

LAWYERING THE PRESIDENCY
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ABSTRACT

Among its many profound effects on American life, the Trump presidency has triggered a surge of interest in the project of law reform to better check the exercise of presidential power. Yet these reform efforts arise against a wholly unsettled debate about the function and effectiveness of existing checks, perhaps none more so than the role of executive branch legal counsel. With courts often deferential, and Congress hamstrung by partisan polarization, scholars have drawn on the experiences of executive branch lawyers to assess whether counsel functions as part of an “internal separation of powers” form of constraint. Yet while these descriptive accounts are invaluable, they are also limited to the attorney side of an attorney-client relationship, leaving much unanswered about whether and why presidential advisors might heed their advice. And while the search for signs of “constraint” is essential, this conceptual framing risks obscuring other ways in which counsel may influence decision-making that might prove essential for reformers to address if they are to achieve the change they seek. Aiming to help fill these gaps, this Article draws on an original survey of more than three dozen former senior U.S. security policy officials, from the Cabinet Secretary level at the most senior, to National Security Council staff at the most junior, to examine when and why policy-making clients engage counsel’s advice surrounding the use of force, and whether and how that advice may shape or reshape policymakers’ existing normative preferences. The depth and bipartisan breadth of officials’ internal sense of obligation to engage counsel described here suggests that the existing literature may be underestimating counsel’s capacity to influence. At the same time, as this Article describes, counsel is structurally capable of exerting that influence in multi-directional ways. Where policymakers’ own normative instincts lead them to want to avoid external limits on executive power, counsel’s insistence that such limits be observed can at times “constrain” executive action. But where, as may also sometimes arise, policymakers would prefer more external checks on presidential behavior, receiving counsel’s permission not to may have an unintentionally encouraging effect. Indeed, where the availability of politically palatable justifications may be a means of avoiding action, the unavailability of a narrowing construction of presidential authority may deprive officials of an effectively action-limiting out. As this Article concludes, if the post-Trump goal is to improve counsel’s function as a “constraint” on power, reforms beyond simply increasing transparency or quality will be required.

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INTRODUCTION

Among its many profound effects on American life, the Trump presidency has triggered a surge of interest among scholars and policymakers in structural reforms to better check the exercise of presidential power.¹ The impulse is welcome, for Trump’s presidency helped expose the fragility of many of the legal rules thought essential to guarding against an authoritarian executive – from anti-corruption measures to limits on the use of U.S. military force. Yet these reform efforts arise against a wholly unsettled debate about the function and effectiveness of existing checks, perhaps none more so than the role of executive branch legal counsel. With the courts often slow to act or deferential to executive judgment, and congressional oversight hobbled by partisan polarization, prominent scholars in the pre-Trump era had come to champion the ability of executive branch offices like the Justice Department Office of Legal Counsel (“OLC”) to help forestall presidential illegality.² Bolstered by independent norms of professional ethics and practice, many argued,

¹ See, e.g., BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020); Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 BOSTON COLLEGE L. REV. (forthcoming 2021); Oona Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 4 (2020); see also Annie L. Owens, *REFORMING THE OFFICE OF LEGAL COUNSEL: LIVING UP TO ITS BEST PRACTICES*, ACS ISSUE BRIEF (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/12/Owens-Reforming-OLC-Final.pdf>; U.S. House Committee on Rules, *Hearing on Article I: Constitutional Perspectives on the Responsibility and Authority of the Legislative Branch*, March 3, 2020.

² See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (discussing the role of military lawyers); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (studying the Office of Legal Counsel); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336-37 (2006); see also Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1, 2 (2010) (studying the role of JAG lawyers); Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45 (2009) (studying the role of State Department Legal Advisers).

counsel could be an effective internal force for promoting executive compliance with law. But even before Trump arrived in the White House, other scholars had begun documenting the relative weakening of OLC’s role, and a corresponding increase in influence of a more diffuse set of interagency lawyers – highlighting the ways in which competing centers of legal advice could undermine their effectiveness, encouraging forum shopping by policymakers seeking more permissive guidance.³ Today, former White House and Justice Department lawyers within the same political party disagree among themselves about the nature of their role in guiding presidential decision making – some maintaining that counsel has a duty in all circumstances to provide policymakers “the best view” of the law,⁴ others arguing that counsel may (and should) offer policymakers all “legally available” interpretations, both with a view to facilitating presidential goals.⁵ These cautionary voices join more traditional skeptics who have long maintained that executive branch counsel in most any structural configuration offers little more than a “fig leaf” of legality to ratify existing official preferences,⁶ a skeptical

³ Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017); *see also* Elad D. Gil, *Totemic Functionalism in Foreign Affairs Law*, 10 HARV. NAT’L SEC. J. 316, 337-38 (2019); ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 68 (2010) (“[OLC] almost always conclude[s] that the president can do what he wants.”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 690 (2005) (“[T]he more critically OLC examines executive conduct, the more cautious its clients are likely to be in some cases about seeking its advice.”).

⁴ *See, e.g.*, Mary B. DeRosa, *National Security Lawyering: The Best View of the Law as a Regulative Ideal*, 31 GEO. J. LEGAL ETHICS 277 (2018); Trevor Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Interpretation*, 124 HARV. L. REV. F. 62, 66 (2011).

⁵ *See* Robert F. Bauer, *The National Security Lawyer, In Crisis: When the “Best View” of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175 (2018).

⁶ ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 40 (2010); *see also* Shalev Roisman, *The Real Decline of OLC*, JUST SECURITY (Oct. 8, 2019), <https://www.justsecurity.org/66495/the-real-decline-of-olc/>.

tradition that can now draw on a fresh set of anecdotal examples from the Trump years to support just such a conclusion.⁷ Can executive branch counsel really function as part of an “internal separation of powers,”⁸ serving as an effective first-order check on presidential behavior? Are existing executive branch legal structures adequate to the task?

Institutional reform efforts seem ill-fated without a deeper understanding of whether and how existing legal structures shape presidential decision-making even in more normal times – and whether and how these structures fall short of some specific goal. Yet scholarship examining these questions has suffered from important empirical and conceptual limitations. While a growing body of qualitative accounts has offered a rich set of illustrations of presidential legal processes, this work draws centrally, usually exclusively, on the insights of executive branch lawyers.⁹ Government lawyers’ views of the role of government lawyers are indispensable – but also inescapably self-interested. More important, lawyers’ understanding of legal advice-giving is necessarily focused on the

⁷ See, e.g., Bauer on Cippollone letter.

⁸ See Katyal, *supra* note 1.

⁹ See CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* (2016); JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012); ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE RULE OF LAW* (1974); see also Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decision Making*, 38 YALE J. INT’L L. 359 (2013); Ashley Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (studying the Office of Legal Counsel); Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1, 2 (2010) (studying the role of JAG lawyers); Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45 (2009) (studying the role of State Department Legal Advisers).

processes, perceptions, and experiences of the advisors’ side of the attorney-client relationship. This work helps us understand how presidential counsel develop and provide advice. But it tells us much less about whether and why policymaking clients attend to it. Especially in increasingly expansive fields like national security, where not only is congressional oversight is limited and judicial review or any formal sanction rare, but also stakes especially high and secrecy pervasive, it is hardly self-evident what incentives lead presidential advisors to heed counsel’s guidance at all.

Conceptually, the study of law’s influence on official decision-making has been hamstrung by having been perennially framed by a functionally vague goal – establishing whether or not law “constrains” presidential power. The term “constraint” is rarely defined but regularly used in different ways by different scholars.¹⁰ For some, “constraint” is found in the achievement of substantive outcome, a demonstration that legal rules or processes have functioned to forestall, for example, recourse to military force, or that legal rules or legal processes function to hold a President to a narrower rather than broader interpretation of that law’s regulatory scope.¹¹ For these scholars, a presidential decision to, for example, conduct military strikes against an Iranian general without congressional

¹⁰ See Deborah Pearlstein, *Getting Past the Imperial Presidency*, 10 HARV. NAT’L SEC. L. J. 368 (2019).

¹¹ See, e.g., GOLDSMITH, *supra* note __, at 182 (“[A]s President Obama’s 2011 military intervention in Libya without congressional approval makes plain, legal checks on unilateral uses of military force are weak at best, especially with regard to low-level uses of force that do not involve ground troops.”).

authorization reveals a lack of legal constraint; whatever substantive rules or processes regulating recourse to such force exist, they did not succeed in preventing an action many scholars believe is inconsistent with substantive constitutional law. Yet such outcome-based assessments of law’s influence, especially when the interpretation of the relevant law remains the subject of contestation, risks eliding key questions about institutional function that bear directly on reformers’ design choice. Did the President decide to use force because he was not especially interested in counsel’s guidance, in which case reform changes focused solely on tinkering with legal substance might matter little (but adjusting other kinds of normative or structural influences might help more)? Or did the President care about substantive law but receive reasonable advice from counsel that the Constitution on this occasion permitted the use of force without congressional authorization, in which case the constraint-minded reformer might be wise to clarify and tighten the substantive legal rule? Or was counsel’s interpretation simply unreasonable or indefensible, in which case the most effective reform to produce a different outcome might be directed at the procedural, interpretive, or ethical rules governing counsel’s role? Asking whether law “constrained” in this sense thus helps little with details that matter centrally to crafting reforms.

Other scholars look for signs of “constraint” not in particular outcomes but in other evidence that a substantive legal rule or process has the *capacity* to influence

official decision making “because of its status as law.”¹² This view, a direct response to a longstanding strain of scholarly skepticism that law has ever mattered at all in the rarefied realm of high politics,¹³ suggests that for constraint to be apparent, law need not “always be *the* deciding factor in motivating presidential behavior,” but it must have “the *potential* to be *the* deciding factor.”¹⁴ This approach has the advantage of accurately recognizing that law might often influence decision-making even when individuals decide in particular instances that other interests are more pressing. (It would be a mistake, that is, to conclude that law is irrelevant to behavior in New York City because one can observe individuals on various occasions violating the city jaywalking law. All laws are violated sometimes.) Yet as legal theorists have long cautioned, identifying a singular *cause* of decision making is an often-impossible burden in characterizing any kind of human reasoning or behavior – a difficulty magnified substantially in institutional decision-making settings, when multiple individuals laboring within bureaucratic structures contribute to the choice of an ultimate action.¹⁵ More, even this quest for “constraint” implies that the best evidence of law’s influence manifests itself in ways both bipolar and

¹² Bradley and Morrison, *supra*, note __, at 1122.

¹³ See sources cited *supra*, note __ (citing POSNER & VERMEULE, et al.).

¹⁴ *Id.*

¹⁵ H. L. A. HART, THE CONCEPT OF LAW 51 (1961) (“[I]t is not easy to state, even in the case of a single order given face to face by one man to another, precisely what connection there must be between the giving of the order and the performance of the specified act in order that the latter should constitute obedience.”); see also *id.*, at 114 (“[The ordinary citizen] may obey [law] for a variety of different reasons and among them may often, though not always, be the knowledge that it will be best for him to do so.”); ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE RULE OF LAW (1974) (describing legal advice “filtered through the different purposes, perspectives, and susceptibilities of the players in the central game,” with law’s influence depending as “a matter of time, occasion, and persons”).

restrictive; it assumes that “law” functions as an on/off switch, with “constraint” commonly found in evidence that a decisionmaker elected *not* to pursue an otherwise contemplated course of action. But some legal rules or processes, conceivably even those intended to “constrain,” may make it *more* likely for a decisionmaker to act,¹⁶ or more likely to select a particular option from within a range of choices, each of which is at least plausibly lawful. Looking only for law’s “constraining” effects in the bipolar sense risks obscuring other ways in which legal structures shape decisional dynamics that might prove essential for reformers to address if they are to achieve the change they seek.

This Article aims to deepen our understanding of counsel’s influence on presidential decision-making by beginning to fill the existing literature’s empirical and conceptual gaps. Drawing on a first-of-its-kind original survey of more than three dozen former senior U.S. national security policy officials, from Cabinet Secretary at the most senior, to Senior Director on the White House National Security Council staff at the most junior,¹⁷ the Article suggests that the existing literature of law’s “constraint” systematically underestimates the extent of legal counsel’s capacity to influence presidential decision-making. Among the bipartisan group surveyed here, senior policy officials’ commitment to engage meaningfully with counsel, as assessed in anonymous and confidential responses, is deeply

¹⁶ Cf. Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. J. INT’L L. 49 (2016) (arguing that international law designed to regulate the use of force has functioned to expand the substantive scope of presidential power to use force).

¹⁷ Additional description of the study’s methodology may be found in Part I, below.

internalized, consistent across the political spectrum, and generally the same whether the underlying legal issue emerges from statutory, constitutional, or international law.¹⁸ Policymakers in both Republican and Democratic administrations described counsel as deeply (if somewhat differently) integrated in the policy process, with counsel commonly seen as part of the same administrative and political team. As detailed below, this degree of process integration, coupled with the functional flexibility in counsel’s role and policymakers’ own relative legal illiteracy, helps explain counsel’s significant capacity for influence. In the rarefied universe in which these officials operated, the structural result was apparent. As one senior official put it: “My rule was you’re just never in the [White House] Situation Room without a lawyer.”¹⁹

Yet if counsel’s presence is indisputably pervasive and broadly valued, it is far less clear that counsel fulfills the function many scholars of “constraint” desire – namely, checking or limiting the assertion of presidential power. This study certainly finds evidence that counsel is capable of surprising officials with their guidance, and even of “saying no” to particular initiatives – experiences more than half of all respondents reported having had at least once.²⁰ Where policymakers’

¹⁸ See *infra*, Part I.

¹⁹ Interview 5 (describing an office in the White House in which critical military decisions and operations were discussed); see also, e.g., Interview 9 (“There’s nothing that you do that you don’t go to lawyers.”); Interview 10 (“[I]t would not have occurred to me to go very far forward with anything without asking [counsel].”) (reporting similar experiences in service that spanned parts of the Bush and Obama Administrations); Interview 15 (“There was not an issue where lawyers weren’t in the room.”).

²⁰ See *infra*, Part I.B.

own normative instincts lead them to want to avoid external limits on executive power, counsel’s insistence that such external limits be observed can, in this sense, “constrain” executive action. But it is also clear that counsel’s influence can run in opposite or orthogonal ways. Beyond those by now well-known occasions in which counsel has at times stretched legal reasoning to enable the assertion of power, this study suggests that where, as is sometimes the case, policymakers’ normative instincts may lead them to prefer *increasing* the engagement of external checks on the President’s use of military force, receiving counsel’s real-time permission *not* to do so may have an unintentionally encouraging effect.²¹ Indeed, where, as this study found could also be the case, policymakers may be seeking politically palatable justifications for *avoiding* action, the unavailability of a narrowing construction of presidential legal authority may deprive policymakers of an effectively action-limiting out.

