequently includes considerations of legality. The pervasive existence of public “law talk” may itself be evidence of, and a mechanism promoting, law’s constraining effect—for both internal and external reasons.

The executive branch almost always endeavors to argue that its actions are lawful—and to rebut criticisms to the contrary.¹⁴⁹ When questions about the legality of a given program or action arise, very

Nuclear Arms Deals, N.Y. Times, Mar. 17, 2002, at 16. President Bush subsequently did submit the agreement to the Senate, and it was approved in 2003, by a vote of 95-0. Amy F. Woolf, Cong. Research Serv., RL31448, Nuclear Arms Control: The Strategic Offensive Reductions Treaty 16 (2011), available at <http://www.fas.org/sgp/crs/nuke/RL31448.pdf> (on file with the *Columbia Law Review*).

147. See Bradley & Morrison, *supra* note 1, at 475–76.

148. The phrase apparently originated with Georg Jellinek, *Allgemeine Staatslehre* [General Theory of the State] 338 (1921); see also Morris Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 582 (1933) (stating ceremonies “have what Jellinek has called the normative power of the actual, that is, they control what we do by creating a standard of respectability or a pattern to which we feel bound to conform”).

149. Even President Lincoln’s famous “all the laws, but one” claim—namely that, in order to save the Union, he was justified in unilaterally suspending habeas corpus at the outset of the Civil War even if it violated the Constitution’s allocation of the suspension power—was simply a backup argument. His principal claim was that the suspension was fully compliant with the Constitution. See President Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in 4 *The Collected Works of Abraham Lincoln* 421, 429–31 (Roy P. Basler ed., 1953) (asserting privilege of writ of habeas corpus may be legally suspended “when, in cases of rebellion, or invasion, the public safety *does* require it”).

commonly the executive will release some sort of analysis defending the action in legal terms. Recent examples from the Obama Administration include its public release, shortly after the March 2011 commencement of the U.S. military campaign in Libya, of OLC's opinion concluding that the President had the authority to initiate the campaign without congressional authorization;¹⁵⁰ its reliance in the summer of 2011 on written and oral testimony from the State Department Legal Adviser that the Libya operation did not constitute "hostilities" within the meaning of the War Powers Resolution;¹⁵¹ and its public release in January 2012 of an OLC opinion concluding that the President's authority to make "recess appointments" applied even in an intrasession recess of the Senate, during which the Senate met in pro forma session every few days.¹⁵² An earlier example from the George W. Bush Administration is its public release of a December 2005 letter to Congress, followed by a January 2006 Justice Department white paper, providing legal arguments in support of a secret (but recently leaked) terrorist surveillance program conducted by the National Security Agency.¹⁵³

In all of these examples, the substance (and sometimes the process) of the executive branch's legal arguments faced substantial criticism.¹⁵⁴

150. Krass Memorandum, *supra* note 33.

151. See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations, 112th Cong. 14 (2011)* (statement of Harold Hongju Koh, Legal Adviser, Dep't of State) [hereinafter Koh Statement].

152. See Memorandum Opinion from Virginia A. Seitz, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to the Counsel to the President, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions* (Jan. 6, 2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf> (on file with the *Columbia Law Review*).

153. See U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), reprinted in 81 *Ind. L.J.* 1374 (2006); Letter from William E. Moschella, Assistant Att'y Gen., Office of Legislative Affs., Dep't of Justice, to the Leadership of the Senate Select Comm. on Intelligence & the House Permanent Select Comm. on Intelligence (Dec. 22, 2005), reprinted in 81 *Ind. L.J.* 1360 (2006). The program defended in these documents was the successor to the program referenced *supra* at text accompanying notes 137–138.

154. For criticism of the Obama Administration's treatment of various legal issues relating to the Libya military operation, see, e.g., Glennon, *supra* note 33, at 1; Morrison, *Libya*, *supra* note 100, at 65–67; Bruce Ackerman, *Op-Ed.*, *Legal Acrobatics, Illegal War*, *N.Y. Times*, June 21, 2011, at A27; Editorial, *War by Any Other Name*, *Wash. Post*, June 18, 2011, at A14.

