

Reorienting the Principal-Agent Frame: Adopting the “Hartian” Assumption in Understanding and Shaping Legal Constraints on the Executive

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I. INTRODUCTION

A. *Claims of Rising Presidential Illegality*

The debate over whether law *can*, and indeed *should*, constrain presidential power is not a new one: at various times throughout the twentieth century, progressives and conservatives argued in turn for an expansion of presidential power beyond the limits imposed by law.¹ Historically, the opposing political party checked each of these periods of partisan support; recently, however, several scholars have suggested that an unprecedented trend is underway and “today, both major parties are in love with the presidency.”² This development, they claim, has given rise to a “runaway presidency” or an “executive unbound.”³ Significantly, commentators from both ends of the political spectrum have advanced this argument—though in assessing its normative implications, these “realists” and “liberal skeptics” differ dramatically⁴—suggesting that the descriptive claim ought to be taken seriously.⁵

In developing their argument about “widespread presidential illegality,” both realists and liberal skeptics focus particular criticism on a key institutional actor that plays a central role in mediating the relationship between law and the executive: the Department of Justice’s Office of Legal

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¹ Richard Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1381 (2012) (book review).

² BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 120 (2010).

³ ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 138 (2010).

⁴ For the realist view, see *infra* notes 8–9 and accompanying text; for the liberal skeptics’ argument, see *infra* note 7 and accompanying text.

⁵ In *The Executive Unbound*, Eric Posner and Adrian Vermeule posit that expanding presidential powers are no longer effectively constrained by the law and claim that this may be a positive development for American government. See POSNER & VERMEULE, *supra* note 3. Meanwhile, in *The Decline and Fall of the American Republic*, Bruce Ackerman calls for major institutional redesign within the executive branch to reign in this perilous trend. See ACKERMAN, *supra* note 2.

Counsel (OLC).⁶ Scholarly criticism of OLC as an institutional constraint on the exercise of presidential power falls along a spectrum. Liberal skeptics, like Bruce Ackerman, claim that OLC has been reduced to a largely “rubber-stamp” function,⁷ while purportedly hard-headed realists, like Eric Posner, acknowledge that OLC may “raise the political cost of [presidential] action,” but it remains on balance an “enabler” of presidential power.⁸ Indeed, Posner and co-author Adrian Vermeule even go so far as to argue that “[a] president need not have or consult any legal advisers at all; nothing prevents [him] from shutting down OLC and the other executive branch legal offices altogether and deciding the Administration’s legal positions for himself.”⁹

B. The “Holmesian” Assumption in Executive-Branch Lawyering

“Liberal legalists” who dismiss these critical accounts contend that “hyperrealist” and “alarmist” claims about a presidency unconstrained by law are unsubstantiated, overbroad, and prove too much. They criticize such arguments for failing to adequately account for law’s ability to serve as a powerful *structural constraint* on executive power, particularly through institutions such as OLC. But in rejecting the view of OLC as an “enabler” and the broader account of “presidential illegality” in which it is embedded, liberal legalists respond to critics’ claims largely on their own terms.¹⁰ Crucially, they adopt a shared assumption that underpins critiques from the right and left—and in doing so ultimately offer an incomplete theory of the relationship between law and the executive. Specifically, liberal legalists con-

⁶ OLC is an executive office that is arguably “the most significant centralized source of legal advice within the Executive Branch.” Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010). OLC offers legal advice to the President and other entities within the executive branch, often focusing on the most challenging legal questions that arise.

⁷ See ACKERMAN, *supra* note 2; see also Neal K. Katyal, *Toward Internal Separation of Powers: Checking Today’s Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2339 (2006).

⁸ Posner advances several related claims to justify this conclusion. He argues that OLC’s institutional incentives often prevent it from providing “neutral” advice (as would an impartial adjudicator); that OLC’s occasionally tendentious legal analysis stretches the definition of presidential “compliance” with the law; and that cost-benefit maximizing presidents avoid asking for OLC advice when they have a strong expectation of disapproval. These considerations lead him to conclude that “[t]he OLC strengthens the President’s hand in some cases and weakens it in others, but overall it extends his power and serves as enabler, not constraint.” 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, 231 (2012).

⁹ Eric A. Posner & Adrian Vermeule, *Libyan Legal Limbo: Why There’s Nothing Wrong With Obama Ignoring Some of His Own Legal Advisors on Libya*, SLATE (July 5, 2011, 6:17 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html.