The finding that legal counsel currently functions in this sense as at least a three-way ratchet – capable of forestalling or encouraging action, or as justifying its avoidance – has important implications for reformers. If the goal of reform is generally to improve the *quality* of presidential legal advice – to ensure, for example, that counsel meets at least basic standards of legal ethics and

²¹ Even accounting for the possibility that respondents to this survey were particularly predisposed to think of counsel’s role as important, respondents described their experiences as standard practices in a variety of agencies and offices, and likewise differed quite a bit among themselves in describing why they engaged counsel as they did. Such characteristics offer some reassurance that the experiences they describe are not limited to a unique or homogeneous group of U.S. policy officials during this period.

reasonableness – then reforms may most usefully aimed at measures like enhancing transparency and accountability.²² If, on the other hand, the goal of reform is to increase the likelihood that counsel’s influence will have a “constraining” effect, in the sense of maximizing the odds that counsel’s (otherwise ethical, reasonable) guidance will lead to narrower rather than broader assertions of presidential power, then reform measures aimed solely at enhancing transparency,²³ or shifting the locus of legal guidance from one internal office to another,²⁴ are unlikely to be sufficient. With a deeper understanding of why and how policymakers rely on counsel, it becomes clear that counsel may better “constrain” presidential power by relaxing the now-dominant assumption that their client always wants more.

The Article proceeds as follows. After a brief description of who this study surveyed and how it aimed to assess their views, Part I identifies and responds to the classical skeptics’ view of executive branch legal counsel – that counsel is not capable of independently influencing, much less forestalling, presidential action in any meaningful sense. As this Article suggests, the near unanimity on this matter from a bipartisan array of official respondents makes the skeptics’ categorical position difficult to sustain. Part II then draws on survey findings to highlight some of the structural characteristics of counsel’s role – again, characteristics common to pre-Trump Republican and Democratic administrations – that seemed to animate

²² See, e.g., American Constitution Society Statement, “The Office of Legal Counsel and the Rule of Law,” available <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf>.

²³ See Hathaway, *supra* note .

²⁴ See BAUER & GOLDSMITH, *supra* note .

officials’ common view that it was essential to engage and integrate counsel into their decision-making. In a field in which traditional, formal incentives to attend to legal rules are limited – the practical risk of personal liability, for instance, is slight – understanding what characteristics give counsel its current influential status is essential to crafting reforms that preserve that influence while improving counsel’s capacity to achieve the reformer’s goal. Part III considers what study findings about officials’ normative preferences – compared with the legal guidance they are apt to receive in the course of decision-making – might suggest about the substantive directionality of counsel’s influence. Part IV finally draws on these findings to craft recommendations for reform, including diversifying the range of legal interpretations made available to policymakers when the law is, as it so often is, susceptible of more than one reasonable reading. A final Part concludes.

I. QUESTIONING COUNSEL’S INFLUENCE

The Trump presidency served in many respects to reinforce scholars’ longstanding claim that “imperial presidency” is “alive and well.”²⁵ Yet while Trump’s rhetoric at times transgressed modern presidential norms – threatening North Korea, for example, with “fire and fury . . . the likes of which the world has

²⁵ See, e.g., Kevin M. Kruse and Julian E. Zelizer, “Have We Had Enough of the Imperial Presidency Yet?,” N.Y. TIMES, Jan. 9, 2019, <https://www.nytimes.com/2019/01/09/opinion/president-trump-border-wall-weak.html>.

never seen”²⁶ – many of his actions, including ordering military strikes against Syrian chemical weapons facilities and Iranian Major General Qassem Soleimani without prior authorization by Congress were hardly without precedent.²⁷ Conventional scholarly accounts have long described the use of military force as a realm in which presidential decision-making is poorly constrained by law.²⁸ As this account goes, the scope of the President’s power to use force under Article II of the Constitution is famously contested, as is the question which interpretive methodology is best applied to settle that meaning.²⁹ Courts regularly rely on a range of justiciability doctrines to avoid ruling on the legality of any particular use of force.³⁰ Congress has delegated the Executive vast swaths of discretionary authority to use force all apart from any inherent constitutional power, and its occasional attempts to reassert its own authority over the use of military force – through framework statutes like the War Powers Resolution or targeted statutes authorizing the use of force for only limited purposes – have encountered executive branch interpretations effectively rendering them far less limiting than they might

²⁶ See, e.g., Peter Baker & Choe Sang-Hun, “Trump Threatens ‘Fire and Fury’ Against North Korea if It Endangers U.S.,” N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html> [<https://perma.cc/7GFN-N9TT>].

²⁷ Michael Crowley et al., *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html> [<https://perma.cc/5RRP-UR94>].

²⁸ See, e.g., GOLDSMITH, *supra* note __, at 182 (“[A]s President Obama’s 2011 military intervention in Libya without congressional approval makes plain, legal checks on unilateral uses of military force are weak at best, especially with regard to low-level uses of force that do not involve ground troops.”); see also LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995) (cataloguing examples); SCHLESINGER, *supra* note __, at __.

²⁹ See, e.g., Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

³⁰ See, e.g., *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010); *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016).

have once appeared.³¹ If there were any one category of executive decision-making one might imagine *least* influenced by legal counsel, “high politics” decisions regarding recourse to force would be it.

Yet even during the Trump years, it has been possible to identify anecdotal evidence tending to support the opposite conclusion, namely, that even at the outer limits of law’s ability to regulate presidential power, lawyers themselves can play a pivotal role. Consider, for instance, the 2017 testimony of then recently retired General Robert Kehler of U.S. Strategic Command (responsible for commanding the nation’s nuclear arsenal), who was called before a tense and unusually bipartisan hearing of the Senate Foreign Relations Committee near the height of the early Korea crisis to explain how the President was “legally restrained, if at all,” in carrying out a nuclear first strike by federal or international laws requiring authorization for, or imposing limits on, the use of force. While disclaiming his own legal expertise, the General was clear that the military was obligated not to follow illegal orders – and equally clear that the first, and in the nuclear launch case critical, check on the legality of the President’s order was the vetting process carried out by Defense Department legal counsel. Senator Johnson pressed the General repeatedly on what he would do in the face of a presidential order to launch, the legality of which had not been checked by counsel. Kehler was unequivocal: “I

³¹ See, e.g., POSNER AND VERMEULE, *supra* note __, at __.

would have said, ‘I have a question about this,’ and I would have said, ‘I am not ready to proceed.’”³²

In a legal realm known for uncertain rules, modest congressional engagement, and even slighter judicial supervision, why would any senior civilian policy official accord a lawyer such power? One common answer offered by skeptics of legal “constraint” in this realm is that they wouldn’t, or at least, not really, for some combination of hypothesized reasons: policy officials only seek legal advice when they are confident they will receive an answer they want, only seek legal advice from counsel they already know will give a permissive reading of relevant law, only seek legal guidance for the purpose of obtaining post hoc justification for action after all serious policy decisions have already been made.³³ Especially where the applicable legal standard is vague or its meaning contested, lawyers can always find an interpretive path around legal obstacles that might stand in the way of policy preference, this argument goes. Indeed, recent scholarship has highlighted in particular the waning influence or even legitimacy of singular offices like OLC, in

³² *Authority to Order the Use of Nuclear Weapons*, 115th Cong. 1 (2017) (statement of General Kehler).

³³ See, e.g., BAUER & GOLDSMITH, *supra* note __, at 257-58 (quoting former OLC head Antonin Scalia) (“The White House will accept distasteful advice from a lawyer who is unquestionably ‘on the team’; it will reject it, and indeed not even seek it, from an outsider – when more permissive and congenial advice can be obtained closer to home.”); ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 40 (2010) (arguing counsel opinions serve as little more than a “fig leaf” of legality to ratify existing official preferences); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); see also ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 88 (2010); *id.*, at 68 (“[OLC] almost always conclude[s] that the president can do what he wants.”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 690 (2005) (“[T]he more critically OLC examines executive conduct, the more cautious its clients are likely to be in some cases about seeking its advice.”).

favor of competing centers of legal advice that make it possible for policymakers to forum shop among options seeking more permissive guidance.³⁴ It would be unsurprising, then, to find senior policy officials readily express their commitment to abide by the guidance of legal counsel in open comments, when the risk of public and political opprobrium for any alternative answer is apparent. How officials actually use legal counsel in the relative secrecy of internal decision-making is another question entirely.

It is also a question susceptible of empirical study. In this Part, I briefly set forth the approach taken here in seeking to understand policy-makers' experiences with executive branch lawyers in use-of-force decision-making at the most senior policy levels of a presidential administration. This small but critical set of presidential advisors shapes the nature and range of policy options that arrive on the President's desk; their advice helps guide the President's choice between one option and another. This Part then offers several lines of evidence the study unearthed calling aspects of the skeptics' case just outlined into question. The following Part expands on this qualitative picture, suggesting several structural dynamics may help to explain counsel's robust capacity for influence.

A. Methods

³⁴ Renan, *supra* note __; *see also* BAUER & GOLDSMITH, *supra* note __; Roisman, *supra* note __.

For reasons suggested above, decisions involving the use of military force seemed a particularly useful field in which to study lawyers' ability to influence decision making. The question of legal "constraint" in this realm has been the subject of rich theoretical debate but relatively scant empirical study already, providing multiple hypotheses about policymaker behavior one might usefully seek to test.³⁵ Each recent U.S. presidency has faced repeated decisions about whether to use military force and, on various important occasions, each has used it – affording policymakers ample practical experience on which to draw. The scope of the President's power to use military force is regulated by a range of legal authorities found in constitutional, statutory, and international law – allowing some room to compare whether and to what extent the formal source of applicable law may make a difference in the extent to which officials attend to counsel's guidance. These formal authorities likewise vary in clarity and degree of afforded discretion – from the relatively straightforward statutory rule that the President must notify Congress of the introduction of U.S. forces into hostilities abroad,³⁶ to the far more contested nature of the President's constitutional authority to use force in some circumstances without congressional or UN Security Council

³⁵ *See supra* nn. __.

³⁶ Indeed, this finding is broadly consistent with the results of general public polling of college-educated Americans, only a third of whom could correctly identify Congress as the branch of the U.S. government with the power to "declare war."
https://www.cfr.org/content/newsletter/files/CFR_NatGeo_ASurveyonGlobalLiteracy.pdf

authorization.³⁷ There is, in short, room for the guidance of legal counsel to make a difference.

It was also possible to identify a relatively defined pool of officials from recent administrations who were involved in executive branch decision making regarding the potential or actual use of U.S. military force to survey. Between 2001-2017, about 163 former government officials served in positions that either by title or description were most likely involved in such decisions.³⁸ Limiting the pool to this

³⁷ As one high profile commission study recently noted, “few areas of American constitutional law engender more fierce debate.” NATIONAL WAR POWERS COMMISSION REPORT, at 3. The formal source of the U.S. obligation to seek UN Security Council authorization for the use of military force in certain instances is contained in UN Charter, art. 2(4) (prohibiting “the threat or use of force against the territorial integrity or political independence of any state”); *see also* U.S. CONST., art. VI (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”). For just a taste of the decades-long writings calling the salience of this obligation into question, *See, e.g.*, Eric Posner, *The U.S. Ignores the U.N. Charter Because It’s Broken*, SLATE (Sept. 9, 2013), <https://slate.com/news-and-politics/2013/09/the-u-n-charter-is-broken-what-should-replace-it.html>; Thomas M. Franck, 64 AMER. J. INT’L L. 809 (1970) (“[T]oday the high-minded resolve of Article 2(4) mocks us from its grave.”).

³⁸ By statute and directive in each presidential administration, the U.S. National Security Council (NSC) Principals Committee is established as the “principal forum for consideration of national security policy issues requiring presidential determination.” The NSC Deputies Committee is likewise charged with helping to ensure that issues being brought before the NSC have been properly analyzed and prepared for decision. While the membership of the NSC Principals and Deputies Committees varies by presidential administration (each President retains discretion to vary membership to some extent), the Principals Committee in the Obama Administration included, for example, such officials as the National Security Adviser, the Secretaries of the Departments of State, Defense, Energy, the Treasury, and Homeland Security of State, as well as the Attorney General, the Director of the Office of Management and Budget, the Representative of the United States to the United Nations, the Chief of Staff to the President, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. Officials such as the Deputy National Security Adviser, the Deputy Secretary of State, and the Assistant to the Vice President for National Security Affairs were also invited to NSC meetings as regular attendees. The Deputies Committee comprised deputies to each of these officials, as well as on occasion such officials as the Assistant to the Vice President for National Security Affairs, and the Assistant to the President for Homeland Security and Counter-Terrorism. President Barack Obama, Presidential Policy Directive 1 (February 13, 2009), available <https://fas.org/irp/offdocs/ppd/ppd-1.pdf> [hereinafter Obama Policy Directive]. All of these personnel were included in the initial recruiting pool. In addition, 33 potential recruits were drawn from a collection of sub-Deputy-level former officials who served during the same period

time period provided a nicely balanced set (eight years each of Republican and Democratic administrations), reduced the risk that memories would be vague, and excluded officials serving in the then-current administration who seemed most likely to feel politically or professionally constrained in the candor of their responses. To further minimize the risk officials would not be candid in their responses due to the classification or sensitivity of information, or due to personal interests or agendas, respondents were given the option of participating either by anonymous digital survey or by oral interview (or both). In either format, strict protections approved by the [University] Institutional Review Board (“IRB”) were in place to keep respondents’ identities as confidential as the format allowed. Further to this end, except where participants volunteered information about specific events (which many did), the questions posed were either hypothetical in form, or they sought information based on officials overall experience in government. And to reduce the likelihood that officials who were themselves legal counsel might tend to overestimate counsel’s influence, I excluded from the pool individuals whose primary title or job description was to function as legal counsel.

who participated in force-relevant interagency committees – called Interagency Policy Committees (IPCs) during the Obama Administration, and Policy Coordination Committees (PCCs) during the George W. Bush Administration – used by both Administrations as the “main forum for interagency coordination” of national security policy. Finally, I recruited 12 potential respondents from a list of names compiled from reliable popular publications identifying officials who were involved in decision making surrounding the use of force during this period (and who were not otherwise included in either of the previous two categories); and from other former government officials who identified them as individuals they knew to have been involved in relevant work during these administrations. Including this group was intended to help compensate for the likelihood that certain officials, varying by administration and personality, may have had great practical influence on use-of-force decision making, but carried formal titles that did not necessarily reflect that influence. I defined “involvement” to include conducting research; preparing memos, talking points, or other written materials; participating in meetings, making recommendations, or taking decisions regarding the use of military force.

In an effort to avoid making the same conceptual mistakes for which one may fault the existing literature of “constraint” – eliding the relative influence of normative beliefs as opposed to structural obligations, or looking only for evidence of a legal structure’s power-limiting effect³⁹ – the survey made an effort to assess both officials’ baseline normative preferences (whether they believed, for example, that the President *should* seek authorization from Congress in various defined circumstances), and separately assess their sense of an obligation to seek and follow guidance of legal counsel before acting on them.⁴⁰ Surveying participants’ beliefs about the role of legal counsel – whether and when in the policy process they thought they should engage counsel, whether counsel’s advice ever surprised them or changed their views, and whether they would be surprised or concerned if counsel was not consulted before the President undertook a use of military force – made it possible to test whether officials shared an internal sense of an obligation to adhere to a secondary legal structure, one setting “common standards of official behavior and appraise critically their own and each other’s deviations as lapses.”⁴¹ Soliciting participants’ normative beliefs about whether or not the President should notify Congress,⁴² or should seek congressional or UN Security Council

³⁹ See *supra*, Introduction.