For criticism of the Bush Administration's defense of its secret surveillance program, see, e.g., Curtis A. Bradley et al., February 2, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Whitepaper of January 19, 2006, in 81 *Ind. L.J.* 1415 (2006); Curtis A. Bradley et al., January 9, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Letter of December 22, 2005, in 81 *Ind. L.J.* 1364 (2006); Memorandum from David Kris, Former Assoc. Deputy Att'y Gen. (Jan. 25,

Indeed, we have advanced some of those criticisms in other writings. Our point here, however, is not to parse the specific merits of the arguments advanced in any of these examples. Instead, our point is to underscore the fact that, in each example, legal argumentation was evidently seen as a critical component of the public defense of the executive's actions. Legality apparently had sufficient salience for the executive branch to attend to it, and to do so in a way that could hope to seem persuasive or at least plausible to interested audiences.

Certain institutional design features also reflect an appreciation of the value to the President of credible legal argumentation. Perhaps most notably, the maintenance of an OLC whose traditions at least partially insulate it from political pressures, together with the practice of treating OLC's opinions as presumptively binding across the executive branch, collectively reflect an understanding that OLC's opinions are most valuable if they appear to take the law seriously, and that presidential invocations of such opinions are most effective when they do not appear purely opportunistic. Similar observations could be made about certain other executive branch legal offices. The Solicitor General's Office, for example, which relies on a staff composed primarily of career attorneys to represent the United States before the Supreme Court, is influential in part because of the perception that it has a degree of political independence.¹⁵⁵ The Justice Department also has an Office of Professional Responsibility that is charged with "investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when related to allegations of attorney misconduct within the jurisdiction of OPR."¹⁵⁶

2006), available at <http://balkin.blogspot.com/kris.fisa.pdf> (on file with the *Columbia Law Review*).

For criticism of OLC's defense of President Obama's 2012 recess appointments, see, e.g., Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary, 112th Cong. 10-20 (2012) (statement of Charles J. Cooper, Partner, Cooper & Kirk, PLLC); Edwin Meese III & Todd Gaziano, Op-Ed., Obama's Abuse of Power, Wash. Post, Jan. 6, 2012, at A17.

155. See, e.g., Ryan C. Black & Ryan J. Owens, The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions 136 (2012) (concluding that influence of Solicitor General's Office on Supreme Court likely comes from Office's "objectivity, professionalism, and independence").

156. Office of Professional Responsibility, About OPR, U.S. Dep't of Justice, <http://www.justice.gov/opr/> (on file with the *Columbia Law Review*) (last visited Apr. 23, 2013). In 2009, the Office concluded that the OLC attorneys involved in drafting the infamous "torture memos" during the Bush Administration had committed "professional misconduct" by failing to provide "thorough, candid, and objective" analysis. Office of Professional Responsibility, U.S. Dep't Just., Report: Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 11 (2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> (on file with the

More generally, the decision to devote resources to producing credible legal defenses of executive actions suggests that legality is salient. This salience could be the product of either of the two basic causal mechanisms identified above. It could be the result of certain executive officials' internalization of legal norms, or it could reflect a Holmesian understanding of the costs associated with being perceived to act illegally. As to the latter, the very fact that an administration publicly invokes a given legal principle to defend its actions can create pressure for the administration to respect that principle over time. This is what Jon Elster calls the "civilizing force of hypocrisy."¹⁵⁷ As Elster explains, "[P]ublic speaking is subject to a consistency constraint. Once a speaker has adopted an impartial argument because it corresponds to his interest or prejudice, he will be seen as opportunistic if he deviates from it when it ceases to serve his needs."¹⁵⁸ Although this constraint is not unique to legal dialogue, it helps explain why supplying public legal justifications for one's actions can serve to constrain future actions.