¹⁰ It is important to point out that liberal legalists are not the only ones who argue that law serves as a constraint on the executive. Scholars like Jack Goldsmith (who would not likely self-identify as a “liberal legalist”) also contend that OLC can act as an external check on the executive. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 33 (2007).

cede the fundamental “Holmesian” assumption that executive-branch actors’ motivations (and those of public officials in general) are best understood as approximating the proverbial “bad man’s” view of the law.¹¹ Building on this motivational assumption, they adopt a *structural* approach that conceptualizes law as an external force that restrains the executive primarily through other actors’ perceptions of, and reactions to, the legality (or illegality) of its actions. The standard debate between critics and defenders of presidential legality is therefore framed primarily in terms of *external structural constraints*, and hinges on the degree to which executive-branch actors rationally choose to submit to the “enabling constraint” of the law.¹²

This paper argues that by adopting a consequentialist “Holmesian” assumption in conceptualizing executive-branch lawyering, liberal legalists ignore the possibility that an alternative approach based on the “Hartian” assumption—which views law’s restraining force as an internalized normative commitment or duty to faithfully execute the laws—may provide a corollary *agency-driven* explanation for law’s ability to constrain the executive.¹³ While acknowledging the difficulty in establishing causation (and thereby assigning relative explanatory power to these competing theories) due to “observational equivalence,” this paper nonetheless maintains that much is at stake in how the relationship between law and the executive is framed. Ultimately, this paper seeks to augment the *structural approach* adopted by liberal legalists and their critics with an *agency-driven approach* that emphasizes the role of internalized norms in restraining the executive.

C. Paper Structure and Argument

This paper is divided into three principal sections: (1) the first section considers the liberal legalists’ structural account of presidential legality, examining implications of the consequentialist “Holmesian” assumption upon which it rests; (2) the second section offers an alternative agency-driven explanation for presidential legality that rests on a normative “Hartian” assumption about executive-branch actors’ internalized commitment to the law, and subsequently demonstrates the difficulty in establishing its relative explanatory power due to “observational equivalence” between these two theories; and (3) the final section argues that adopting an *agency-driven approach* as a corollary to the standard *structural approach* is nonetheless val-

¹¹ See 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 his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).

¹² See, e.g., John McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Phenomenon*, 15 CARDOZO L. REV. 375, 422 (1993) (discussing how other actors’ perceptions of executive-branch legality as those actions consistent with OLC opinions, reflect the enabling constraint of law); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1708 (2011); Pildes, *supra* note 1, at 1409.

¹³ See H.L.A. Hart, *THE CONCEPT OF LAW* (2d ed. 1994).

uable both to ensure presidential legality—given the limitations of solely structural constraints on the executive—and to advance a more robust theory of executive-branch lawyering.

II. THE LIBERAL-LEGALIST ACCOUNT OF PRESIDENTIAL LEGALITY

A. *Law as an “Enabling Constraint”*

Liberal legalists broadly accept—and indeed assert—that law serves as an “enabling constraint” adopted by power-maximizing executive actors as a means to enhance their long-term power.¹⁴ On this view, the historical development of executive-branch legal institutions merely reflects a set of instrumental decisions by savvy Presidents who recognized that “legal restraint increases executive power.”¹⁵ This understanding is similarly reflected in liberal legalists’ views of OLC: “willingness to follow OLC interpretations would seem to be the quintessential kind of executive self-binding constraint . . . critical to presidential credibility.”¹⁶ Because it is widely perceived that the President will inevitably be influenced by political considerations, “in order for his legal views to have force . . . it is useful for [OLC] to cultivate a reputation of applying the law scrupulously without regard to political or policy interest.”¹⁷ Thus, by taking a legal position that appears to constrain the executive, OLC actually serves as an “enabling constraint” that enhances long-term presidential power. On this view, OLC is merely one of several “self-binding mechanisms”—along with multilateral commitments, transparency measures, and special prosecutors—that “smart presidents” willingly adopt in order to maximize their institutional power over time.¹⁸ Skeptics of presidential legality adopt fundamentally similar

¹⁴ See, e.g., McGinnis, *supra* note 12, at 422–24; Morrison, *supra* note 12, at 1688; Pildes, *supra* note 1, at 1409. Hence, Richard Pildes notes that “a close relationship exists between presidential credibility and effective power. . . . [T]hat credibility is bound up with perceptions about whether presidents are complying with domestic law.” Pildes, *supra* note 1, at 1424.

¹⁵ As Pildes notes,

By acting consistently with these self-adopted constraints, presidents build up their credibility by signaling that they are using their discretion in acceptable ways and should therefore continue to be granted that discretion—including discretion to avoid, circumvent, or ignore the law when, in the President’s best judgment, doing so will produce better outcomes.

Pildes, *supra* note 1, at 1388.

¹⁶ *Id.* at 1390.

¹⁷ McGinnis, *supra* note 12, at 424.