⁴⁰ The notion that a mature legal system functions as a result of officials who have a “sense of an especially strong social obligation” to primary legal rules and secondary legal processes is, famously, H.L.A. Hart’s. See HART, *supra* note __, at 51. For a detailed explanation of Hart’s relevance to the study of law’s influence, see Deborah Pearlstein, 10 HARV. NAT’L SEC. J. 368 (2019).

⁴¹ HART, *supra* note __, at 116-117.

⁴² Since 1973, the federal War Powers Resolution (WPR), 50 U.S.C. § 1543, has required the President to submit, within 48 hours of introducing U.S. armed forces into hostilities or into situations where involvement in hostilities is likely, a report to the Speaker of the House of

authorization,⁴³ before or after a planned use of military force in various defined circumstances,⁴⁴ provided an additional means of testing counsel's influence, including whether counsel's guidance might lead an official to pursue action inconsistent with existing normative preferences. Where officials' normative preferences and legal requirements already align, one might perceive the influence of counsel where in fact none exists. (Most people elect not to commit murder because they would never think of committing murder, entirely independent of available expert advice that it is also against the law.) Where normative

Representatives and the President pro tempore of the Senate explaining the circumstances necessitating the introduction of forces, and the basis of the President's constitutional and legislative authority to do so.

⁴³ Since the Korean War, OLC has repeatedly taken the position that the president's constitutional authority to use force without prior authorization excludes operations "sufficiently extensive in 'nature, scope, and duration'" that they rise to the level of "war in a constitutional sense." *Auth. to Use Mil. Force in Libya*, 35 Op. O.L.C. 1, 8–10, 13 (2011) ("This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period. Again, Congress's own key enactment on the subject reflects this understanding. By allowing United States involvement in hostilities to continue for 60 or 90 days, Congress signaled in the WPR that it considers congressional authorization most critical for 'major, prolonged conflicts such as the wars in Vietnam and Korea,' not more limited engagements." (quoting *Deployment of U.S. Armed Forces into Haiti*, 18 Op. O.L.C. 173, 176 (1994))); see also, e.g., *April 2018 Airstrikes Against Syrian Chem.-Weapons Facilities*, 42 Op. O.L.C. 1 (2018); *Deployment of U.S. Armed Forces into Haiti*, 18 Op. O.L.C. 173 (1994). The legal obligation for nations to seek authorization for the use of military force from the UNSC under certain circumstances is set forth in the first instance in the UN Charter, a treaty signed and ratified by the United States in 1945. UN Charter, art. 2(4) (prohibiting "the threat or use of force against the territorial integrity or political independence of any state"); see also U.S. CONST., art. VI ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

⁴⁴ The digital survey gave respondents 21 brief (2-3 sentence), hypothetical situations in which they were told that the President had decided that the United States must use military force against Sovereign State X or Terrorist Organization X (TOX). Respondents were asked the same three questions following each scenario: (1) Do you believe the Administration should, all things considered, notify some or all members of Congress about the President's planned use of military force? (2) Do you believe the Administration should, all things considered, seek congressional legislation authorizing the President's planned use of military force? (3) Do you believe the Administration should, all things considered, seek a UN Security Council Resolution authorizing the President's planned use of military force?

preferences do not align with the law, it may be possible to inquire more meaningfully about the role of counsel’s advice, and to detect which if any direction away from an initial preference counsel’s influence led.

Finally, while the small size of the total pool made the population ill-suited to any kind of formal statistical sampling, and likewise poses risks of selection bias among the subset of individuals who participated – the risk, for instance, that only those who tend to have similar views about law would agree to take part in a survey like this in the first instance – I took various steps in recruiting to help ensure the relative representativeness of the pool. In the end, respondents cumulatively reported having participated on more than 154 occasions during their government service in decisions involving the potential or actual use of military force.⁴⁵ Participants ranged from the Cabinet Secretary level at the most senior, to Senior Director on the White House National Security Council staff at the most junior. Multiple participants had served in more than one government position over the course of their careers. They included 16 Democrats, 12 Republicans, five Independents, and five who opted not to identify a political affiliation.⁴⁶ Sixteen

⁴⁵ The survey defined “involvement” as including conducting research; preparing memos, talking points, or other written materials; participating in meetings, making recommendations, or taking decisions. Of those officials who responded to the survey question asking how many times they were “involved in a decision-making process regarding the potential or actual use of military force abroad,” 3 respondents answered 1-3 occasions, 2 respondents selected 4-10 occasions, and 13 respondents selected more than 10 occasions. The estimate given in the text assumes respondents’ actual experience involved the lowest number of each of these ranges. I did not ask direct interview subjects to state how many times they had been involved in decisions regarding the use of military force abroad.

⁴⁶ Survey respondents were asked their political affiliation and given the option of selecting from between Democratic, Republican, Independent, None of the Above, or Prefer Not to Answer. Based

participants had received law degrees; 14 had prior experience serving in an office of the legislative branch; seven had served in the U.S. military. While the findings discussed below thus offer important insights, it would be a mistake to proceed without highlighting the limitations of the qualitative approach taken here. For these reasons and others, it bears emphasizing that the study is no more than a descriptive report of findings, an analysis of their meaning, and a tempting roadmap for future study.

B. Testing the Non-Influence Hypothesis

If the touchstone of a mature legal system is officials' internal sense of an obligation to follow a legal process – a sense that “the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great”⁴⁷ – officials' near-uniform sense of obligation to consult executive branch legal counsel before recommending any use of military force made the internal system's maturity apparent. Of the dozens of policy officials

on respondents' identification of the Executive Branch offices or agencies in which they had experience (multiple respondents had served in more than one agency during their government careers), 22 had experience serving in the White House (which includes, for example, the National Security Council and the Office of the Vice President), 10 had experience in the Department of Defense, seven in the Department of State, two in the Department of Treasury, five in the Department of Justice, two in the Department of Energy, two in the Department of Homeland Security, four in an agency or division of the U.S. Intelligence Community, and three in another U.S. Government office or agency.

⁴⁷ HART, *supra* note __, at 86; *see also id.*, at 116-17 (describing official recognition of “common standards of official behavior and appraise critically their own and each other's deviations as lapses”); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 110 (1993) (“Since H.L.A. Hart, jurisprudence has been grounded on the so-called ‘internal point of view’ – the perspective of a participant in the legal system who regards its laws as norms for her behavior.”).

surveyed, only one answered in the negative when asked directly whether, on occasions in which the official was involved in a decision-making process regarding the potential or actual use of military force, the official had “a sense that you should know or seek the views of government legal counsel regarding the legality of the proposed operation before it occurred?”⁴⁸ Beyond the certainty that they should seek counsel’s guidance on such questions, officials expressed the consistent understanding that they would be concerned if counsel were not consulted.⁴⁹ One interviewee was characteristically blunt: “If you didn’t [include counsel in the process], there was a 100% chance that the policy would get derailed during legal review and you’d have to start over.”⁵⁰ Another said: “I’d be shocked [if counsel were not consulted before a use of force], lawyers get consulted about everything.”⁵¹

Contrary to the skeptics’ view described above that counsel merely functions to ratify already settled official preferences,⁵² policy makers in both Bush and Obama Administrations described a system in which counsel was present from the

⁴⁸ Q101. The question for unique interview respondents was worded somewhat differently: “Did have the sense you should know or seek the views of legal counsel before undertaking any military operation?” Among digital survey respondents (who could only access the question if they had previously answered “yes” to the question asking if they had ever been involved in a decision surrounding the use of force), all but one answered in the affirmative; all of the unique interview respondents agreed. Aggregating digital survey and interview responses, respondents answered in the affirmative 27-1.

⁴⁹ The digital survey, for example, asked respondents to rate on a scale of 1-5 the extent to which they agreed with the following statement (with 5 indicating the strongest agreement): “I would be concerned if Executive Branch legal counsel were not consulted before the President undertook a new operation to use military force abroad.” Q125; *see also* Q124. All digital respondents selected the highest level of agreement.

⁵⁰ Interview 13.

⁵¹ Interview 9.

⁵² POSNER & VERMEULE, *supra* note __, at 40.

generation of policy initiatives within agencies like the Department of Defense through the presidential decision level at the Principals Committee at the White House National Security Council (NSC).⁵³ Obama Administration officials described what one called a “triple law process,” in which counsel was engaged “in every building” (meaning within each relevant agency and White House office); then in an interagency lawyers’ group, which interviewees described as hashing out disagreements and developing consensus on complex matters; and finally in a formal NSC process through which Interagency Policy Committees (IPCs) reported to the NSC Deputies and Principals’ Committees.⁵⁴ As a result, “there was not an issue [at any stage] where lawyers weren’t in the room.”⁵⁵ Principals Committee meetings (involving Cabinet Secretaries, among others) in particular regularly included NSC General Counsel and White House Counsel, as well as other agency lawyers depending on the issue (typically Defense, State or the Office of the Director of National Intelligence).⁵⁶ As one official reported, there was “never a time” when the official was in a Principals meeting in which “Obama didn’t tum at some point at some point to his lawyer.”⁵⁷

⁵³ For a description of the composition of this body, see *supra* note __.

⁵⁴ These bodies are defined *supra*, note __. See Interview 3, 4, 15 (describing everyone as “lawyered up in their own stovepipe”).

⁵⁵ Interview 15.

⁵⁶ Interview 4. The Obama Administration Principals Committee also included the Attorney General. See ORG. OF THE NAT’L SEC. COUNCIL SYS., PRESIDENTIAL POLICY DIRECTIVE-1 (2009), <https://fas.org/irp/offdocs/ppd/ppd-1.pdf> (Obama’s Presidential Decision Directive).

⁵⁷ Interview 15; *accord* SAVAGE, *supra* note __, at 67 (quoting Obama National Security Advisor Tom Donilon) (“We never had a meeting that didn’t include the legal adviser to the National Security Council or her assistant.”).

In contrast to some accounts, which describe the Obama Administration’s reliance on an interagency lawyers’ group as a significant shift,⁵⁸ multiple Bush Administration officials, as well as officials whose service spanned the Bush and Obama Administrations, described the role of legal counsel in their Bush-era experience generally in not dissimilar terms. At the agency level, Defense and State Department officials reported coordinating with “lawyers from bottom to top, integrated into process at every level.”⁵⁹ Even if staff at the operational level believed a proposed action to be “an uncontroversial, day to day kind of decision,” and tried to “work around the process,” a respondent Defense Department official described it as “my job to make sure the General Counsel, the lawyers were added in.”⁶⁰ The Bush Administration, too, had an interagency lawyers’ group, an expanded continuation of the group first established in the George H.W. Bush Administration to advise on legal issues surrounding covert action.⁶¹ Respondents also described counsel’s presence at the most senior agency levels. Defense Department General Counsel was “routinely included in most meetings” with the Secretary of Defense,⁶² and State Department General Counsel was likewise

⁵⁸ See SAVAGE, *POWER WARS*, *supra* note __, at 64 (“[T]he Obama team revived the interagency national security lawyers group, a bureaucratic institution from the 1990s that the Bush-Cheney administration had effectively dismantled.”).

⁵⁹ Interview 14; *see also* Interviews 6, 7, 9.

⁶⁰ Interview 14.

⁶¹ See John Bellinger, *Charlie Savage and the NSC Lawyers Group*, LAWFARE, (Nov. 8, 2015), available <https://www.lawfareblog.com/charlie-savage-and-nsc-lawyers-group> (former NSC and State Department Legal Adviser describing an interagency lawyers group that “continued to meet regularly throughout the Bush Administration to consider and develop consensus on numerous legal issues”); *see also* National Security Directive 79 (Jan. 19, 1993), <https://fas.org/irp/offdocs/nsd/nsd79.pdf>.

⁶² Interview 6; *see also* Interview 9.

regularly “in these [State Department policy] discussions from beginning.”⁶³ NSC staff reported similar experiences. One official said: “It would not have occurred to me to go far forward with anything without asking” NSC Legal Counsel.⁶⁴ Another agreed: “It wouldn't often be the case that we'd wait until a Principals meeting to seek legal guidance. Mostly, agencies and NSC would have worked through any legal issues, from the moment of first contemplating a policy all the way forward.... These weren't just offline consultations with lawyers.”⁶⁵ As one senior official who worked on these issues in the White House described it, interactions with lawyers there were “constant.”⁶⁶

Notwithstanding counsel's clearly ubiquitous presence beginning early in the policy process, it was still possible that other parts of “constraint” skeptics' criticisms remained valid – for instance, that policy officials only sought out legal advice because they knew they could count on counsel to favor permissive or sympathetic readings of relevant law.⁶⁷ In other words, counsel was present, but counsel's influence did not really meaningfully limit a planned course of action.

⁶³ Interview 7.

⁶⁴ Interview 10; *see also* Interview 13 (“I had my own lawyer at NSC. Every office on the national security team had an assigned NSC staff lawyer, or sometimes someone from White House Counsel's office. My rule was to have budget officer and lawyer in the room for all policy meetings.”).

⁶⁵ Interview 8.

⁶⁶ Interview 6.

⁶⁷ *See, e.g.*, ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 40 (2010) (arguing counsel opinions serve as little more than a “fig leaf” of legality to ratify existing official preferences); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); *see also* ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 88 (2010); *see also id.*, at 68 (“[OLC] almost always conclude[s] that the president can do what he wants.”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 690 (2005) (“[T]he more critically OLC examines executive conduct, the more cautious its clients are likely to be in some cases about seeking its advice.”).

Testing this proposition directly is tricky, for each approach comes with limitations. One can ask, for example, whether an official could recall a circumstance in which a contemplated course of action had been changed as a result of a lawyer saying “no” or “do it differently.” Such examples are certainly instructive, but likely to be highly idiosyncratic. Because each policy official’s experience is finite, it is possible that lawyers were equally capable of and did say both “yes” and “no” on various occasions, but any one particular policy maker did not experience one or the other. (Indeed, as suggested above, the nature and timing of counsel’s engagement seems likely to have weeded out many potential policy initiatives that had received “no” answers far earlier in the process than at the senior level of the officials surveyed here.) One could, alternatively, attempt to discern whether the consultation with counsel was genuine – that is, whether officials ask lawyers questions even when they did not know the answer they would get, or whether officials were ever surprised by the answer they received. But here, too, the experience of surprise at a legal judgment likely depends as much on the policy maker’s own experience and knowledge as it does on the effective functioning of the counsel structure. Finally, one might aim to assess officials’ existing normative preferences on matters associated with use-of-force decision-making – whether or not they believed they should seek congressional authorization, for instance – and separately assess the extent to which they might be swayed to favor a course contrary to those normative instincts if given contrary advice by counsel. Given such limitations, the survey attempted to assess counsel’s influence in multiple ways, in the hope that

triangulating approaches would make any overall conclusion more reliable.⁶⁸ The direct results are discussed here; lessons drawn from understanding officials' normative preferences are addressed in Parts below.