Over time, moreover, the internal and external constraints might merge. If successfully defending the legality of one's actions has a political value, law may come to be partly constitutive of an official's preferences. Rational choice perspectives on individual and institutional behavior sometimes appear to take an actor's interests as fixed and then to examine various strategies for maximizing those interests. Yet it seems plausible to posit a more dynamic relationship. Political self-interest might not only incentivize attentiveness to law but also become partially constituted by the perceived legal status of one's actions.¹⁵⁹ A President, for example, might be committed to defending the legality of his actions

Columbia Law Review). On review, the Justice Department agreed with many of the Office's criticisms of the memos but rejected the Office's finding of professional misconduct. See Eric Lichtblau & Scott Shane, Report Faults 2 Who Wrote Terror Memos, *N.Y. Times*, Feb. 20, 2010, at A1.

157. Jon Elster, Strategic Uses of Argument, *in* *Barriers to Conflict Resolution* 236, 250 (Kenneth J. Arrow et al. eds., 1995) (emphasis omitted); see also Ian Johnstone, Law-Making Through the Operational Activities of International Organizations, 40 *Geo. Wash. Int'l L. Rev.* 87, 120–21 (2008) ("Having made rhetorical commitments, speakers feel some pressure to match their words with deeds. Otherwise, they would be branded as blatantly hypocritical, which would defeat the purpose of making the argument in the first place."); Richard H. McAdams, Resentment, Excuse and Norms, *in* *The Hart-Fuller Debate in the Twenty-First Century* 249, 253 (Peter Cane ed., 2010) (discussing norm internalization and noting "it is difficult to resist applying one's normative beliefs concerning the behavior of others to one's own behavior").

158. Jon Elster, Deliberation and Constitution Making, *in* *Deliberative Democracy* 97, 104 (Jon Elster ed., 1998) [hereinafter Elster, *Deliberation*] (emphasis omitted); see also Thomas Risse, "Let's Argue!": Communicative Action in World Politics, 54 *Int'l Org.* 1, 23 (2000) (referring to same basic mechanism as "argumentative self-entrapment").

159. See Fallon, *Constitutional Constraints*, *supra* note 6, at 1002 ("[E]xternal constraints not only reinforce, but also help shape, officials' perceptions of their obligations.").

not just because it would yield success in the pursuit of his interests independent of law, but also because being perceived to act lawfully is itself part of what he wants from his presidency.¹⁶⁰

Still, to say that legality is partially constitutive of an actor's interests is not necessarily to say that legal dialogue is a constraint. Law could have a rhetorical salience (like appeals to fairness, or "the good") without imposing any real constraint if any position could be defended as lawful. For it to be a constraint, legal dialogue must be subject to some validity or at least plausibility limits.¹⁶¹ This returns to some of the points made above with respect to the internalization of legal norms: Even if the goal is merely to establish the plausibility of a legal position (as opposed to its being consistent with the best view of the law), law acts as a constraint if the norms of legal reasoning or professional responsibility impose at least some barriers.¹⁶²

Admittedly, the law in many areas is open-ended and malleable, and arguments that might once have seemed beyond the pale can (perhaps in response to political or policy preferences) come to be accepted as plausible. This may be especially so for questions of executive power unlikely to be addressed by a court, because the absence of a final judicial arbiter may leave the substance of the law more uncertain and subject to competing characterizations. But it would be a significant—and we believe unwarranted—leap to conclude that the law is so manipulable that legal dialogue imposes no constraints on the President whatsoever.

Of course, this analysis does not necessarily yield the conclusion that the constraints associated with legal dialogue are robust. The relative strength of such constraints can be determined only through difficult empirical work. Moreover, the degree of this constraint probably depends on the relative strength of other institutions. In the United States, it is likely that the existence of institutions such as a free press, an organized bar, an extensive university system, and an active NGO community enhance the constraint imposed by the salience of law in public dialogue. That constraint would presumably be weaker in a country with-

160. Cf. Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 *B.C. L. Rev.* 1551, 1555 (2011) ("Certain conceptions of how to exercise power are part of the settled grammar of each office. In addition to these role-specific constraints, a president is also bound by the virtues and excellences that define what it means to fulfill the office's duties well.").