¹⁸ This consequentialist explanation is not unique to executive-branch lawyering. It follows from a broader understanding of individuals’ relationship to law through the lens of rational-choice theory, which posits that instrumentalist actors continually weigh the costs and benefits of legal compliance and proceed to obey the law only when the latter exceed the former. Critically, this approach assumes that actors will accept legal constraints not because they are motivated by any inherent normative commitment to the rule of law per se, but solely as a means to maximize power. To the extent that legal constraints will prove effective only

consequentialist premises,¹⁹ and the standard debate between liberal legalists and their critics thus rests upon a shared assumption about executive-branch actors' "Holmesian" approach toward the law.

B. *The Inconclusive Empirical Debate*

From this common ground, liberal legalists challenge claims of "widespread presidential illegality" on their own terms, maintaining that critics' concerns are largely unsubstantiated and overblown; the difference here is one of degree, since they share the same underlying consequentialist assumption. The debate thus becomes an empirical one about the degree to which external legal constraints effectively restrain power-maximizing executive-branch actors. Hence, Trevor Morrison attempts to debunk Ackerman's "alarmist" assertions about OLC's "rubber-stamp" role by citing numerous instances where it has raised legal barriers to major presidential initiatives in the face of White House pressure²⁰ and by marshaling statistical evidence that OLC's formal opinions have at times rejected proposed presidential actions.²¹ Similarly, Richard Pildes criticizes the purportedly "realist" account in *The Executive Unbound* by claiming that it fundamentally overlooks (or deeply underestimates) the constraining power of the law.²² Pildes argues that Posner and Vermeule offer a "thin and indeterminate case" for their sweeping conclusions.²³ He cites compelling ethnographic accounts to demonstrate that Presidents are often constrained by the anticipation that their legal advisors will say "no" and the adverse response expected from other actors if presidents contravene this advice.²⁴ Nonetheless, this emphasis on the overarching relationship between perceived legality and credibility—the abiding source of presidential power—clearly reflects a conception of law as an *external structural constraint* on the executive. While these liberal legalists' arguments may be persuasive to some, the empirical debate ultimately remains inconclusive. This paper seeks to move

when the benefits (in some utilitarian sense) of compliance outweigh the costs, this suggests that there will be situations where legality is not "rational." See Pildes, *supra* note 1, at 1404.

¹⁹ See, e.g. POSNER & VERMEULE, *supra* note 3, at 113–53.

²⁰ Morrison, *supra* note 12, at 1718.

²¹ As Morrison reports, from 1977 to 2009, OLC memoranda approved presidential action seventy-nine percent of the time, rejected it thirteen percent of the time, and "provided a mixed response in the remaining instances." *Id.* at 1717–18. Richard Pildes builds on this point by arguing that data on OLC's formal opinions underrepresent OLC's actual constraining influence on the executive, because it fails to capture those "contexts in which the White House does not seek OLC input in the first place . . . or in which advice giving is oral." Pildes, *supra* note 1, at 1400.

²² Pildes argues that with respect to "effective mobilization and maintenance of political power . . . [Vermeule and Posner] somehow miss that law, too, can work as an enabling constraint [T]he single *most powerful* signal of that willingness to be constrained, particularly in American political culture, is probably the President's willingness to comply with law." Pildes, *supra* note 1, at 1408.

²³ *Id.* at 1392.

²⁴ Pildes, for instance, highlights the view of law as constraint on the executive held by senior officials in the Bush Administration who actually served in the executive branch, including Jack Goldsmith, Dick Cheney, and Donald Rumsfeld. See *id.* at 1396–97.

beyond this indeterminacy by shifting away from the structural approach underlying the standard debate.

III. AN ALTERNATIVE APPROACH: INTERNAL NORMATIVE LEGAL CONSTRAINTS ON THE EXECUTIVE

A. *The Hartian Assumption*

Whereas scholars on both sides of the standard debate adopt a “general rational-choice approach [in which] considerations of morality or duty internal to the legal system do not motivate public actors,”²⁵ an alternative agency-driven approach emphasizes constraints arising from actors’ internalized normative commitments. This understanding of law “as a practice that is experienced as normatively binding” was originally articulated by H.L.A. Hart and has since developed into an extensive body of legal research and commentary.²⁶ The “Hartian” view challenges the Holmesian assumption that law cannot be understood by looking at it as “a good [man] who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”²⁷ On this view, actors are motivated to obey the law not from a cost-benefit calculus reinforced by external constraints but from internalized normative obligations or a sense of duty to faithfully execute the laws.²⁸

B. *The Role of Norms in Executive-Branch Lawyering*

Commentary by legal scholars and former officials suggests that norms play a significant role in influencing executive-branch lawyers’ approach toward the law, at least within one key institution—OLC. Several former OLC officials highlight the importance of “powerful, if somewhat informal, norms” in shaping the organization’s approach to its mission.²⁹ These norms include a presumption that OLC advice is legally binding across the executive branch, a belief that the executive branch has a “duty to defend” the constitutionality of laws that have been enacted, and an obligation to provide “its best understanding of what the law requires—not simply an advocate’s defense of the contemplated action or position proposed by an agency or the

²⁵ *Id.* at 1404.