In the end, the study yielded several indications that legal guidance was capable of and often was a meaningful influence on policy decision-making. For example, asked directly how much counsel's presence mattered in influencing decision making in this realm, most interviewees believed counsel exerted significant influence, with views varying along a spectrum. The most common response across both Administrations was some version of the view that counsels' influence was as pervasive as their presence. As one put it: "Policy makers are grounding how they're thinking about policy options in context of legal principles and parameters,"⁶⁹ a view reinforcing the suspicion that simply counting lawyerly "no's" is an insufficient metric of counsel's influence. Obama Administration officials all expressed certainty that counsel could influence policy judgments surrounding the use of force; several described legal considerations as "so frequently bound up in policy discussions," it was "hard to separate the two."⁷⁰ Describing legal and policy discussions as "integrated"⁷¹ or "merged,"⁷² several officials also voiced their certainty that counsel's guidance changed outcomes, perhaps most

⁶⁸ LAWLESS, ET AL., *EMPIRICAL METHODS IN LAW* 77 (2d ed. 2016).

⁶⁹ Interview 8.

⁷⁰ Interview 4.

⁷¹ Interview 4

⁷² Interview 3.

notably surrounding the President’s decision not to use force against Syria, which four different officials raised independently when asked whether there was a circumstance in their experience in which a lawyer had ever said no.⁷³ Multiple officials described counsel as pivotal in the President’s decision on that occasion: “[The] lawyers could never get to a place where that was legal. The President was never persuaded it was legal. That was clearly one of the reasons that intervention didn’t happen.”⁷⁴

Others felt lawyers’ influence even more strongly, expressing the view that lawyers regularly changed the course of affairs. One official, when asked whether he had ever found his views changed based on the input of legal counsel, responded: “It changed my thinking all the time.”⁷⁵ As it turned out, it was not uncommon for officials to get an answer they had not expected from legal counsel. More than half of all respondents reported that they had at one point in their experience either been surprised by counsel’s guidance, or had received negative guidance from counsel (i.e. had been told no).⁷⁶

⁷³ Interview 3, 4, 14, 15.

⁷⁴ Interview 3; *see also* Interview 4, 14, 15.

⁷⁵ Interview 5.

⁷⁶ Q123 of the digital survey asked: “On those occasions during your Executive Branch service you sought the opinion in any form of government legal counsel regarding the legality of a proposed operation to use military force, did you ever receive legal guidance that surprised you?” More than half of digital respondents reported that they had. While the question of surprise was intended to illuminate how genuine consultation with counsel had been – that is, how likely officials were to ask counsel only those questions to which officials already knew the answer – I later worried that this question might underestimate the impact of counsel’s advice. Officials with significant experience or independent legal knowledge seemed less likely to be surprised than others, but might still believe that counsel’s advice had, for example, changed their planned course of action. I thus asked interview respondents whether counsel’s view had ever surprised them, or whether counsel had ever said “no” upon consultation. Of the 10 unique interview respondents, three evaded or did not offer

At the same time, it became clear that respondents’ self-conscious perception of the degree of influence asserted by counsel was not as uniform as respondents’ shared belief that they should seek counsel’s guidance before any use of force. Notably, some officials expressed beliefs about counsel’s influence in response to direct questions that diverged from the experiences the same officials described in response to other questions. A single Bush Administration official, for example, took the position that while legal guidance generally played a large role in security policy decisions, questions about whether to seek congressional or UN Security Council authorization for a particular military action were political, not legal in nature. “Lawyers can have their views,” this official offered, but “it’s a political decision to go to the Hill.”⁷⁷ That view was, in this study, unique. More common among officials who expressed skepticism about lawyers’ ability to affect significant policy initiatives – describing lawyers’ guidance as affecting “mostly left/right steering issues” rather than fundamental change⁷⁸ – was the extent to which their self-conscious description diverged from their (otherwise described) lived experience. For when those officials were later asked whether they had ever had

clear enough responses to the question to be codable. Of the remaining seven, six (4 Republicans, 2 Democrats) responded either that counsel’s advice had surprised them, or that they had the experience of counsel saying no. Of the 13 interview respondents who answered, 11 said counsel’s guidance had surprised them, or they had the experience of counsel saying no.

⁷⁷ Interview 7.

⁷⁸ Interview 6

the experience of changing a course of action because a lawyer said no, each responded without hesitation that they had.⁷⁹

II. DECONSTRUCTING COUNSEL'S INFLUENCE

The finding that senior national security policy officials of both political parties felt a subjective sense of obligation to consult counsel, and that it is possible to identify at least some objective examples of counsel's influence on decisions, should be adequate answer to those skeptics who believe that counsel's role is purely ephemeral or post hoc. But such findings do not, standing alone, help us understand why counsel enjoy the degree of influence they have, or whether particular features of the current structure of executive branch legal advising may be essential to preserve if any reform effort is to be successful. Neither do they shed light on the extent to which counsel's influence is generally a "constraining" one, in the sense that term is used to mean that counsel promotes not only compliance with law regulating executive power, but compliance with a narrower rather than broader understanding of that law's scope. Yet answering both questions is essential to understanding the likely effects of any reform – whether to revise the terms under which counsel operate, shift the locus of legal guidance from one internal office to another, or engage more external checks on counsel's authority.⁸⁰

⁷⁹ Interview 6 (reporting following legal guidance to the effect "if you do X, you should do it this way"); *see also* Interview 8, 9, 12.

⁸⁰ *See supra*, TAN _ (describing proposals).

Reforms that have the effect of modifying structures of counsel’s influence may disable what “internal separation of powers” function counsel currently serves. And reforms designed solely with a view to enhancing counsel’s current degree of influence may have counterproductive effects if it turns out counsel’s influence is not a “constraining” one in the sense reformers seek.

This Part takes up the first of those questions, namely, why senior policy officials attend to or heed the advice of legal counsel on questions involving the use of force. Intuitively, one might imagine the answer involves some combination of a social or cultural commitment to the systemic observance of the rule of law, bureaucratic habit, or fear of legal or political sanction for failure to do so. Indeed, many officials voiced exactly such factors in interviews here, and the description of counsel’s role that follows is not at all meant to suggest that such effects are not at work. But those explanations, standing alone, did not fully capture the way in which officials described the respect they commonly afforded legal counsel, and indeed it might be surprising if they did. The prospect of individual legal sanction in this space is notably weak – after all, no U.S. policy official has ever faced civil or criminal liability for recommending or urging a recourse to military force. The prospect of political sanction for a use of force counsel believed beyond the scope of lawful authority is also far less than certain, given the availability of broadly recognized arguments affording the President an enormous degree of discretion over the use of military force. Likewise, however ingrained Americans’ belief in the rule

of law, such socialization has neither been anything like fully successful in preventing official law breaking, nor does it fully account for why executive branch lawyers (as opposed to some other institutional authority) are so vigorously accepted as the trusted repository for transmitting the law’s requirements. And if recent years have taught us nothing else, it is of the potential fragility of bureaucratic norms administration to administration.⁸¹

This Part thus highlights three structural features of counsel’s role that, I argue, further explain why counsel are capable of being so influential within this elite population of government decisionmakers. First, as Part I sketched, counsel is deeply integrated in the policymaking process. Among other effects of this integration, it both ensures that policymakers’ most common contact is with counsel within their own department or office, and contributes to a frequently expressed sense among officials interviewed here that counsel was part of the “same team,” making interactions as much co-dependent and relational as bureaucratic. Second, officials described interactions with counsel as serving multiple purposes, enabling counsel to function as a capacious vessel serving a diverse array of official needs. Given the range of policy agendas and decision-making processes favored by different presidents, such role flexibility seems likely to help ensure that at least some aspects of counsel’s function are preserved across multiple presidential administrations. Third, counsel often operated in a relative vacuum of client

⁸¹ See, e.g., Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1433–34 (2018).

knowledge of even baseline rules of relevant domestic or international law regulating the recourse to force. With many policymakers ill-equipped to evaluate the quality or even reasonableness of counsel's work internally, and the courts and Congress disinclined to do so externally, counsel enjoys the ability to guide decision-making day to day on the basis of functionally unchallenged expertise.

A. Bureaucratic Integration and Relational Lawyering

Policy officials' description of counsel as typically integrated, temporally and bureaucratically, in all levels of decision-making, is in many respects a positive one.⁸² Officials engage legal counsel early and often, from initial stages of policy consideration to final. Officials take that engagement seriously, and multiple officials demonstrated a willingness to change course (in small ways or large) as that guidance emerges. The presence of counsel in meetings from the outset likely helps minimize circumstances in which policy makers seek out counsel's guidance solely for the purpose of developing post hoc justifications for already settled decisions; it also avoids putting counsel in the position of chronically saying no to senior decision-makers, with most obviously unlawful courses of action weeded out long before the Principals Committee stage. The availability and participation of counsel from multiple legal offices across the executive branch ideally affords policy makers access to specialized expertise on a range of legal issues; interagency

⁸² See *supra*, Part I. B.

lawyers’ groups promote broad consultation and coordination and may help counsel debate and refine views on complex legal questions.⁸³

This bureaucratic reality also shapes the lived experience of officials’ relationship with counsel in important ways. Among others, policymakers’ most common contact with legal counsel is not with OLC or with a high-level interagency group, but with counsel within their own department or office. Most officials had little or no insight into processes by which interagency lawyers debated interpretations or settled disagreements among themselves. Neither did many officials have a clear sense of a hierarchy of opinion among legal offices. For instance, to get a sense which counsel officials interacted with most often, survey respondents were asked: “If you had a question during your Executive Branch service about whether a proposed operation to use military force was constitutional, which government official or office would you consult?”⁸⁴ (The survey also asked the identical question regarding whether a proposed operation was “in compliance with U.S. treaty obligations.”⁸⁵) Each question gave participants a set of eight potential choices – including OLC, the State Department Legal Adviser’s Office (OLA), General Counsel at the National Security Council, White House Counsel, a lawyers’ group counsel, counsel from their own agency, other (with the option to fill in the response), or it depends – and instructed them to check all that applied. By a slim

⁸³ Renan, *supra* note __, at __.

⁸⁴ Q106.

⁸⁵ Q108.

margin, the most commonly selected answer on questions of constitutionality was counsel in the respondent's own office or agency, with OLC next in line.⁸⁶ But in aggregating answers across all choices, 83% of responses identified non-OLC legal offices; only 17% of responses identified OLC. More significant, asked which counsel's view officials regarded as "authoritative" on questions of constitutionality (where one might imagine the answer to be OLC),⁸⁷ or questions of treaty application (where one might imagine OLA holds sway),⁸⁸ the results were similar. While OLC and OLA were, respectively, the single most popular selections, there was no significant difference between the number of respondents who selected OLC or OLA, and the number of respondents who selected any other legal office listed.⁸⁹

Interview responses broadly echoed these findings; to a person, interviewees identified the counsel they regularly consulted as one within their own agency or office. Asked which legal office's view would prevail in the event of disagreement among counsel, no Obama Administration official answered unequivocally. At the most senior level, most described their understanding of "a consensus driven approach,"⁹⁰ in which disagreements were "hashed out in lawyers group

⁸⁶ Thirteen individuals selected "legal counsel in my office or agency"; 10 individuals selected OLC.

⁸⁷ Question 112 asked: "If Executive Branch lawyers have differing opinions regarding the legality of a proposed operation to use military force abroad, which counsel's view would you regard as authoritative on whether the proposed operation was constitutional?"

⁸⁸ Survey Question 114 posed the identical question regarding which counsel's view respondents would "regard as authoritative on whether the proposed operation was in compliance with U.S. treaty obligations?"

⁸⁹ Among respondents who answered Q112, 10 selected OLC, while six selected one of the other choices. Among respondents who answered Q114, eight selected OLA, while eight selected one of the other choices.

⁹⁰ Interview 1; *accord* Interview 3, 4, 15.

meetings,”⁹¹ and thus in many cases generally invisible to the most senior policy officials.⁹² Principals were informed if the lawyers’ group was unable to produce consensus, and several officials expressed the sense of a fluid selection in those circumstances. “There was some sense of first among equals depending on relevant expertise.... Maybe at the presidential level White House Counsel was first among equals.”⁹³ As one official summarized: “There was no set rule about whose view was authoritative, but there was an understanding that particular legal offices had particular competencies. It felt more informal.”⁹⁴

Bush Administration officials, likewise, emphasized their primary reliance on counsel within their own agency or office.⁹⁵ There, when disputes among counsel arose – a number of which have since been widely documented in public accounts – OLC was regularly involved.⁹⁶ As one official offered: “If there were a real constitutional question that hadn’t been resolved, most would look to OLC to provide an opinion.”⁹⁷ But officials also had the impression of some flexibility about which counsel’s view prevailed in the event of disagreement: “In my mind, ... the relevant agency lawyers would hash it out.... Or if there was a particular equity at play,” like military or intelligence community authority, “the agency with the

⁹¹ Interview 3; *accord* Interview 1, 4, 15.

⁹² *Id.*

⁹³ Interview 1; *accord* Interview 4, 15; *see also* Interview 3 (“I’d think if there was a split of opinion either White House Counsel or OLC would prevail.”).

⁹⁴ Interview 4.

⁹⁵ *See* Interviews 7, 8, 9, 10, 12, 13.

⁹⁶ *See, e.g.*, SAVAGE, TAKEOVER, *supra* note __; GOLDSMITH, THE TERROR PRESIDENCY, *supra* note __.

⁹⁷ Interview 8; *accord* Interview 13.

equity, the expertise, the authority would usually hold sway.”⁹⁸ As during the Obama years, the most difficult disputes were resolved by the President himself.⁹⁹

The norm of seeking guidance from agency counsel first, and the relative lack of clarity or stability in that counsel’s position on a hierarchy of internal legal opinion, creates a variety of risks, perhaps foremost the forum shopping risk that officials will pick and choose among available options the counsel’s opinion that best suits their normative preferences – giving internal legal offices, among other things, some incentive to compete with one another for influence.¹⁰⁰ But counsel’s bureaucratic integration also has the effect of supporting a relational model of lawyering that reinforces counsel’s influence. Asked to think of a particular lawyer who they had worked with and respected, and to identify what made them inclined to trust that counsel’s judgment, many officials described, in addition to “their” counsel’s expert knowledge and experience, strong feelings of admiration and gratitude, the sense that these were people “you want at your side.”¹⁰¹ Several emphasized the sometimes years-long history of professional interaction (often across agencies) they shared. As one official put it: “They were just part of process, ... part of the conversation, part of the team.”¹⁰² Another official emphasized the potential personal stakes that drove his sense of dependence on trusted counsel:

⁹⁸ Interview 8.

⁹⁹ Interview 9; *see also* SAVAGE, TAKEOVER, *supra* note _ (describing presidential compromise decision following interagency dispute over legality of Bush-era surveillance program).

¹⁰⁰ *See* Renan, *supra* note _, at _.

¹⁰¹ Interview 10.

¹⁰² Interview 15; *see also* Interview 4, 5, 7, 10, 13.

“One thing that concentrates your mind when you’re confirmed by the Senate ... you realize if you screw some things up you’re violating the law. Especially in circumstances with this litigious and polarized environment, you want to make sure you’re on the right side. Lawyers can be invaluable in helping with that.”¹⁰³ The sense that counsel was in the officials’ corner, was as interested as they were in ensuring the political and policy success of the President, was a repeated feature of policymakers’ expressed understanding of what made them willing to trust counsel’s advice.