161. Cf. Elster, *Deliberation*, *supra* note 158, at 104.

162. See Levinson, *Parchment*, *supra* note 14, at 709 (arguing notions of legal plausibility "can serve to narrow the range of political disagreement on some issues and to rule some options off the table"); see also Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. Legal Educ.* 518, 526 (1986) ("[L]aw constrains as a physical medium constrains—you can't do absolutely anything you want with a pile of bricks, and what you can do depends on how many you have, as well as your other circumstances.").

out such institutions, and might approach zero in a dictatorship that simply mouthed legal platitudes without any risk of criticism from skeptical audiences. The point is simply that, at least with respect to the U.S. presidency, the phenomenon of extensive legal dialogue is both suggestive of, and plausibly a contributing factor to, some degree of constraint.

D. *Libya and “Hostilities”*

In order to make the discussion in the preceding sections more concrete while also identifying some of the difficulties with attempting to isolate the effect of law on presidential action, this Part concludes by considering a recent episode, mentioned earlier, that is thought by many to involve clear presidential illegality. It involves the Obama Administration’s treatment of the War Powers Resolution in connection with the 2011 military operation in Libya. Under the terms of the Resolution, military operations rising to the level of “hostilities” must cease (or at least be drawn down to the point that they are no longer hostilities) within sixty days if not authorized by Congress.¹⁶³ Distinct from the question of the President’s authority to initiate the Libya operation without congressional authorization,¹⁶⁴ the question here was whether the operation constituted “hostilities” as used in the Resolution and thus was subject to its sixty-day cutoff.

The Obama Administration answered no. Although the operation ultimately lasted longer than sixty days and was never authorized by Congress, the Administration insisted that such authorization was unnecessary under the War Powers Resolution because the operation did not constitute “hostilities.”¹⁶⁵ In testimony before the Senate Foreign Relations Committee, State Department Legal Adviser Harold Koh placed heavy reliance upon a 1975 letter to Congress from the then-State Department Legal Adviser and Defense Department General Counsel. That letter stated that the Executive Branch understood “hostilities” to refer to “a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces,” but not to include “irregular or infrequent violence which may occur in a

163. 50 U.S.C. § 1544 (2006).

164. See *supra* text accompanying note 33.

165. See Koh Statement, *supra* note 151, at 14–16. Press reports claimed that OLC had reached the conclusion that the Libya operation *did* constitute “hostilities,” but that the White House decided not to adhere to that position. E.g., Charlie Savage, 2 Top Lawyers Lose Argument on War Power, N.Y. Times, June 18, 2011, at A1. One of us has raised serious concerns about the process by which that decision was reached, especially if it did not grant OLC’s legal views the presumptive authoritativeness that they are customarily accorded. See Morrison, *Libya*, *supra* note 100, at 66–74.

particular area.”¹⁶⁶ Koh asserted that President Obama was “operating within this longstanding tradition of executive branch interpretation” when he concluded that the Libya operation—which involved voluminous bombing but little if any exchanges of fire with enemy forces—did not rise to the level of “hostilities.”¹⁶⁷

The Obama Administration’s position has been met with widespread criticism. Some academics have taken it to be a clear example of presidential illegality.¹⁶⁸ Many in Congress also condemned it.¹⁶⁹ Yet at the same time there was no serious effort in Congress to force the President to comply with the letter of the Resolution.¹⁷⁰

How, then, should this episode be understood? One possibility is that the Obama Administration simply violated the Resolution’s sixty-day cutoff requirement, and that neither Congress nor the public at large saw fit to impose any sanction for the violation. On that view, this would appear to be a clear instance of law’s failure to constrain. Of course, even if that is the best understanding of what happened, it would not show that the President is *generally* unconstrained by law. Virtually every

166. Letter from Monroe Leigh, Legal Adviser, Dep’t of State, and Martin R. Hoffmann, Gen. Counsel, Dep’t of Def., to Clement J. Zablocki, Chairman, Subcomm. on Int’l Sec. & Scientific Affairs of the House Comm. on Int’l Relations (June 3, 1975), in *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int’l Sec. & Scientific Affairs of the H. Comm. on Int’l Relations, 94th Cong., 39 (1975)* [hereinafter Leigh & Hoffman Letter]; see also Koh Statement, *supra* note 151, at 11 (quoting Leigh & Hoffman Letter, *supra*).