²⁶ *Id.* at 1404 n.69; see also HART, *supra* note 13. For recent literature developing the Hartian normative view of law in the context of executive-branch lawyering, see, for example, Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); see also THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

²⁷ See Holmes, *supra* note 11, at 459.

²⁸ See HART, *supra* note 13, at 202.

²⁹ Morrison, *supra* note 12, at 1693; see also GOLDSMITH, *supra* note 10, at 37.

Administration.”³⁰ Former OLC head Jack Goldsmith notes that these “cultural norms” emphasize “detachment and professional integrity” in the office’s work,³¹ while Trevor Morrison, a former OLC official, claims that they are “deeply ingrained norms, and OLC’s professed commitment to them helps it attract lawyers motivated to uphold them.”³² These norms are central to OLC’s “unique mission, and long-established tradition . . . as to how its work should be carried out,” especially the delicate undertaking of providing legal advice to the President.³³ Recent practices further indicate that OLC’s leadership takes these norms and traditions seriously. In the past decade, the Office has issued two memoranda laying out best practices (across Administrations with disparate ideologies), in addition to a similar document outlining “guiding principles” issued by a group of former OLC attorneys.³⁴ These memoranda reflect an attempt to codify norms and traditions that OLC attorneys are encouraged—and indeed expected—to internalize in order to pursue a principled approach toward executive-branch lawyering.

Senior officials outside OLC have also highlighted the importance of an internalized commitment to the rule of law in guiding executive-branch lawyers’ work. In a speech to lawyers within the intelligence community, for example, former Deputy Attorney General James Comey emphasized that “[t]he lawyer is the custodian of so much . . . most importantly of all, the custodian of our constitution and the rule of law.”³⁵ Comey suggested that “moral character” is central to this role and concluded by thanking the assembled intelligence-community lawyers for remaining committed to the rule of law.³⁶ Hence, the normative Hartian view of law finds support within OLC practices and commentary, as well as across the executive-branch legal community more broadly.

This agency-driven view of executive-branch lawyering posits that an internalized normative commitment to the rule of law will motivate Presidents and their legal advisors, at least in certain circumstances, to impose constraints on the executive. And indeed, statistical data indicate that OLC has frequently imposed legal barriers to various presidential initiatives over

³⁰ See Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Att’y’s of the Office, 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>.

³¹ GOLDSMITH, *supra* note 10, at 37.

³² MORRISON, *supra* note 12, at 1723.

³³ See 2010 OLC Best-Practices Memorandum, *supra* note 30, at 6.

³⁴ See *id.*; Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Att’y’s of the Office, Best Practices for OLC Opinions (May 16, 2005), available at <http://www.justice.gov/olc/best-practices-memo.pdf>; see also Memorandum from Walter E. Dellinger, former Assistant Att’y Gen., Office of Legal Counsel, et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), available at http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf.

³⁵ James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 2D 439, 444 (2007).

³⁶ *Id.*

the past several decades.³⁷ But the strongest evidence supporting the Hartian assumption can be found in those instances where OLC has taken positions that expressly prevented or rejected highly significant initiatives in which the President had a major policy interest.

Scholars have cited a number of examples demonstrating such forceful legal restraint, including OLC's conclusion during the Nixon Administration that the President lacks the inherent authority to impound funds appropriated by Congress,³⁸ its determination during the Reagan Administration that the President lacks inherent line-item veto authority,³⁹ its conclusion near the end of the Clinton Administration that a former President may be prosecuted for the same conduct that had been the focus of an unsuccessful impeachment proceeding while he was in office,⁴⁰ and its withdrawal of some of the extremely controversial OLC "torture memos" during the Bush Administration on the basis that they could not be legally defended.⁴¹ One of the most dramatic recent instances of such resistance was the refusal of former OLC head Jack Goldsmith, along with former Attorney General John Ashcroft and former Deputy Attorney General James Comey, to certify the legality of a major classified electronic-surveillance program.⁴² Similarly, OLC's conclusion in 2011 that the Obama Administration's continued support for the NATO campaign against Libya amounted to "hostilities" under the War Powers Act represents the latest in this series of examples that demonstrate its willingness to exercise legal restraint on the executive (though in this case, it was overruled by the President).⁴³

³⁷ Between 1977 and 2009, OLC memoranda "going predominantly against the White House" have comprised approximately thirteen percent of its formal published opinions. See Morrison, *supra* note 12, at 1717–18.