B. Varied Purpose, Common Effect

Officials surveyed here certainly evinced a sense of obligation to consult executive branch legal counsel in the Hartian sense – viewing counsel as part of a structure within which law is interpreted and applied, a structure some form of social pressure demands they engage, and which, if not engaged, is viewed broadly as a lapse.¹⁰⁴ But underlying that sense of obligation were diverse understandings of the multiple purposes counsel was understood to serve. Some officials cited instrumental concerns. Explaining that “lawyers were tasked to go to the [meeting] room [where use of force was being discussed] even if there was no legal controversy,” one official emphasized lawyers’ presence in the room was “to make

¹⁰³ Interview 6.

¹⁰⁴ See HART, *supra* note __, 81, 92–94.

sure the meeting didn't *create* legal controversy."¹⁰⁵ Much like official worry about potential personal or political liability for running afoul of legal restrictions, counsel's role was seen by some as centrally designed to help an administration or individual avoid a range of potentially adverse consequences of violating the law. Other officials attributed the inclusion of counsel in the first instance to habit; as one put it: "It was just the coordination process, every package [of memos or recommendations] that came through had a coordination sheet on top to check who had seen or signed off on it," and counsel was one of those boxes.¹⁰⁶ In this view, consultation with counsel is the result of principally bureaucratic norms – norms that, once created, become their own justification for behavior.

But the most common explanation – voiced repeatedly by members of both political parties – was the functional value of lawyers' analytical approach to decision-making more generally. Several officials emphasized counsel's utility in forcing further policy thinking; some described lawyers' questions as driving officials to "flesh out our policy interests,"¹⁰⁷ to "think hard about tradeoffs" surrounding certain courses of action.¹⁰⁸ Others emphasized counsel's framework setting role, "breaking undifferentiated masses of proposed actions into discrete legal questions."¹⁰⁹ Still others highlighted counsel's educational function, as both

¹⁰⁵ Interview 15; *see also* Interview 1, 7, 14.

¹⁰⁶ Interview 14; *see also* Interview 1, 2.

¹⁰⁷ Interview 1; *see also* Interview 8.

¹⁰⁸ Interview 4.

¹⁰⁹ Interview 1; *see also* Interview 8.

especially meticulous readers of legal and other texts, and as “scrupulous observers of minutiae,” capable of leading officials to say, “oh, I hadn't thought about it that way, of educating me.”¹¹⁰ Far more than, and different from, a structural check that serves solely to green or red-light already formed choices or settle existing disputes, counsel were both active participants in, and in some respects, drivers of, policy decision-making. Part of the same administrative “team,” they were capable of playing, and were regularly solicited to play, an integrally utilitarian role.

The diversity of functions counsel is capable of serving, or can be asked to serve, seems important, among other reasons, in understanding officials’ strikingly bipartisan willingness to accord counsel such a central place at the table. Executive branch counsel are, to borrow Cass Sunstein’s terms, an “incompletely theorized” legal structure.¹¹¹ No matter how disparate officials’ normative commitments may be, or how disparate their beliefs about the role of law in constraining executive power, the breadth and flexibility of counsel’s role make it possible for counsel to sustain its structural influence even in the absence of – and perhaps because of the absence of – any political consensus around counsel’s broader purpose as one of “constraint.” Such diversity of function no doubt complicates the challenge of reform. To the extent this functional flexibility is desirable, reforms must take care not to compromise it inadvertently. To the extent functional flexibility is essential

¹¹⁰ Interview 15.

¹¹¹ See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

to preserving counsel's influence at all, reformers may be challenged to adjust the scope or nature of reforms to ensure its preservation.

C. Legal Fluency

National security law is a specialized, often complex field, and it is thus perhaps unsurprising that many senior policy officials have limited independent knowledge of the domestic and international legal rules governing the recourse to force. This knowledge differential is, indeed, precisely why policymakers not specially trained in law seek out counsel's expert advice. At the same time, some gaps in legal knowledge might be fairly considered more foundational than others. It may be one thing, for example, for the average White House or Defense Department national security policy staffer not to know that the War Powers Resolution requires the President to submit, within 48 hours of introducing U.S. armed forces into hostilities or into situations where hostilities are likely, a report to the Speaker of the House of Representatives and the President pro tempore of the Senate explaining the circumstances necessitating the introduction of forces, and the basis of the President's constitutional and legislative authority to do so.¹¹² It is another thing for them not to know that the Constitution grants Congress the power to "declare war."¹¹³ But whatever gaps in legal knowledge might

¹¹² 50 U.S.C. § 1543.

¹¹³ Counsel on Foreign Relations, What College-Aged Students Know About the World: A Survey on Global Literacy, available <https://www.cfr.org/global-literacy-survey> (finding only a third of

appropriately be considered ‘foundational’ – indeed, whether or not one thinks such gaps problematic at all – it is worth recognizing that their existence functions to reinforce the degree of counsel’s influence.

While this study was not designed to test policymakers’ legal knowledge – indeed survey questions aimed to make clear that the focus was on participants’ personal experiences and normative beliefs, not their understanding of law – it became especially apparent in oral interviews that knowledge gaps were common. Consider an example. The legal obligation for United Nations member states to seek UN Security Council authorization for the use of military force under certain circumstances is set forth in the first instance in the UN Charter, a treaty signed and ratified by the United States in 1945.¹¹⁴ While many aspects of the Charter framework, including the role of the UN Security Council, have been the subject of decades-long debate,¹¹⁵ there is strong *legal* consensus surrounding, at a minimum,

American college students can correctly identify the power to “declare war” as belonging to the Article I branch).

¹¹⁴ UN Charter, art. 2(4) (prohibiting “the threat or use of force against the territorial integrity or political independence of any state”); *see also* U.S. CONST., art. VI (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

¹¹⁵ Indeed, the vitality of the UN Charter Art. 2(4) prohibition on the use of force against the territory of another sovereign without their consent has long been the subject of (to put it mildly) doubt, the rule’s “demise” having been reported on multiple occasions since rumors of its death first emerged half a century ago. *See, e.g.*, Eric Posner, *The U.S. Ignores the U.N. Charter Because It’s Broken*, SLATE (Sept. 9, 2013), <https://slate.com/news-and-politics/2013/09/the-u-n-charter-is-broken-what-should-replace-it.html>; Thomas M. Franck, 64 AMER. J. INT’L L. 809 (1970) (“[T]oday the high-minded resolve of Article 2(4) mocks us from its grave.”). These declarations have appeared especially compelling in recent years in light of a series of high-profile violations of the Charter prohibition. *See, e.g.*, Claus Kress, “On the Principle of Non-Use of Force in Current International Law,” JUST SECURITY (Sept. 30, 2019) (noting, among others, the Russian annexation of Crimea and

the basic framework: states must seek UN Security Council authorization to use armed force against another state unless the target state consents, or unless the attacking state is acting in national self-defense.¹¹⁶ But in discussions of officials' normative beliefs about the role of the UN Security Council, just four of 16 officials who sat for oral interviews evinced any working knowledge of this basic framework, including its relationship to the UN Charter. A substantial majority rather expressed significant uncertainty about or misapprehension of the Charter scheme.¹¹⁷ As one emphasized: "No where can I recall seeing a document that a nation has to go to the UN Security Council."¹¹⁸

Neither was such uncertainty limited to international law. Nearly a third of officials participating in oral interviews volunteered their sense that they lacked knowledge about whether U.S. law required congressional authorization for the use of force in various circumstances, and indicated a strong preference to consult counsel even before answering any question about their normative preference as to whether the administration should seek congressional or UNSC authorization under various hypothetical conditions.¹¹⁹ As particularly relevant for present

the Israeli annexation of the Golan). *But see also* Kress, *supra* ("The 'cornerstone' of international law is as stable today as it was in 1970. But it remains surrounded by a grey area."), <https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/>.

¹¹⁶ *See, e.g.*, THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002).

¹¹⁷ While the four knowledgeable interviewees had all attended law school at some point, it is worth noting that most U.S. law schools do not require a general course in International Law, and even students who take it may not have delved into detailed questions about UN Charter application.

¹¹⁸ Interview 7; *see also* Interview 9 ("Dean Acheson would've gone ape" if he thought the UN Charter required the United States to get "UN permission to act on behalf of our own national interests.")

¹¹⁹ *See* Interviews 2, 8, 12, 14, 16.

purposes, multiple interviewees volunteered the conviction that it was *appropriate* that U.S. security policy makers generally lacked knowledge about these rules. “I don't think it's appropriate for policy officials to make legal judgments,”¹²⁰ one explained. Said another: “I never had a course in international or constitutional law. No one in policy besides their lawyer would. That's why we have lawyers.”¹²¹

Consider then what effect this knowledge gap has on officials' willingness to depart from even strongly held prior normative commitments in the face of counsel's contrary advice. Here, too, the UNSC example is instructive. For while a notable majority of officials disclaimed any willingness to make legal judgments about the UNSC's role in authorizing the use of force, almost all voiced clear normative preferences or beliefs about the UN and the UN Security Council in general. For example, just over half of oral interviewees (6 Republicans, 3 Democrats) at some point during the interview asserted categorically that the lack of UNSC authorization – particularly as a result of the veto of China or Russia – should not be understood as a bar to U.S. action where U.S. interests otherwise require it. As one interviewee put it: UNSC authorization “was always on balance a good and nice thing to have,” but “if in the end, we had to act outside that, we had to be prepared for that.”¹²² Likewise, said another, “American tradition has never allowed a multilateral organization to determine our actions.... When it comes to the UN

¹²⁰ Interview 9.

¹²¹ Interview 13; *see also* Interview 2, 3.

¹²² Interview 10; *see also* Interview 8, 14.

Security Council, we have an obligation to follow the rules unless we decide not to.”¹²³ Still another expressed the view that it was the general consensus of the U.S. national security policy community that the “UN is there to be used when useful but not otherwise.”¹²⁴

Yet notwithstanding these views, the same officials hedged markedly when asked in follow up questions about whether to seek UNSC authorization in particular scenarios, and when asked about the effect of legal guidance to the contrary.¹²⁵ As one who had expressed some basic knowledge of the UN Charter but otherwise vigorous realist views as a general matter put it in response to the question: “[What would the UN Charter require] if we didn’t really have any claim of self-defense? Those are interesting questions. If I were in government I’d like to hear what lawyers have to say about that.”¹²⁶ Asked if counsel had advised that the law required UNSC authorization, another with similar views said: “Well, I would take it very seriously.... Especially if they said we’re at risk of violating international law, that puts real stress on the system.”¹²⁷ Only one interviewee expressed the view that the decision about seeking UNSC authorization did not require legal guidance.¹²⁸ Every other interviewee expressed the view that either

¹²³ Interview 13; *see also* Interviews 4, 6, 9, 12.

¹²⁴ Interview 3.

¹²⁵ *See, e.g.*, Interview 9 (“[What would we do] if we didn't really have any claim of defense, those are interesting questions, if I were in govt I'd like to hear what lawyers have to say about that.”); *see also* Interview 8, 10.

¹²⁶ Interview 9; *accord* Interview 4 (“We'd never just blow past that, we'd spend hours working past that.”).

¹²⁷ Interview 8.

¹²⁸ Interview 7.

the appearance or reality of acting with international legal legitimacy mattered.¹²⁹ And for the great majority of them, lacking independent knowledge of even the basic legal framework, the judgment of executive branch counsel about what that law required was the operative word.

The normative views officials expressed regarding the role of the UNSC have a variety of interesting implications, some of which this Article returns to in Part III below. For present purposes, however, the more relevant point is that officials, bolstered by their sense that counsel was on the “same team,” were entirely prepared to entertain legal advice contrary to even strongly held preexisting normative preferences – and to do so in the absence of any other basis for assessing even the baseline reasonableness of the legal advice counsel provides. In areas where the law is uncertain, especially complex, or requires significant pre-existing training to understand, the necessity of relying on expertise (if usually not so unchecked) is unavoidable. But where, as in the existence of the broad framework of the UN Charter, or, for instance, of first-order constitutional principles recognizing Congress’ authority to impose statutory limits on executive power, reliance solely on the “team” expert seems harder to justify. Especially when coupled with the feelings of respect and gratitude many officials expressed toward counsel they have come to trust, policy officials’ lack of legal fluency unquestionably bolsters counsel’s capacity to influence.

¹²⁹ *See infra*.

III. CHARTING DECISIONAL DYNAMICS:

INTERNAL SEPARATION OF POWERS AS THREE-WAY RATCHET

The scholarly literature’s longstanding focus on law’s ability to “constrain” presidential power has helped ensure that much of the focus of empirical study of lawyers has remained on identifying instances where the President has (or has not) refrained from some otherwise contemplated action in the face of legal advice. In those terms, several of the examples noted in Part I are surely evidence of counsel’s ability to “constrain.”¹³⁰ Yet it would be a mistake to conclude from this that counsel’s influence is visible solely in singular occasions in which binary policy choices have shifted from green to red. Rather, this Part suggests, counsel’s influence may be better tracked not only according to how it shapes the outcome of particular decisions, but also in setting or reinforcing officials’ normative preferences over time. It would likewise be a mistake to assume from individual examples of “constraint” that counsel’s influence functions principally to *limit* policy options in contemplation. While counsel’s influence may at times have the effect of limiting options, or indeed limiting the scope of asserted presidential power, it may also serve a knowingly or even inadvertently permissive function, making officials more likely to pursue some options than they might otherwise have been. Drawing on both survey findings and the insights of cognitive psychology, this Part considers

¹³⁰ See *supra*, Part I.B (citing Interview 3; see also Interview 4, 14, 15); see also, e.g., GOLDSMITH, *supra*, note _.

a broader range of ways in which counsel may influence policymakers' behavior in the face of existing normative preferences.

A. Influence Over Time

Beyond the prospect that legal counsel may directly influence the outcome of particular policy decisions, constructivist scholars in international law have long posited that repeated exposure to legal norms over time may influence officials to internalize them as part of their own views – whether or not the official recognizes legal rules or legal structures as the source of their preference.¹³¹ It seemed worth examining whether any such normative influence was apparent in the pool of senior policy officials surveyed here, the vast majority of whom had interacted with counsel regularly in different settings over periods of years, often developing relationships with one or more individual lawyers who came to earn the official's trust. Might repeated interactions with lawyers or legal concepts come to inform officials' policy beliefs or preferences over time, whether or not the official recognizes or attributes those beliefs to the operation of a particular legal rule or instance of legal advice?

¹³¹ See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996) (“As transnational actors interact, they create patterns of behavior and generate norms of external conduct which they in turn internalize.”).

To assess this, the digital survey began by gauging officials' normative preferences in separate questions asking for officials' beliefs about what a hypothetical U.S. administration should do in 21 brief (2-3 sentence), fictional situations in which they were told that the President had decided that the United States must use military force against Sovereign State X or Terrorist Organization X. After each scenario, the survey posed the same three questions: (1) Do you believe the Administration should, all things considered, notify some or all members of Congress about the President's planned use of military force? (2) Do you believe the Administration should, all things considered, seek congressional legislation authorizing the President's planned use of military force? (3) Do you believe the Administration should, all things considered, seek a UN Security Council Resolution authorizing the President's planned use of military force? I then compared these answers with the publicly known position of executive branch counsel on that issue during the relevant period. While an alignment between policy officials' normative preference and the relevant rule is of course no proof that counsel's influence *caused* officials to hold that view, a contrary finding – that there was, for example, no alignment between counsel's interpretation of the rule and officials' views – might undermine the claim that counsel had over time or in any particular case influenced those preferences.