167. Koh Statement, *supra* note 151, at 14.

168. See, e.g., Schauer, *Political Risks*, *supra* note 93, at 90 (“[I]t seems more than plausible to treat [the Obama Administration’s argument that the Libya operation did not constitute ‘hostilities’ under the War Powers Resolution] as so weak as to permit the claim that the actions simply violated the law in a straightforward way.”); see also *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations, 112th Cong., 45–46 (2011)* (statement of Louis Fisher, Adjunct Scholar, Cato Institute) (arguing Obama Administration violated War Powers Resolution).

169. See, e.g., David A. Fahrenthold, ‘A Lot of this Fuss is Politics,’ *Wash. Post*, June 30, 2011, at A4 (noting congressional disapproval of White House’s interpretation); David A. Fahrenthold, *Legislators Call Obama’s Action on Libya Illegal*, *Wash. Post*, May 26, 2011, at A6 (noting bipartisan disagreement with White House’s interpretation).

170. A resolution that would have directed the President to remove U.S. forces from Libya within 15 days was defeated in the House on a vote of 265-148, and, on the same day, another resolution expressing opposition to the use of ground forces in Libya passed the House on a vote of 268-145. Richard F. Grimm, *Cong. Research Serv., RL33532, War Powers Resolution: Presidential Compliance 13 (2012)*, available at <http://www.fas.org/sgp/crs/natsec/RL33532.pdf> (on file with the *Columbia Law Review*). A few weeks later, a resolution that would have authorized the Libyan operations was defeated in the House by a vote of 295-123. *Id.* at 14. The full Senate did not hold any votes on resolutions concerning the Libya operation. Ten members of the House of Representatives sued President Obama, claiming that he was violating both the Constitution and the War Powers Resolution, but the case was dismissed for lack of standing. *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011).

constraint has its limiting case, and the constellation of countervailing nonlegal considerations at work in the Libya episode may simply have been too much for the law to withstand.¹⁷¹

Moreover, even if there were presidential illegality in this case, that fact alone would not mean that law failed to play any constraining role. Instead, this might be a situation where law's constraining effect had more to do with requiring reasonable or plausible legal argumentation. Given its claimed fidelity to the 1975 Executive Branch letter to Congress, the Obama Administration's position, even if ultimately unpersuasive as an account of the best understanding of "hostilities," might at least be plausible.¹⁷² If the Administration felt compelled to have a plausible legal account of consistency with the Resolution, then the Resolution might have had some constraining effect even if it was violated.¹⁷³

In addition, the law might have had a more observable constraining effect if the Libya operation had been less successful operationally. If, instead of quickly toppling the Qadhafi regime, U.S. forces had become mired in a protracted conflict, it is quite possible that the legal questions surrounding the operation would have intensified. In that circumstance, the potential illegality of the operation might have increased its political costliness to the Obama Administration.¹⁷⁴ Although those costs did not materialize in this particular situation, that does not mean they would fail to constrain in a different situation where operational success was in more serious doubt. More generally, a potentially interactive relationship among operational success, political cost, and legality does not mean that the last factor imposes no constraint; it merely specifies circumstances in which that constraint is most likely to engage. Again, to emphasize a point that runs throughout this Essay, the fact that the law in this area is interrelated with politics does not show that it is unimportant.

It is also worth emphasizing that, despite a low likelihood of judicial involvement in the issue, the Obama Administration offered public legal

171. Clearly, there were some distinctive features to this episode that might have made noncompliance more likely than in other circumstances. Those features include the fact that some presidential administrations have raised doubts about the constitutionality of the War Powers Resolution, as well as the low likelihood that Congress would impose any serious sanctions for violating the Resolution in the Libya operation.

172. See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations, 112th Cong. 48 (2011)* (statement of Peter J. Spiro, Professor of Law, Temple University Beasley School of Law), available at http://www.fas.org/irp/congress/2011_hr/libya.pdf (on file with the *Columbia Law Review*).