³⁸ Memorandum from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to the Honorable Edward L. Morgan, Deputy Counsel to the President, Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), reprinted in *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. On Separation of Powers of the S. Comm. On the Judiciary*, 92d Cong. 279–91; see McGinnis, *supra* note 12, at 430.

³⁹ See The President's Veto Power, 12 Op. O.L.C. 128 (1988).

⁴⁰ See Memorandum from Randolph Moss, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., Whether a Former President May Be Indicted and Tried for the Same Offences for Which He Was Impeached by the House and Acquitted by the Senate (Aug. 18, 2000), available at <http://www.justice.gov/olc/expresident.htm>.

⁴¹ See GOLDSMITH, *supra* note 10, at 141–61.

⁴² Morrison, *supra* note 12, at 1718; see also Pildes, *supra* note 1, at 1396 n.48 (noting that "Goldsmith's account has been corroborated by others").

⁴³ Despite OLC's conclusion, President Obama ultimately made a decision on the "hostilities" question that contravened the OLC interpretation and "sided instead with a more favorable analysis provided by Harold Koh, the State Department's chief legal adviser." However, he did so after pursuing an unusual (and much criticized) process that involved soliciting legal opinions directly from multiple departments, including the Defense and State Departments, rather than having these opinions first sent to OLC. Michael Isikoff, *On Libya, President Obama Evaded Rules on Legal Disputes, Scholars Say*, NBC NEWS (June 21, 2011, 6:09 AM), http://www.msnbc.msn.com/id/43474045/ns/politics-white_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/. Nonetheless, as Morrison notes, OLC's Libya interpretation clearly demonstrates that it "said 'no' on an issue of presidential power that was deeply important to the White House." Trevor W. Morrison, *Libya, 'Hostilities,' the*

C. Causal Indeterminacy: The Problem of “Observational Equivalence”

The examples noted above underscore that law can indeed restrain the executive: they clearly do not fit well within critical views of OLC as “Keeper of the Presidential Fig Leaf” offered by realists,⁴⁴ or a mere “rubber stamp” as characterized by liberal skeptics.⁴⁵ Yet it remains difficult to identify precisely *why*, in these instances, OLC exercised a restraining role. On the Hartian view, these cases represent paradigmatic examples of law’s normative force exerting itself through OLC attorneys driven by an internalized conviction that certain executive actions simply cannot be reconciled with the rule of law. Take, for example, the decision to withdraw the controversial “Torture Memo.”⁴⁶ Despite the “superstrong stare decisis presumption” that has long governed OLC treatment of its own precedent, former OLC head Jack Goldsmith justified his decision by carefully identifying serious flaws in the Memo.⁴⁷ Though undoubtedly a complex decision, this momentous act—which put Goldsmith at loggerheads with powerful players in the Administration⁴⁸—can plausibly be seen as evidence that internalized norms regarding the rule of law can motivate an executive-branch lawyer to exercise restraint against the executive.

Yet liberal legalists who adopt a consequentialist Holmesian view of the law can offer an equally plausible explanation for such examples of OLC resistance. They posit that the Office must say “no” often enough (and on issues important enough) to preserve “OLC’s value to its client—including the President—[which] lies in the perception that its legal opinions are the product of independent judgment consistent with its best view of the law.”⁴⁹ Hence, the liberal legalists’ structural account would suggest that instances in which OLC has stood tall in the face of White House pressure merely reflect calculated efforts to build (or rebuild) OLC’s legitimacy in order to serve as an effective “credibility enhancing mechanism” for the executive—not because of OLC attorneys’ internalized normative commitment to the rule of law. On this view, Goldsmith’s withdrawal of the Torture Memo was an instrumental act undertaken to stem a serious legitimacy gap in the wake

Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation, 124 HARV. L. REV. F. 62, 66 (2011).

⁴⁴ See Posner & Vermeule, *supra* note 9.

⁴⁵ See ACKERMAN, *supra* note 2; see also Katyal, *supra* note 7.

⁴⁶ Memorandum from the Office of Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>.

⁴⁷ See GOLDSMITH, *supra* note 10, at 146.

⁴⁸ These “powerful players” included Goldsmith’s colleague and fellow Yale Law alumnus, John Yoo, author of the Memo (and the individual who had recommended Goldsmith for the OLC position), as well as Attorney General Alberto Gonzales, who had signed off on the Memo’s legal soundness.