Consider first officials' answers regarding their belief regarding whether they should notify Congress about a planned use of military force. As a matter of law,

the answer is relatively clear. Since 1973, the federal War Powers Resolution (WPR) has required the President to submit, within 48 hours of introducing U.S. armed forces into hostilities or into situations where involvement in hostilities is likely, a report to the Speaker of the House of Representatives and the President pro tempore of the Senate explaining the circumstances necessitating the introduction of forces, and the basis of the President’s constitutional and legislative authority to do so.¹³² The statutory requirement was enacted in part in response to President Nixon’s decision to order a major air bombing campaign in Cambodia, a significant expansion of the then-ongoing conflict in Vietnam into the territory of a new, previously neutral country, without notifying Congress. While Presidents since 1973 have regularly filed the reports the law requires,¹³³ critics have worried that the reporting requirement may be less effective than appears. Presidents have not filed WPR reports on a few occasions when they believed that the introduction of forces under the circumstances did not rise to the level of “hostilities” triggering the Article 4 reporting requirement.¹³⁴ Even when reports are submitted, one policy study noted, they are “relegated to lower-level executive personnel,” and “stripped of so much content in the interest of preserving secrecy as to make them hardly useful.”¹³⁵

¹³² 50 U.S.C. § 1543.

¹³³ CONG. RESEARCH SERV., THE WAR POWERS RESOLUTION: CONCEPT AND PRACTICE 95 (Mar. 8, 2019), <https://fas.org/sgp/crs/natsec/R42699.pdf> [<https://perma.cc/ALM9-26SD>].

¹³⁴ See, e.g., ELY, *supra* note __, at 49 & n. 171.

¹³⁵ JAMES A. BAKER III, ET AL., MILLER CENTER OF PUBLIC AFFAIRS, NATIONAL WAR POWERS COMMISSION: REPORT (2008) <http://web1.millercenter.org/reports/warpowers/report.pdf>.

Given this history – and given the current reality of extreme partisan polarization – the survey found a striking degree of bipartisan agreement on the necessity of congressional notification. While the timing of notification varied to some extent depending on the degree of secrecy required for a planned operation, respondents *universally* shared a sense of obligation to notify Congress about every executive branch use of force across every single scenario surveyed, no matter how minor the hypothetical military action planned. Of the 418 recorded responses to congressional notification questions across all 21 scenarios, all but one respondent to one question believed the Administration should notify Congress either before or after the planned use of force.¹³⁶ Held up against past eras in military policy when the executive kept a massive air bombing campaign in Cambodia secret from Congress for the better part of four years,¹³⁷ or one in which it hid from Congress its distribution of support for armed rebel forces in Latin America,¹³⁸ this uniform normative preference may offer some modest reassurance to those concerned about executive branch secrecy writ large.

After learning digital respondents' remarkably uniform answer to this basic notification question, and after posing the same question to unique interview subjects (that is, subjects who had not also taken the digital survey), whose

¹³⁶ Had all 28 respondents answered the congressional notification question for all 21 scenarios, the survey would have recorded 588 independent responses. The total number of responses reflected here is lower because the survey permitted respondents to skip questions if they wished.

¹³⁷ See, e.g., WILLIAM SHAWCROSS, SIDESHOW 32, 214 (1979).

¹³⁸ See, e.g., LAWRENCE E. WALSH, IRAN-CONTRA: THE FINAL REPORT (1993).

responses were equally uniform on this point,¹³⁹ I asked interview subjects to share their impressions of why there seemed to be such strong consensus about the need for notification. I anticipated that at least some of them would respond with reference to the WPR, or more generally recognize that agreement was so uniform because the law requiring reporting was clear, or because the law is codified in statute. Yet of the 16 interview subjects asked (5 of whom had law degrees), only one (who did not have a law degree) noted the existence of a specific statutory requirement to report military actions to Congress. As that former Defense Department official saw it, the consensus existed because there was a “a real acculturation in the national security community to the rule of law, a basic respect for the rule of law.”¹⁴⁰

All other interview subjects suggested several, overlapping reasons for the consensus, in responses falling into one of three rough categories. Many highlighted structural constitutional values, either in broad, general strokes of “checks and balances”¹⁴¹ or Congress’ role as “a coequal branch of government,”¹⁴² or with specific reference to Congress’ formal, instrumental constitutional power. “You get

¹³⁹ See, e.g., Interview 12. For interviewees who had already taken the digital survey, I informed them that survey responses to that point had been running unanimous that respondents believed they should notify Congress of the use of force in any of the described scenarios, and then asked them to speculate as to why there was so much agreement on this point. For interviewees who had not otherwise taken the digital survey, I first asked them about their own sense of obligation to inform Congress, and then (given all of them shared it strongly) told them their response was consistent with those of respondents thus far, and invited them to speculate why there was such agreement.

¹⁴⁰ Interview 14.

¹⁴¹ Interview 5; see also Interview 13, 16.

¹⁴² Interview 2.

your authority and funding from them,” one official noted, “and they can make life miserable for you if they’re not notified or consulted.”¹⁴³ A second set of explanations emphasized the political utility of keeping Congress in the loop, often framed as a defensive concern about adverse reaction if Congress was not informed: “We liked notifying people so we didn’t get blowback afterwards.”¹⁴⁴ A final set of explanations attributed the unanimity to habit, noting that reporting was just “part of the deal,”¹⁴⁵ or that “I just assumed you had to.”¹⁴⁶ One senior official put it directly: “We never thought of not notifying Congress. I don’t know where the habit came from. There may also be statutory requirements, do you know?”¹⁴⁷

Far from foreclosing the prospect that interactions with counsel had some impact on officials’ normative views, these responses offer some modest support for the notion that law, or even lawyers, shaped these views. The constitutional principles some officials credited are very much a legal source of obligation, even if not the most direct source of law lawyers would cite in identifying the rule requiring legal compliance, and far from the clearest. (The Constitution of course says nothing about “notification” as such; officials are presumably inferring that obligation from the structural or purposive sense of the document they have developed over time.) Likewise, officials who recognized congressional notice as

¹⁴³ Interview 2; *see also* Interview 6 (citing Congress’ power to control funding).

¹⁴⁴ Interview 1; *see also* Interviews 2, 3, 5, 12.

¹⁴⁵ Interview 3.

¹⁴⁶ Interview 12.

¹⁴⁷ Interview 15.

common practice or habit may well have discovered it to be thus because executive branch counsel or others had long since implemented bureaucratic systems for reporting that made it standard procedure across administrations – in other words, officials were certain of the course of action they “should” pursue because their lawyers knew it to be clear. Even the officials who viewed reporting as, at least in part, a political imperative, thought so in the expectation that the politics would redound to the Administration’s disadvantage if the public were to find out the President had acted without informing Congress – either because of Congress’ constitutional (i.e. legal) authority to cut-off funding, or in anticipation of a public reaction that itself may be driven in part by popular expectations of perceived infractions against the Constitution or laws.

A similar effect was arguably visible in responses to the survey’s repeated question whether the President should seek congressional *authorization* for a use of force abroad in various circumstances. As a matter of constitutional interpretation, OLC has developed a two-part standard for determining when the President might avoid getting such authorization, requiring (1) that the President’s use of force be intended to advance an important national interest, and (2) that the amount of force to be used constitutes something less than “war” in the sense that term is meant in the Constitution’s Declare War Clause.¹⁴⁸ The OLC rule is no doubt well familiar to lawyers who labor in this field, but hardly

¹⁴⁸ *See supra.*

common knowledge among the general population. More, while scholars have varied views on whether OLC’s test is an accurate reading of constitutional law,¹⁴⁹ conventional scholarly wisdom has long painted a picture of modern presidential war power as broadly unconstrained by Congress or the Constitution, with an executive branch pulled “into a continuing pattern of evasion” of constitutional constraint.¹⁵⁰

Respondents’ normative views about whether they believed they should seek congressional authorization for a contemplated use of military force lined up remarkably closely with the amount-of-force measure described in the OLC standard. In all three fictional scenarios involving “sustained” military campaigns including ground troops (the steepest amount of force contemplated in any of the scenarios), every single respondent to the digital survey indicated that the Administration should seek legislation authorizing the use of military force – a striking degree of unanimity on this point.¹⁵¹ In contrast, the hypothetical scenarios that tested respondents’ belief as to whether they should seek

¹⁴⁹ Bradley and Morrison, *supra* note __.

¹⁵⁰ KOH, *supra* note __, at 122; *see also* FISHER, *supra* note __, at xi; (presidents using ‘war powers’ “have regularly breached constitutional principles”); SCHLESINGER, *supra* note __; Louis Fisher, *A Dose of Law and Realism for Presidential Studies*, PRESIDENTIAL STUDIES QUARTERLY 32(4), 672-92, 673 (2002) (“On matters of war, we have what the framers thought they had put behind them: a monarchy. Checks and balances? Try to find them.”).

¹⁵¹ This finding is based on 58 responses to 3 different questions, Q41, Q69, Q97. In each scenario, between 2-4 respondents (of assorted political affiliations) favored seeking authorization after, rather than before, the campaign was launched, but both because such numbers are within any margin of error, and because these scenarios did not specify the reason for the use of force (respondents might have assumed, for example, that the President was launching the campaign in national self-defense, in which case post-action authorization would be constitutionally appropriate), it seems inappropriate to draw any conclusions from the difference in this respect.

congressional authorization when the planned use of force involved lesser degrees of force – for example, “a limited series of airstrikes against a handful of military targets” – consistently produced divided responses, with at least several respondents regularly selecting against seeking authorization (before or after the action) in those circumstances.¹⁵²

Interview responses were broadly consistent with this alignment. Of the seven unique interview respondents who specifically addressed whether the amount of force used made a difference to their view about their belief in the importance of congressional authorization, six volunteered the idea that it did.¹⁵³ Several volunteered answers tracked the OLC view quite closely. As one respondent (who did not hold a law degree) put it, authorization was required for “any new and substantial deployment to overseas location for what is expected to be sustained period of time.”¹⁵⁴ Of all 16 in-person interviewees, only one expressed a view that was inconsistent with the idea that the amount of force as such mattered in this respect.¹⁵⁵ Beyond this, the most common response among multiple interviewees

¹⁵² Q33, Q61, Q89.

¹⁵³ Interviews 8, 10, 11, 12, 13, 14. Among the remaining 4 unique interviewees, two believed that it might depend on the circumstances in which force was used but would have preferred to consult a lawyer on this point, Interviews 15, 16; one did not address the question of congressional authorization, Interview 9; and one took a categorical position that the President could use force at any time, subject only to Congress’ power to cut off funding for any such activity, Interview 7.

¹⁵⁴ Interview 10; see also Interview 14 (“[T]he for-sure case is a war of the United States toward a [foreign] state.... I do think sometimes the President has independent authority. But with some sustained engagements now I think we’re on thin ice.”).

¹⁵⁵ That respondent took the position that while it was generally “the better part of wisdom to get Congress involved,” the Constitution made it clear that “the President can use force any time, and Congress can stop it with the power of the purse.” Interview 7.

was uncertainty about which lesser uses of force they believed warranted congressional authorization and which did not. As one Republican interviewee put it, initially repeating the question: “Is there ever any case in which the President has an obligation to get congressional authorization? In my mind, the harder question is when” he has that obligation, raising the example of the 2018 U.S. bombing of several Syrian targets following the use of chemical weapons. As to that example, the official noted: “My head wants to say no, but my gut, I don’t know. This is when I’d call a lawyer.”¹⁵⁶

The strong consensus that an Administration should seek congressional authorization for prolonged, extensive uses of force is itself significant. In the 70 years since President Truman’s decision to pursue the war in Korea – a conflict in which nearly 1.8 million American troops were deployed, leaving more than 36,000 American soldiers dead, and more than 100,000 wounded¹⁵⁷ – scholars, and on rare occasions OLC, have treated Korea as but one entry in a long catalog of historical practice in which executives have used force without prior authorization.¹⁵⁸ These findings suggest, notwithstanding the fact of Truman’s example, that contemporary policy makers share a strong normative belief that congressional authorization

¹⁵⁶ Interview 16.

¹⁵⁷ Congressional Research Service, American War and Military Operations Casualties: Lists and Statistics, Sept. 14, 2008, available <https://fas.org/sgp/crs/natsec/RL32492.pdf>.

¹⁵⁸ See generally ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY (1973); see also Memorandum Opinion for the Counsel to the President, Authority of the President Under Domestic and International Law to Use Military Force Against Iraq (Oct 23, 2002) (listing Korea as among historical examples of the use of presidential use of military force without congressional authorization); Memorandum Opinion for the Counsel to the President, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities (May 31, 2018) (same).

should be sought in such circumstances. The pervasiveness of this belief may also help explain why – notwithstanding the absence of an authoritative judicial decision establishing the unconstitutionality of such an action, the contested constitutional effect of the WPR attempting to limit the President’s authority in such conflicts, and even the occasional reliance on the Korea example in OLC opinions – no President since Truman has pursued a conflict of comparable scope without seeking congressional authorization.

At the same time, it would be a mistake to make too much of what this normative belief among officials reflects about the influence of repeated interactions with legal counsel as such. Perhaps officials came to their views on the question independently, based on their formal education, knowledge of history, experience in politics, or moral beliefs. For that matter, especially to the extent the OLC standard itself is grounded in OLC’s assessment of past presidential practice, the question whether the amount-of-force-matters view is one grounded in law or political custom seems likely to yield no more than a circular answer at best. Yet it is equally a mistake to imagine counsel is not exerting at least some influence, at a minimum in generally reinforcing those existing normative beliefs. For it is one thing for policymakers to hold an independent belief that they should seek congressional authorization for a use of force because authorization would redound to the President’s political or strategic advantage. It is quite another for officials to believe – as all but one of the interviewees did – that in the course of evaluating the

relative political or strategic advantage to be gained from such an action, they should seek the guidance not just of a political or strategic adviser, but of a *lawyer*.