173. Cf. Charlie Savage & Thom Shanker, *At Deadline, U.S. Seeks to Continue War in Libya*, *N.Y. Times*, May 13, 2011, at A10 (reporting "the Obama legal team is now trying to come up with a plausible theory for why continued participation by the United States does not violate the [Resolution]").

174. See Schauer, *Political Risks*, *supra* note 93, at 84–85.

justifications, based heavily on arguments from historical practice, for the Libya operation. OLC issued an extensive legal opinion in support of the legality of the initial deployment of force, and high-level Administration officials testified in support of the legality of continuing the operation past the sixty-day point. If law were playing no constraining role either internally or externally, it is not clear why the Administration would have made those efforts, instead of simply arguing that the operation constituted good policy. After all, the legal arguments were not costless: They required effort to construct and exposed the Administration to criticism from those who disagreed with the analysis.

To be sure, the precise way that the Administration defended the legality of its position on the “hostilities” question raised concerns. Press reports suggested that views on the question were divided within the Administration, and that OLC (and others) apparently thought the operation did constitute hostilities and thus was subject to the sixty-day cutoff.¹⁷⁵ Especially given its reliance upon a written opinion from OLC to defend the legality of the initial deployment, the Administration’s decision to reject OLC’s views on the “hostilities” question and to rely instead on the State Department Legal Adviser to defend the contrary view appears opportunistic—and worrisome to those who value the tradition of treating OLC’s legal conclusions as presumptively binding within the executive branch.¹⁷⁶ The key point here, however, is that the Administration did not simply defend the continuation of the Libya operation on humanitarian or other policy or political grounds. Instead, even in departing from the apparent views of OLC, it went to considerable lengths to provide a detailed legal defense of its position. The particulars of that defense may have been less than convincing, but its very existence highlights the apparent salience of the law in this context.

Given that the Obama Administration was able to continue the Libya operation while defending its definition of “hostilities,” its definition might become accepted going forward. Especially in areas like this, where institutional practice plays such a central role, the best understanding of the law is not necessarily fixed and unchanging. As a result, actions supported by minimally plausible legal defenses might over time be understood to exert a gravitational pull on the best understanding of the law. Such a possibility does not eliminate the prospect of legal constraint. It does, however, highlight a potential drawback to a practice-based approach to law, at least on issues of presidential power. Put simply, practice can sometimes sap the law of its constraining power.

That said, it should be noted that the Obama Administration went to great lengths to tie its conclusion that the Libya operation did not entail

175. See *supra* note 165.

176. See generally Morrison, *Libya*, *supra* note 100 (discussing this “process” concern).

“hostilities” to the specific facts of that situation.¹⁷⁷ One might question the legitimacy of artificial attempts to confine the sweep of a precedent at the very point it is issued.¹⁷⁸ Still, the Obama Administration’s context-specific approach may make it harder for future administrations to generalize from the Libya episode. And again, if law were imposing no constraint whatsoever on the Obama Administration’s approach to the issue, it is not clear why the Administration would have bothered to limit its claim in this way.

CONCLUSION

Some commentators have suggested that presidential authority has become “unbounded” by law, and is now governed only or primarily by politics. At the same time, there has been growing skepticism about the ability of the familiar political checks on presidential power to work in any systematic or reliable fashion. This Essay has attempted to understand more precisely what it means for the President to be constrained by law, and to outline possible mechanisms for such legal constraint. In doing so, it has resisted any sharp distinction between politics and law and has identified ways in which the two likely operate together. Politics and law are best understood not as mutually exclusive but as interactive in a range of complicated ways, sometimes in tandem and sometimes in opposition. Such interaction does not mean that law is unimportant or unconstraining, just as it does not mean that politics are unimportant or unconstraining.