⁴⁹ As Morrison notes, “as a prudential matter, OLC’s basic function would be undermined if it treated the President’s constitutional views or preferences as conclusive in every case.” Morrison, *supra* note 6, at 1513.

of the memorandum being leaked, rather than a principled decision driven by Hartian motivations.⁵⁰

As the above analysis indicates, in cases where law does constrain the executive, it is difficult to ascertain the actors' underlying motivations. In each of these instances, OLC attorneys could have been driven by internalized norms regarding the rule of law, but they also might have acted out of an instrumental desire to cultivate a reputation for legality among external observers. This uncertainty is compounded by various methodological limitations in research related to the executive branch, requiring reliance on internal, ethnographic accounts—especially those of legal advisors—that “run the risk of being self-serving or suffering various forms of self-attribution bias.”⁵¹ The problem is one of *observational equivalence*, and “we have no likely access to empirical facts that would resolve which motivational account is true.”⁵² To the extent that we cannot definitively conclude which explanation better accounts for these observed legal constraints on the executive, what is at stake in adopting one theoretical approach over the other?

IV. TOWARD A MORE COMPLETE THEORY OF EXECUTIVE-BRANCH LAWYERING

A. *Limitations of the Structural Approach*

Broadly speaking, two theoretical approaches can be advanced to explain legal constraints on the executive: (1) a *structural approach* that views legality as the outcome of Holmesian rational-choice calculus reinforced by external constraints, and (2) an *agency-driven approach* that explains legality as a product of internalized norms driving individual Hartian actors to exercise restraint.⁵³ This section argues that the structural approach faces important limitations in the specific context of executive-branch lawyering because several factors weaken the law's ability to effectively restrain the

⁵⁰ Morrison argues, for instance, that, “even though Goldsmith is adamant that he made his initial decision to withdraw the Torture Memo well before it was ever leaked to the public, the timing of the ultimate withdrawal is best viewed as a legitimate response to the now-leaked Memorandum's corrosive effect on OLC's integrity and credibility.” *Id.* at 57.

⁵¹ Pildes, *supra* note 1, at 1400.

⁵² *Id.* at 1394.

⁵³ Though useful as a heuristic, drawing generalized conclusions about instrumental and normative motivations is overly simplistic; in reality, executive-branch actors (like all other individuals) will adopt a combination of Holmesian and Hartian outlooks on the law; depending on the circumstances, one set of motivations may be more influential than the other, though neither is likely to provide the exclusive motivational force. As one scholar puts it:

Between the legal romantic's vision of presidents treating legal compliance as the highest value and always acting on the basis of the best, good-faith interpretation of the law, and the cynic's vision of presidents willing to ignore the law when judicial enforcement is unlikely, lie the complex realities of the relationship between presidential power and law.

Pildes, *supra* note 1, at 1424.

executive through external constraints alone; therefore, the agency-driven approach offers a valuable—and needed—complement in understanding and shaping legal constraints on the executive.

For one, numerous issues arising in the context of executive-branch lawyering are nonjusticiable.⁵⁴ This limitation on judicial enforcement reduces other actors' ability to challenge the legality of executive actions, lowering the cost of disobeying the law within the rational-choice calculus. Additionally, the lack of transparency surrounding many issues in executive-branch lawyering—driven by national-security concerns, executive-privilege claims, and bureaucratic maneuvering—creates a problem of asymmetric information that dampens the feedback mechanism between legality and credibility (and, ultimately, presidential power)⁵⁵ by limiting the ability of external actors (including other branches, the media, and the broader public) to perceive and respond to executive actions. Self-imposed legal constraints cannot effectively serve as a “credibility enhancing mechanism” if external actors are unaware of their existence; lack of transparency thus reduces both the instrumental benefits of obeying the law and lowers the costs of illegality. Furthermore, the potentially “diaphanous” nature of the law governing executive-branch actors (partly stemming from the fact that congressional controls are often broad or vague) arguably grants executive-branch actors significant latitude to act within a capacious understanding of “legality.”⁵⁶ This latitude is exacerbated by the first two factors (nonjusticiability and nontransparency); it further reduces the ability of law to serve as an external constraint on the executive, because executive-branch lawyers will take advantage of this latitude to consistently adopt views that best advance their clients' policy preferences, engaging in an “interpretive bias” that systematically maximizes executive power even while remaining within the (broad) bounds of “legality.”⁵⁷

Collectively, these factors skew the rational-choice calculus underpinning executive-branch lawyering to make disobeying the law more attractive by reducing the costs of illegality, making them more diffuse, and deferring them into the future. Consequently, even if executive-branch actors do not go so far as to publicly proclaim defiance of the law, they may rationally choose to “push the boundaries of legal compliance by embracing tendentious legal positions not widely shared among legally knowledgeable inter-

⁵⁴ See, e.g., Morrison, *supra* note 12, at 1695.