B. Permissive Influence

The foregoing examples involve situations in which counsels' role (assuming, as public documentation from both administrations suggests, that counsel embraced the conventional legal interpretations given above) would have the effect of influencing officials to effectively limit presidential power – either by setting or reinforcing the normative belief that the Administration should notify Congress, and in certain circumstances, seek congressional authorization for a use of military force. Yet well-known examples of legal guidance in the past 20 years make clear counsel has not always played such a role. As common accounts of lawyering in the early Bush Administration describe, for instance, senior policy advisors sought legal opinions from counsel enabling the President to ignore statutory prohibitions against torture in authorizing “enhanced interrogation techniques” against terrorist suspects – and counsel twisted laws and conventional methods of legal interpretation beyond recognition in order to provide them.¹⁵⁹ Indeed, such examples are in no small measure responsible for the growth in scholarly study

¹⁵⁹ See, e.g., Renan, *supra* note __, at 832-33 (describing the OLC “torture” memo); Hathaway, *supra* note __, at 60 (describing “the willingness of an array of lawyers in the administration to bless legal positions that the Bush administration itself later came to recognize were not supported by the law”). Legal controversies surrounding detention, interrogation, trial, surveillance and other matters have been well documented publicly. See, e.g., SAVAGE, TAKEOVER, *supra* note __; GOLDSMITH, THE TERROR PRESIDENCY, *supra* note __.

since then of whether counsel can ever really “constrain” a determined executive, and in reform efforts that have regained steam post-Trump.¹⁶⁰

Guarding against the danger of unethical, unprincipled lawyering is important indeed, and might well be aided by enhancing transparency or other professional accountability mechanisms for checking lawyerly conduct that runs afoul of this minimal standard. (The Article returns to reforms that might address the problem of unethical or erroneous legal advice in Part IV below.) But the apparent bureaucratic dynamics of these examples – in which policy makers push for greater executive power or flexibility and counsel oblige them – obscures the prospect that counsel’s views may equally influence policymakers whose normative preference is not maximal legal flexibility. One senior conservative official’s description of his experience of the early Bush era was instructive in this respect. Emphasizing the extent to which counsel was capable of exercising significant influence on policymakers, he described counsel of the era as an example of “how not to use a lawyer.”¹⁶¹ Criticizing counsel for developing legal guidance in relative isolation from key policy officials – describing the practice of small subgroup of lawyers meeting together “without their clients” as a “disaster” – this official emphasized how lawyers’ “perspective on these issues is almost always narrower than the

¹⁶⁰ See, e.g., Annie Owens, *A Roadmap for Reform: How the Biden Administration Can Revitalize the Office of Legal Counsel*, JUST SECURITY, Dec. 16, 2020 (describing working group efforts to design reforms to help ensure that OLC provides “candid, independent, and principled advice – even when that advice is inconsistent with the aims of policymakers”), <https://www.justsecurity.org/73879/a-roadmap-for-reform-how-the-biden-administration-can-revitalize-the-office-of-legal-counsel/>.

¹⁶¹ Interview 9.

national interest writ large.... The lawyers were asking, ‘what can we do to give the President flexibility.’ And presidential flexibility is an important idea. But there are broader interests here.”¹⁶² In several instances during this era, this official argued, counsel’s influence had the effect of expanding presidential power beyond the bounds policy officials actually would have preferred.

Whether or not that official’s causal description adequately accounts for the policy embrace of torture during the Bush Administration, it offers a concise reminder that officials’ normative beliefs do not always lead them to prefer that counsel maximize policymaking flexibility. Indeed, President Bush ultimately decided to seek congressional authorization for the United States’ 2003 invasion of Iraq notwithstanding counsel’s guidance that no such authorization was legally required.¹⁶³ This survey likewise suggests that such normative preferences are hardly one-offs. Return to the question regarding the circumstances in which officials believe an administration should seek prior congressional authorization before undertaking a use of military force. Conventional (and largely uncontroversial) legal opinion, reflected in contemporary OLC memoranda and

¹⁶² *Id.*

¹⁶³ The 2002 OLC opinion signed by Assistant Attorney General Jay Bybee was the first time in which OLC cited Truman’s example in Korea in unmodified support of the proposition that “[p]residents have long undertaken military actions pursuant to their constitutional authority as Chief Executive and Commander in Chief . . . [in] numerous unilateral exercises of military force.” *Auth. of the President Under Domestic and Int’l L. to Use Mil. Force Against Iraq*, 26 *Op. O.L.C.* 143, 151–52 (2002) (arguing that the President had the constitutional authority to use force in Iraq without prior authorization up to and including force necessary to secure “regime change”). As one account of the internal decision-making process surrounding Iraq has it, President Bush himself decided, notwithstanding counsel’s advice, “to involve Congress because he wants more moral authority in moving forward.” BOB WOODWARD, *PLAN OF ATTACK* 169 (2004).

elsewhere, holds that no prior authorization is required for the President to respond with force in national self-defense following an attack on the United States.¹⁶⁴ To test whether officials’ normative beliefs were aligned with this view, one digital survey scenario provided simply: “Sovereign State X has attacked the United States. The President believes it is essential to respond with military force, and preparations are underway.”¹⁶⁵ The scenario was written to describe a classic instance of national self-defense – a circumstance in which counsel would certainly advise that no prior authorization was necessary. Yet when asked whether they believed they *should* in that scenario seek congressional authorization before undertaking the use of force, 11 of the 24 officials who answered the question thought they should.¹⁶⁶ Why?

The responses are of course in part a reflection of the question; it deliberately did not ask what the law required or permitted, but rather what officials believed an administration should, all things considered, do. What the answers suggest, however, is that some policy officials’ normative inclination under those circumstances is to behave in a way that would involve *more* congressional participation than a conventional understanding of the law requires: engage Congress notwithstanding the availability of legal permission not to. One possible

¹⁶⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., rev. ed. 1966); see also *The Prize Cases*, 67 U.S. 635 (1863).

¹⁶⁵ Q17.

¹⁶⁶ Eight respondents believed the Administration should seek authorization after the use of force, and five believed no such authorization was the best approach.

explanation for this inclination among some officials is that it reflects no more than a misapprehension of what the law requires in these circumstances; perhaps the 11 respondents mistakenly believed that prior authorization was legally required and, once instructed that it was not, would hasten to change their response to “no” – a prospect to which this discussion returns below.

But interviews strongly suggested another explanation – namely, that some officials would on some occasions *prefer* more congressional participation than what a conventional understanding of the law requires. Indeed, consistent with their views about the utility of congressional notification, officials offered a range of reasons why they believed there were circumstances in which an administration should seek congressional authorization for the use of force. Again, several tied their reasons to the Constitution’s separation-of-powers structure.¹⁶⁷ But the most commonly offered explanation was officials’ desire for Congress to share in the political responsibility for military action.¹⁶⁸ As one Republican put it: “Congress should be part of discussion so Congress bears some part of responsibility.”¹⁶⁹ A Democratic official agreed, recalling that President Obama had voiced this view in a meeting of advisers regarding his decision to seek congressional authorization for the use of force in Syria; as the official said the President put it: “They should own this.”¹⁷⁰

¹⁶⁷ *See, e.g.*, Interview 5 (“Obviously checks and balances give Congress some say and some sway.”).

¹⁶⁸ *See, e.g.*, Interviews 3, 7, 8.

¹⁶⁹ Interview 8.

¹⁷⁰ Interview 3.

The digital survey produced a similar array of responses regarding the circumstances in which officials believed the United States should seek UNSC authorization for a contemplated use of military force. As noted above, while there are multiple persistent legal debates surrounding the application of the UN Charter,¹⁷¹ there is no dispute that the Charter treats self-defensive and consensual uses of force differently from aggressive uses of force. To assess the degree to which officials' normative inclinations aligned with the law in this respect, the digital survey thus presented respondents with several scenarios involving a contemplated use of force in circumstances in which a conventional interpretation of the Charter would *not* require prior UNSC authorization – for example, where the target state had consented, or where the hypothetical circumstances most plainly involved self-defense (a response to an armed attack, or an anticipatory response to temporally imminent attack).¹⁷² Responses indicated that while the existence of target state consent did make it somewhat less likely respondents would favor seeking UNSC

¹⁷¹ Indeed, the vitality of the UN Charter Art. 2(4) prohibition on the use of force against the territory of another sovereign without their consent has long been the subject of (to put it mildly) doubt, the rule's "demise" having been reported on multiple occasions since rumors of its death first emerged half a century ago. *See, e.g.*, Eric Posner, *The U.S. Ignores the U.N. Charter Because It's Broken*, SLATE (Sept. 9, 2013), <https://slate.com/news-and-politics/2013/09/the-u-n-charter-is-broken-what-should-replace-it.html>; Thomas M. Franck, 64 AMER. J. INT'L L. 809 (1970) ("[T]oday the high-minded resolve of Article 2(4) mocks us from its grave."). These declarations have appeared especially compelling in recent years in light of a series of high-profile violations of the Charter prohibition. *See, e.g.*, Claus Kress, "On the Principle of Non-Use of Force in Current International Law," JUST SECURITY (Sept. 30, 2019) (noting, among others, the Russian annexation of Crimea and the Israeli annexation of the Golan). *But see also* Kress, *supra* ("The 'cornerstone' of international law is as stable today as it was in 1970. But it remains surrounded by a grey area."), <https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/>.

¹⁷² FN question text

authorization,¹⁷³ the existence of a legally sufficient self-defense justification made effectively no difference in the likelihood respondents were to favor or oppose authorization.¹⁷⁴

How to explain these results? Recall the discussion of officials' UNSC views presented in Part II – that most officials interviewed had limited knowledge of the law regulating UNSC's role, but most also had clear normative preferences about what they believed UNSC's role should be, with just over half of interviewees (6 Republicans, 3 Democrats) volunteering the view that the lack of UNSC authorization should not be understood as a bar to U.S. action where U.S. interests otherwise require it.¹⁷⁵ As one characterized the view, it was the general consensus of the U.S. national security policy community that the "UN is there to be used when useful but not otherwise."¹⁷⁶ Given these views, one might hypothesize that officials' varied preferences about when to seek UNSC authorization might best be

¹⁷³ There were 7 scenarios in which the host state refused to consent (Q71, 75, 79, 83, 87, 91, 95), and 7 scenarios in which the host state consented (Q43, 47, 51, 55, 59, 63, 67). Across all no-consent scenarios, 70 answers favored authorization, and 48 opposed (total 118), making respondents likely to favor authorization in these circumstances roughly 60% of the time. Across all scenarios in which states had consented, 50 answered favored authorization, and 87 opposed, meaning respondents favored authorization only about 36% of the time.

¹⁷⁴ There were 6 scenarios in which the United States was plausibly acting in self-defense against an actual or temporally imminent attack: Q18, 22, 46, 50, 74, 78. There were 6 scenarios in which the United States was acting for other stated reasons: Q26, 30, 54, 58, 82, 86. Across all self-defense scenarios, respondents favored - opposed authorization => 61-64 (125); that is, they favored authorization roughly 49% of the time. Across scenarios involving the use of force for any other given reason (i.e. where authorization would be required), respondents favored -opposed authorization => 64-55 (119); that is, they favored authorization about 54% of the time.

¹⁷⁵ See *supra*, Part II.

¹⁷⁶ Interview 3.

explained by some version of the realist account of international law:¹⁷⁷ officials believe they should seek UNSC authorization when it is in the U.S. interest to do so, and officials have varied assessments of when those interests are served.

Interviews, on the other hand, suggested a more complex explanation. For even officials who rejected the notion that lack of UNSC authorization could be a bar to U.S. military action shared a parallel normative belief common to *all* interviewees: it served U.S. interests to get UNSC authorization, at a minimum, whenever possible. Why? Three expressed their view substantially in terms of America's own legal obligation: there are times when the law requires the United States to seek authorization, and it is in U.S. interests to comply with the law.¹⁷⁸ The remaining 13 described various advantages to the United States in *being seen* to be acting with legal legitimacy. One official offered an allegory: "It's the hunter's dilemma. There's a pheasant and a fence. And then there's a sign that says do not enter. And then a sign that says do not hunt. And if I walk by all of those, I'm guilty of trespassing."¹⁷⁹ You have to at least try to make your case, this official explained: "Otherwise, in eyes of world, you're guilty."¹⁸⁰ Another put it in more directly instrumental terms: "International legal justification for use of force by a

¹⁷⁷ See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) ("[W]hile state behavior may be at times aligned with international legal requirements, such an alignment 'emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.'").

¹⁷⁸ Interview 1, 5, 16.

¹⁷⁹ Interview 5.

¹⁸⁰ *Id.*

sovereign adds legitimacy to the extent we're trying to create precedent, deter, or bring coalition partners along.”¹⁸¹ Several Bush Administration officials explained the President's decision to seek UNSC authorization for the Iraq War (notwithstanding disagreement among administration officials on the wisdom or necessity of such an effort) in just these terms; the President was persuaded by arguments that essential alliances depended upon a good faith effort to (repeatedly) engage the UNSC.¹⁸² Perhaps the most telling response came from one Republican official who, when asked whether there were any circumstances in which he believed the United States had an obligation to get UNSC authorization, answered, “most of the time.” Asked whether his views were because of his understanding of what the law required, or of what is in the U.S. interest, he said both: “The law wasn't handed down from Mt. Sinai, it was developed and agreed to because” of our understanding of our interests.¹⁸³ Put differently, unprompted by specific guidance about what international law actually required or permitted, officials interviewed believed the United States was more likely to be seen as acting with legal legitimacy – in any circumstance – if UNSC authorization was present.

In circumstances like these, where authorization for the use of force by external institutions is, in effect, a check on the scope of presidential power, the prospect that at least some policy officials might in the first instance prefer external

¹⁸¹ Interview 8.

¹⁸² See, e.g., Interview 7, 16; *accord* DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR 440-41 (2011).

¹⁸³ Interview 16.

participation raises the important question whether counsel’s permissive advice in these situations – that is, counsel informing the policy official that no UNSC authorization is legally required – might influence officials to favor fewer constraints rather than more. That is, assuming the process accounts above are accurate, officials who learn from counsel in the very throes of policy decision-making that the no-authorization option is available, might come to favor or at least embrace that now front-of-mind, available option provided by trusted counsel.¹⁸⁴ Or to substitute the readily available legal answer – that authorization is not legally required – for the more difficult inquiry and now less readily available normative preference that the administration should, all things considered, try to get it.¹⁸⁵ In this cognitive universe, counsel would play neither a “constraining” nor even a neutral role in advising policy officials that an option is “lawful but awful.”¹⁸⁶ For cognitive biases like the availability heuristic just noted suggest that telling officials a course of action is *lawful* may make them less likely to think it is wrong.

¹⁸⁴ See Cass Sunstein, *What’s Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295 (2003); Jeffrey J. Rachlinski and Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002).

¹⁸⁵ Sunstein, *supra*, note __, at 1302 (“If people believe that some risks are much higher than they actually are and that other risks are much lower than they actually are, ... [p]eople will take excessive precautions to avoid trivial risks and they will fail to protect themselves against genuine hazards.”).

¹⁸⁶ Rosa Brooks, *Cross-Border Targeted Killings: “Lawful but Awful”?*, 38 HARV. J.L. & PUB. POL’Y 233-250 (2014) (quoting Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, “The Obama Administration and International Law,” Keynote Speech at the Annual Meeting of the American Society of International Law 3 (March 25, 2010), available at <http://www.state.gov/documents/organization/179305.pdf> [<http://perma.cc/V94-UA8A>]).

To be clear, none of this is to suggest that lawyers who inform policy officials that, for example, UNSC authorization is not required in legally clear cases of national self-defense are doing anything wrong. They are simply offering a straightforward and, in the hypothetical scenario discussed here, accurate account of what the law says. Neither is it to deny the possibility that other influences – for example, the political knowledge that Congress or the UNSC would not respond favorably to a request for authorization – might also ultimately shift officials’ away from their first-order belief that authorization is the normatively preferable option. It is, rather, to make a reform-designing point. If reformers’ goal is to make legal counsel more likely to “constrain” policy behavior (in the sense of holding a President to a narrower rather than broader interpretation of executive power), then this insight has significant implications for what standard government counsel should observe in providing officials legal advice whether the “best view of the law,” or the “legally available” option, or something else.¹⁸⁷ This is especially so because the hypothetical case tested here is far removed from what is almost certainly the more common reality presidential lawyers face, in which what the law requires or permits is less than clear. Given the risk that legal guidance may have an unintentionally permissive influence, lawyers who view their imperative as maximizing executive flexibility, or otherwise emphasizing the breadth of options legally available, may exacerbate the operation of existing cognitive biases.¹⁸⁸

¹⁸⁷ See *supra* (notes regarding competing “best view of the law” and “legally available” standards).