Ultimately, the extent to which law constrains the President is an empirical question. In offering illustrations of how law might constrain presidential power, this Essay has sought to make the analysis more concrete, not to make systematic claims about what is happening in practice. There are a number of challenges to developing such claims. First, the problem of observational equivalence can make it difficult to disentangle law-based explanations for a given action from various non-law-based reasons for the same action. In some situations, this may simply be

177. Harold Koh stressed that (1) “U.S. forces are playing a constrained and supporting role in a NATO-led multinational civilian protection operation, which is implementing a U.N. Security Council Resolution tailored to that limited purpose,” (2) “our operations have not involved U.S. casualties or a threat of significant U.S. casualties,” (3) “U.S. military operations have not involved the presence of U.S. ground troops, or any significant chance of escalation into a broader conflict,” and (4) “[t]his situation does not present the kind of ‘full military engagement[] with which the [War Powers] Resolution is primarily concerned.’” Koh contended that, “[h]ad any of these elements been absent in Libya, or present in different degrees, a different legal conclusion might have been drawn.” See Koh Statement, *supra* note 151, at 7–11.

178. Cf. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

the result of the fact that both legal and extralegal norms point in the same direction. In others, certain non-law-based reasons may themselves be affected by law. The sense that something is immoral, for example, might be based in part on a sense that it is unlawful (and vice versa).¹⁷⁹

Second, as discussed earlier, disputes over the content and meaning of the law often make it unclear whether the legal norm has been followed. If the law in a given area is so malleable or undeveloped as to admit of any interpretation that the regulated actor might prefer, it is difficult to see how the law could be said to impose any meaningful constraint. Yet it can be difficult to separate such cases from cases of legitimate but bounded disagreement over the law. Practice-based law is probably more likely to suffer from this difficulty than law grounded in clear textual provisions, especially if there is little prospect of authoritative judicial review. The problem is compounded in circumstances where the law-complying standard to which the relevant actors are held does not follow the “best” view of the law but merely ensures that there is a reasonable or plausible legal basis for their actions.

Third, focusing on the law’s impact on actions actually taken by the President or other executive actors threatens to obscure the potentially much broader universe of actions not taken. Identifying relevant “nonevents,” however, is extremely difficult. Moreover, even when a given nonevent is identifiable, the reason why it did not transpire may be elusive. Although legal considerations might explain why certain actions were not taken or even seriously considered, the fact that a forgone action would have been legally controversial or even indefensible does not mean it was forgone for that reason. Furthermore, government officials do not typically provide public explanations for why they are not taking particular actions, and even when they do, the explanation may be self-serving. Internal deliberations relating to nonactions may be especially difficult to access with respect to the presidency, where norms of confidentiality will often apply.

Notwithstanding these difficulties, some empirical investigation should be possible in this area. It would be useful to consider, for example, modern instances in which Congress has resisted presidential action and framed its resistance in explicitly legal terms. Of course, the mere presence of an objection articulated in legal terms does not mean that the law was the principal motivating factor. As explained elsewhere, congressional resistance to presidential action is heavily affected by

179. See, e.g., Leonard Berkowitz & Nigel Walker, *Laws and Moral Judgments*, 30 *Sociometry* 410, 412 (1967) (“Laws may often be taken as implying a social consensus, and this implied consensus could influence attitudes toward the behavior that is the subject of the laws.”); cf. Hart, *supra* note 112, at 7 (“Not only do law and morals share a vocabulary so that there are both legal and moral obligations, duties, and rights; but all municipal legal systems reproduce the substance of certain fundamental moral requirements.”).

political partisanship.¹⁸⁰ Especially in times of divided government, congressional resistance that is articulated in legal terms may be principally motivated by partisan concerns. When members of Congress from the President's own party join in a legal objection, however, it might be fair to infer that concern for the law itself provides a greater part of the motivation for the objection.

In addition to being intertwined with partisanship, legally articulated objections by members of Congress are probably more likely to occur when the objectors disagree with the action as a matter of policy. As political science literature has made clear, a significant motivation for members of Congress is reelection, which means that they tend to be focused more on their constituents' policy preferences than on Congress's institutional prerogatives.¹⁸¹ Still, there may be instances where legal concerns stand apart from policy considerations, such as where Congress resists presidential action on legal grounds but subsequently approves the action once its legal concerns are resolved. (Senatorial insistence that arms control agreements be concluded as Article II treaties, discussed in Part III.B, is a potential example.)