⁵⁵ See, e.g., RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 185 (1990) (offering a classic account of presidential influence stemming from formal powers of the office, professional reputation, and prestige or public standing).

⁵⁶ See Pildes, *supra* note 1, at 1394–95.

⁵⁷ OLC itself acknowledges that its analyses “may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President.” See 2010 OLC Best-Practices Memorandum, *supra* note 30, at 2. To this end, OLC arguably enjoys substantial latitude in adopting one among multiple competing views as “its best understanding of what the law requires.” *Id.* at 1. This approach is reflected, for instance, in former OLC head Jack Goldsmith's claim that “my job was to make sure the President could act right up to the chalk line of legality.” GOLDSMITH, *supra* note 10, at 78.

prefers but that nonetheless enable presidents to pursue their policy aims.”⁵⁸ These significant limitations in law’s ability to generate effective external legal constraints on the executive underscore the importance of an alternative, internally motivated set of restraints that might help to constrain the executive. Put another way, executive-branch actors engaging solely in a Holmesian calculus are likely to conclude that, in many cases, it is actually *rational* to ignore the law; a corollary Hartian motivation may be essential in restraining them from doing so.

Making this theoretical shift—to incorporate an *agency-driven approach* as a corollary to the standard *structural approach* toward executive-branch lawyering—has two key implications. First, it suggests that reform efforts should not focus solely on mechanisms that strengthen external constraints (such as enhanced transparency or institutional innovation to create independent bodies that provide credible checks); they should also emphasize *norm generation and diffusion* among executive-branch lawyers through measures such as legal pedagogical reform, changes in hiring and evaluation review in OLC (and other executive-branch legal offices), and efforts to ensure adherence to best practices within such offices. Second, it reveals a broader pitfall arising from the *structural approach* toward executive-branch lawyering: this standard view adopted by liberal legalists and their critics conceptualizes the relationship between the President and OLC (as well as other executive-branch lawyers) in a *principal-agent* frame implicitly centered on *maximizing presidential power*—an underlying assumption that is little examined and not clearly justified. Adopting an agency-driven approach may permit commentators to reorient this skewed principal-agent frame by taking into consideration the role of executive-branch lawyers’ internalized normative commitments to the law, which rest upon principles that are independent from the maximization of presidential power.

B. *Implications for Reform: Refocusing Efforts on Norm Generation and Diffusion*

Liberal legalists’ reform proposals aim to strengthen various feedback mechanisms between presidential legality (or illegality) and credibility, based on their underlying view that law’s restraining force operates through structural constraints on the executive. For example, Ackerman’s proposal for institutional redesign calls for legislation creating a “Supreme Executive Tribunal” comprised of nine presidentially nominated, Senate-confirmed “judges for the executive branch” that will replace OLC, and whose answers will legally bind all executive-branch actors, including the President.⁵⁹ Questions of its constitutionality aside, at its core this seemingly radical reform basically aims to replace a purportedly broken “credibility enhancing mechanism” (OLC) with one that will work (the Supreme Executive Tribu-

⁵⁸ Pildes, *supra* note 1, at 1424.

⁵⁹ ACKERMAN, *supra* note 2, at 141–79.

nal). Similarly, Morrison calls for enhanced transparency by “increas[ing] the speed and frequency with which OLC publishes its opinions to the outside world,”⁶⁰ in order to bolster an external constraint on the executive—namely, third parties’ ability to hold it accountable for the legality of its conduct.⁶¹

In contrast, an agency-driven approach rooted in the Hartian assumption about actors’ motivations would suggest that these reform proposals, though well intentioned, ultimately miss the mark. Instead, it would call for an entirely different set of reforms focused on strengthening norm generation and diffusion among executive-branch lawyers. Such measures could include pedagogical reforms within law schools to place greater emphasis on internalized normative commitments to the law (for example, in professional-responsibility or government-lawyering courses). Similarly, law-school hiring committees that are evaluating former executive-branch lawyers could engage in robust examination of these individuals’ normative commitment to the rule of law (to the extent reflected in their available work product, academic articles, and workplace reviews by colleagues) when making hiring decisions; given the well-trodden path between executive-branch lawyering and academia, this could encourage greater internalization of norms among attorneys in OLC and other key executive-branch legal offices.⁶²

The agency-based approach also suggests that reform efforts should aim to strengthen the mechanisms by which norms are maintained and diffused within the executive branch. In OLC, for example, such reforms could encompass further top-down measures along the lines of the codification of key norms and traditions in recent best-practices memoranda, as well as bottom-up measures such as greater informal encouragement from senior OLC officials to line attorneys to submit review requests on sensitive issues perceived to implicate rule-of-law concerns. Additionally, norm-oriented reforms may warrant changes in OLC’s hiring and evaluation processes (and those of other key executive-branch legal offices), to consider individual attorneys’ normative commitment to the rule of law (for instance, through per-

⁶⁰ Bruce Ackerman, *Lost in the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13, 35 (2011) (discussing Professor Morrison’s proposals).

⁶¹ Morrison, *supra* note 12, at 1725.

⁶² Several criticisms can be leveled against such proposals. For one, many law schools already require some sort of ethics element in their coursework. Moreover, some argue that law schools inculcate in students an overly optimistic and unrealistic ideal of law as a determinate enterprise. One might also ask whether an internal normative commitment to law is something that can be taught at all. Furthermore, law-school hiring practices only impact a subset of OLC lawyers, and then only *after* they leave public service. Finally, one might question whether it is appropriate for law schools to hire faculty based on their normative conception of the law. The preliminary proposals outlined in this paper are intended to frame the types of solutions needed, rather than offer workable policy solutions. Further work is needed to develop practical and effective means by which to instill norm diffusion within OLC.

formance reviews that consider this dimension of their work product as well as its technical quality).⁶³

C. Reorienting the “Principal-Agent” Frame

Adopting an agency-driven approach to executive-branch lawyering ultimately reveals a broader pitfall in the standard structural approach toward executive-branch lawyering adopted by liberal legalists and their critics: it conceptualizes the relationship between the President and OLC (as well as other executive-branch lawyers) in a *principal-agent* frame implicitly centered on *maximizing presidential power*. Yet this underlying assumption remains largely unexamined and weakly justified.⁶⁴ Indeed, there are good reasons to question it and perhaps even conclude that *constraining executive power*—not merely as a short-term step calculated to increase long-term presidential power, but as an end in itself—may be a legitimate objective for executive-branch lawyers to pursue.

For one, the structural approach toward executive-branch lawyering implicitly frames the President as the sole principal, overlooking the fact that OLC (and other executive-branch lawyers) may be obligated to serve other principals as well. Preliminarily, these could include Congress, the authorizing body that established the Department of Justice and to whom the executive may be constitutionally bound to take care that the laws be *faithfully* executed; the judiciary, which exerts a strong normative influence on executive-branch lawmaking; and the American people, in whose interests the Constitution has vested the “Executive Power” to the President (and impliedly, his surrogates). Furthermore, the imbalanced principal-agent frame underpinning the structural account of legal constraints on the executive also ignores the fact that executive-branch lawyers are themselves *principals* in an important sense—in their own relationship with the law. Ironically, it is the *agency-driven* approach that this makes clear, by shifting focus away from the President (the sole principal in the standard account) and toward his lawyers, who may feel bound by an internalized duty to obey “the best”

⁶³ This proposal faces several challenges in terms of practicability. For one, it will prove difficult to engage in *ex ante* screening of individuals’ normative commitment to the rule of law prior to their hiring, but it may be possible to measure their *ex post* performance—for example, based on adherence to the best practices outlined in formal OLC memoranda—once they have entered the job. Furthermore, measuring individuals’ normative commitments through such evaluations (both in performance and hiring) will undoubtedly suffer from many of the same methodological limitations noted earlier in this paper. Nonetheless, the aim here is to offer preliminary suggestions for the types of reform around which an agency-driven approach to executive-branch lawyering can help focus future commentary and analysis.

⁶⁴ For instance, in defending the “pro-executive tenor” in OLC’s work, Morrison notes: “[T]his may simply reflect the fact that it is part of the executive branch. OLC is a participant in the separation of powers scheme envisioned by James Madison, wherein each branch defends its prerogatives against the other two.” See Morrison, *supra* note 12, at 1716. Yet, as Pildes points out, “If we ask why that interpretive bias [in OLC’s work] ought to be acceptable—there are few detailed defenses of it in the academic literature” Pildes, *supra* note 1, at 1422.

view of the law in some *neutral* sense, rather than the “best” view of the law in a *contextualized* sense that takes the lawyers’ institutional locus and presidential objectives into consideration.⁶⁵

Adopting an agency-driven approach toward executive-branch lawyering can help to reorient the skewed principal-agent frame underlying the standard structural approach, by encouraging commentators to explicitly engage with the complex relationship between executive-branch lawyers’ internalized normative commitments to the law and their institutional obligations to the President (and possibly to principals beyond the executive branch as well). Doing so is compelling for prudential reasons—internalized norms can provide an effective basis for legal restraint on the executive and thereby supplement the limitations of external structural constraints—and will ultimately enable a more robust understanding of the relationship between law and the executive.

⁶⁵ See 2010 OLC Best-Practices Memorandum, *supra* note 30, at 1.