The more fundamental point, however, is that the mere existence of partisan or policy motivations to resist a particular presidential action does not disqualify congressional resistance articulated in legal terms from counting as an instance of legal constraint. Law, politics, and policy are best viewed not as mutually exclusive but as overlapping, interactive domains. For example, as discussed above, the political costs of unpopular or unsuccessful presidential actions may go up with their perceived illegality. Certainly it is possible to think of examples—the Iran-Contra scandal, for instance—that might illustrate such a phenomenon.¹⁸² If so, then even if legally articulated congressional resistance is entirely opportunistic, the ability of Congress to marshal credible legal objections can produce a form of constraint.¹⁸³ Empirical

180. See Bradley & Morrison, *supra* note 1, at 443.

181. See *id.* at 442.

182. The Iran-Contra scandal involved the secret facilitation by the Reagan Administration of arms sales to Iran in an effort to secure the release of hostages, and the diversion of some of the funds from the sales to support rebels in Nicaragua, despite a statutory ban on such support. After the scheme was discovered in 1986, the Reagan Administration suffered substantial political damage. See R.W. Apple Jr., *The Iran Affair: A Presidency Damaged*, *N.Y. Times*, Nov. 26, 1986, at A1. Reagan's popularity rebounded, however, before the end of his presidency.

183. A similar observation might be made about the link between law and policy. In deciding on a course of action, Presidents presumably seek to avoid policy failure. Legal uncertainty can potentially affect this calculation by creating a higher risk of such failure. In the debt ceiling debate, for example, the legal uncertainty generated by unilateral presidential action could have contributed to difficulties in the bond markets, which in turn could have harmed the U.S. economy. If legal considerations make policy failure

investigation of this sort of hypothesized exacerbation of political cost (through the use of opinion polls, for example) would be useful.

Internal constraints on presidential action will be more difficult to verify empirically, in part because of norms of confidentiality surrounding executive branch decisionmaking. Still, to the extent that internal accounts of such decisionmaking are or become available, they can be very instructive. To take an example mentioned earlier, it would be useful to know more about the legal deliberations in 2011 (and again in late 2012 and early 2013) associated with the Obama Administration's decision not to attempt unilaterally to exceed the statutory debt ceiling. With the passage of time, the details of such internal deliberations are more likely to be disclosed,¹⁸⁴ although there are of course dangers that after-the-fact recollections will be self-serving or otherwise distorted. Identifiable examples of resistance by executive branch attorneys to contemplated presidential action—for example, in the form of publicly disclosed OLC opinions¹⁸⁵—can also be at least suggestive of constraints on particular issues.¹⁸⁶

In sum, although there are a number of obstacles to pursuing systematic empirical investigation of law's constraining effect in this area, they may not be insurmountable. As a first step, successful empirical research depends on asking the right questions. To that end, this Essay has sought to clarify the primary analytical issues and to articulate plausible hypotheses that might help frame future research.

more likely, they can affect the President's decisionmaking even if he has not internalized the legal norms as such.

184. As noted above, an informal report from a former Obama Administration official suggests that law did indeed operate as a constraint. See Jarmul, *supra* note 83.

185. A 2010 memorandum outlining best practices for the provision of legal advice by OLC embraces "the presumption that [OLC] should make its significant opinions fully and promptly available to the public." 2010 OLC Best Practices Memorandum, *supra* note 130, at 5. In contrast, the 2005 memorandum that the 2010 memorandum replaced acknowledged no comparable presumption and stressed instead the importance of "[m]aintaining the confidentiality of OLC opinions." 2005 OLC Best Practices Memorandum, *supra* note 130, at 4. It is unclear, however, whether OLC has in fact disclosed its opinions at a greater rate in recent years than it did previously.

186. Cf. Morrison, *Constitutional Alarmism*, *supra* note 32, at 1718–19 (noting various such examples as well as examples that seem to point in other direction, and explaining why simply counting "yes" rate in written OLC opinions will not yield fully accurate picture of extent to which OLC constrains White House).

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