¹⁸⁸ See Bauer, *supra* note _ (noting counsel’s fear of losing seat at table).

Greater flexibility is not always what policymakers want. More, it may well have the opposite of the effect a power-limiting reformer aims to achieve.

C. Justification Influence

Consider finally the prospect that counsel may not only be capable of influencing officials to assert more power or less, but also in making officials aware of the available range of public justifications for whatever course they pursue. To see how this might matter, return to the example of President Obama’s non-use of force in Syria in the years before ISIS emerged. At least four officials who participated in that decision-making process described counsel’s assessment of the law as a key obstacle to the President’s willingness to press forward.¹⁸⁹ Yet a fifth official, also directly involved in decision-making, was unsure whether describing the law as a “constraint” in those circumstances was the right word. Noting that the President had a range of concerns about the wisdom of a U.S. military intervention in Syria at that time, the official suggested the law might have served in that instance as more of “an off ramp” for an action the President was, that official believed, disinclined to take under any circumstances.¹⁹⁰ Whether or not the President’s policy preference was fully visible to the entire circle of presidential advisors and counsel, or for that matter fully visible to the President himself, the official acknowledged that law would never be “just a speed bump people blow over.” In a situation in which many

¹⁸⁹ *See supra*, TAN _.

¹⁹⁰ Interview 4.

in Washington were clamoring for action, this official described counsel’s advice as “provid[ing] the President with an out.”¹⁹¹

That presidents – or any political official – might seek ways to avoid or minimize the extent of his unique political accountability for a significant decision is hardly unfamiliar. Within days of the publication of an op-ed by a prominent retired conservative jurist arguing that the Senate lacked the constitutional authority to pursue an impeachment trial after a president leaves office,¹⁹² multiple Republican Senators seized on the (otherwise unpersuasive) argument in a way that made it easy to imagine their sudden enthusiasm for recognizing their lack of constitutional power was motivated in part by their desire to find a plausible excuse for not supporting conviction following the President’s role in the Capitol insurrection.¹⁹³ The same effect has long been visible at the institutional level, as presidents once regularly punted to the courts questions of foreign sovereign immunity to avoid entanglement in politically uncomfortable diplomatic affairs.¹⁹⁴ Members of Congress have likewise, sometimes expressly, voted for legislation they believe to be unconstitutional in the stated expectation that the courts will correct it later, enjoying the accountability benefits of voting for popular legislation without the

¹⁹¹ *Id.*

¹⁹² J. Michael Luttig, “Opinion: Once Trump Leaves Office, the Senate Can’t Hold an Impeachment Trial,” WASH. POST, Jan. 12, 2021.

¹⁹³ See Jess Bravin, “Senate GOP Set to Argue Out-of-Office Trump Can’t be Convicted in Impeachment,” WALL STREET JOURNAL, Jan. 17, 2021, <https://www.wsj.com/articles/senate-gop-set-to-argue-out-of-office-trump-cant-be-convicted-in-impeachment-11610881200>

¹⁹⁴ See DAVID L. SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (2011).

accountability burden of voting against popular legislation otherwise beyond Congress' constitutional authority to pass.¹⁹⁵ Indeed, the current Supreme Court docket features a case in which the Trump Administration had urged that the Court recognize as beyond Congress's constitutional authority a provision (relieving Americans of a mandate to acquire health insurance while still guaranteeing coverage for pre-existing conditions) the Administration itself signed into law.¹⁹⁶

The prospect that a policymaker may find strategic utility in being able to declare a course of action legally *unavailable* is of no small significance for reformers. Consider again the common circumstance in which the “best” reading of the law is unclear, or subject to reasonable dispute. In such a circumstance, counsel could, in a way entirely consistent with all relevant ethical obligations, make good faith arguments both for and against the view that reading the rules to permit a use of force is the “best” view of the law in some sense. Counsel who believes her role is principally to “facilitate,” or to maximize policymaker flexibility, will not offer the President the argument that the law could be read to prohibit the course of action in apparent contemplation. Counsel who believes her obligation is to offer “the best view” of the law, or who otherwise functions in an environment that favors the

¹⁹⁵ See Dahlia Lithwick and Richard Schragger, “Pass the Buck – When Congress Passes Unconstitutional Laws,” SLATE, Oct. 7, 2006 (“Specter’s justification for then voting for a bill he deemed unconstitutional? ‘Congress could have done it right and didn’t, but the next line of defense is the court, and I think the court will clean it up.’”), <https://slate.com/news-and-politics/2006/10/when-congress-passes-unconstitutional-laws.html>.

¹⁹⁶ See Amy Howe, Justices Grant Affordable Care Act Petitions, SCOTUSblog (Mar. 2, 2020, 10:22 AM), <https://www.scotusblog.com/2020/03/justices-grant-affordable-care-act-petitions/>.

production of a single, consensus position, *may* offer the President the more restrictive argument, but only when the law is clear enough to demand such a position, or where it is clear enough to achieve majority or consensus support among administration lawyers if a consensus-finding model prevails. In these settings, the restrictive view of the law is unlikely to surface to senior policymakers if it is no more than a “legally available” reading of the law. Yet for at least one species of “constraint”-minded reformer, such dynamics reduce the likelihood policymakers will have access to available justifications *against* the use force. How reformers might address such dynamics is the topic to which the Article turns next.

IV. IMPLICATIONS FOR REFORM

Periods of intense scandal or crisis in Washington have regularly given rise to reform efforts aimed at remedying the perceived failings of existing governing structures.¹⁹⁷ Critiques of the past two decades of presidential lawyering have now highlighted the risk of more than one such failing: that counsel will fail to produce ethically defensible legal guidance;¹⁹⁸ that counsel will actively work to enable the President to avoid any external constitutional check;¹⁹⁹ or more simply that counsel

¹⁹⁷ See, e.g., JOHN A. LAWRENCE, THE CLASS OF '74: CONGRESS AFTER WATERGATE AND THE ROOTS OF PARTISANSHIP 38 (2018) (describing the views of senior members of Congress that reform efforts were “motivated at least in part by a sense of outrage at the scandalously unethical and illegal deeds of some in the Nixon Administration.”).

¹⁹⁸ See, e.g., Renan, *supra* note _, at 832-33 (describing the 2002 OLC “torture” memo).

¹⁹⁹ See, e.g., Roisman, *supra* note _ (describing the Trump White House’s “extreme claims relating to executive privilege”).

(or at least one among legal advising offices) is overly influenced by incentives and practices that ensure the production of maximally expansive interpretations of executive power, from the availability of a robust body of pro-executive OLC precedents,²⁰⁰ to the competition among presidential counsel to provide permissive guidance, the better to safeguard their own structural influence.²⁰¹ To those concerns, this study adds another—namely, that counsel will effectively disable incentives that might otherwise operate to limit the scope of executive power asserted. How, then, to reform the function of presidential counsel in a way that protects counsel’s structural capacity to check executive excesses, while guarding against the danger that counsel will provide unethical or simply maximally expansive interpretations of presidential power?

Critics of presidential counsel tend to agree that at least one of the problems with the current delivery of legal advice is the matter of quality control – the need to avoid the manifestly unethical or simply extreme interpretations of the President’s authority that have emerged from OLC and other legal offices in recent years. Many reform recommendations thus focus on enhancing mechanisms for ensuring presidential counsel may be held in some sense accountable for their opinions – from increasing the public transparency of OLC’s work, to empowering the courts and Congress to check, or at least compete with, the current near-

²⁰⁰ See, e.g., Berman, *supra* note _.

²⁰¹ See, e.g., Bauer, *supra* note _ (describing counsel’s concern for retaining a seat at the table and competing advice relating to the use of force in Libya).

monopoly held by executive branch lawyers’ views on interpreting the scope of the President’s statutory and constitutional authority.²⁰² And such reforms may well help guard against the most obviously unethical or extreme views. But they seem far less certain as a corrective to the collection of internal practices and incentives, including those discussed here, that lead presidential counsel to produce guidance that, while comfortably within ethical boundaries, consistently maximizes presidential power. The general public, the courts, and Congress quite regularly themselves favor expansive understandings of executive power, whether a result of partisan affiliation or normative preference,²⁰³ institutional deference,²⁰⁴ or an interest in dodging their own political accountability for difficult decisions.²⁰⁵

Without rejecting such proposals, this Part offers an alternative package of recommendations aimed at reshaping the incentives under which counsel operate in real time. First, to combat existing tendencies that lead presidential counsel toward more rather than less expansive views of presidential power, counsel across legal offices providing presidential guidance should adopt an educational model of

²⁰² See, e.g., Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 BOSTON COLLEGE L. REV. (forthcoming 2021); Oona Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 4 (2020); Annie L. Owens, REFORMING THE OFFICE OF LEGAL COUNSEL: LIVING UP TO ITS BEST PRACTICES, ACS ISSUE BRIEF (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/12/Owens-Reforming-OLC-Final.pdf>;

²⁰³ Alec Tyson, “Americans Divided in Views of Use of Torture in U.S. Anti-Terror Efforts,” Pew Research Center, Jan. 26, 2017, available <https://www.pewresearch.org/fact-tank/2017/01/26/americans-divided-in-views-of-use-of-torture-in-u-s-anti-terror-efforts/> (“About seven-in-ten Republicans and Republican-leaning independents (71%) say there are some circumstances where it is acceptable for the U.S. to use torture.”).

²⁰⁴ See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

²⁰⁵ See *supra* TAN (congressional efforts to avoid impeachment and military commission decisions).

advising, ensuring that on questions where the law is silent or unsettled, policymakers have access not only to particular counsel’s judgment, but to the best case available both for and against the interpretation offered. Second, to bolster existing internal safeguards against wholly unreasonable or unethical legal advice, national security policymakers should receive, along with standard briefings on ethics and the proper handling of classified information at the outset of government service, a baseline introduction, with content agreed upon by a bipartisan group of legal experts, to foundational principles of constitutional and international law. Finally, reforms of any kind must take care to preserve those characteristics of counsel’s role that help make counsel influential, including deep integration in the policy making process and broad flexibility in function.

A. Modeling Educational Lawyering

The current debate surrounding the standard under which presidential counsel should operate – between prevailing OLC guidelines providing that counsel give their “best understanding of what the law requires,”²⁰⁶ and some more flexible touchstone, especially in “conditions of crisis,” that would allow counsel to embrace a “best, professionally responsible legal defense” of the policy selected by the client²⁰⁷ – seems in some sense oddly disconnected from the descriptive account

²⁰⁶ 2010 OLC Memorandum, *supra* note _ (“OLC’s central function is to provide...controlling legal advice to Executive Branch officials in furtherance of the President’s constitutional duties to preserve, protect, and defend the Constitution...”).

²⁰⁷ Bauer, *supra* note _.

above. Focused principally on the formal opinion-writing function of a singular legal office in the Department of Justice, the OLC standard imagines presidential legal advice flowing from a singular, authoritative source with court-like independence, capable of identifying a professionally “best” interpretation of unsettled areas of law, uncolored by the normative predispositions of the lawyers who draft them. While professional methods of legal reasoning surely exist and often suffice to address straightforward questions of law, such questions tend to be addressable and indeed addressed by counsel at the agency stage. By the time a legal issue has remained unresolved long enough to percolate through to presidential-level discussion, it is far more likely to involve judgments other than “a set of fixed, self-defining categories of permissible and prohibited conduct.”²⁰⁸ While ordinary methods of legal reasoning are of course still essential to OLC and other executive branch counsel, they are, in light of the availability of decades of judicially untested, executive-friendly practical precedents, certain to systematically favor broad constructions of presidential power.²⁰⁹ Even before taking account of the mission OLC associates with its role – to “*facilitat[e]* the work of the Executive Branch and the objectives of the President,”²¹⁰ the “best” view in this context is bound to be a broad view – consistently resulting in a form of legal (and cognitive)

²⁰⁸ CHAYES, *supra* note __, at 34-35.

²⁰⁹ See, e.g., Berman, *supra* note __ at 19 (collecting sources); John C. Dehn, *Institutional Advocacy, Constitutional Obligations, and Professional Responsibilities: Arguments for Government Lawyering Without Glasses*, 110 COLUM. L. REV. SIDEBAR 73 (2010).

²¹⁰ Department of Justice Office of Legal Counsel, Memorandum Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) (emphasis added), available <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

influence that runs contrary to what a “constraint”-minded reformer might wish. In all events, OLC does not stand alone among presidential counsel, but is rather one voice among counsel across the administration, including in the White House, competing for presidential influence – a competition that may itself have advice-skewing effects. To guard against the dangers of forum shopping, whatever standard of guidance counsel adopt at the *presidential* level – OLC, White House Counsel, NSC and State Department Legal Advisors, Defense Department General Counsel, and more – should be the same.

An alternative option on offer, one that would recognize the obvious formal indeterminacy of key questions of constitutional and international law, and the availability of arguments that are no better than more and less “plausible,” has the great virtue of accuracy. Particularly given the extent to which many policymakers seem to seek and value counsel’s ability to help frame and think through systematically complex choices of policy, morality, and law, the impulse to offer the kind of thoroughgoing analysis good counsel is capable of producing – provided it distinguishes clearly and candidly between what the law makes certain and what it leaves open – seems wise. But offered solely as a means to expand, defend, and justify an asserted policy preference, to offer a “full exploration of the legal grounds *for action*,”²¹¹ it leaves policymakers, including the President, at a disadvantage. Assuming the task of legal guidance is complete with one’s best legal case for doing

²¹¹ Bauer, *supra* note __, at 250 (emphasis added).

what the requestor says he wants risks foreclosing the prospect that the debate remains fluid, that the President’s advisors differ among themselves, that individual clients, including the President, are within themselves internally conflicted about the appropriate course, or that one or more would not be interested in the availability of a strategic out.

It serves the interest of good lawyering, and good counsel in the broad sense, to ensure that the best “available” legal case for action is regularly accompanied by the best “available” legal case against it as well. Yet as it stands, it should not perhaps be surprising to find more than one example, even among the limited set of publicly available, written OLC opinions, that falls far short of introducing and addressing the “best available” case against it. Counsel regularly operates under significant time pressure, even absent emergency circumstances, and it is easy to imagine how and why a fulsome account of arguments-to-be-rejected falls lower on the list of drafting priorities. Former presidential lawyers themselves have described their sense that it is important to help maximize presidential flexibility lest they lose their seat at the table among trusted policy advisors,²¹² and such incentives seem likewise likely to reduce the likelihood that counterarguments are fully excavated and addressed. And especially because written legal opinions often do become public – even those not initially intended for publication – it would be surprising to find counsel insensitive to the risks, political or legal, that might

²¹² See, e.g., Bauer, *supra* note _ (describing counsel’s concern for retaining a seat at the table and competing advice relating to the use of force in Libya).

result from an internal executive branch legal opinion that itself sets forth an exceedingly strong case for the other side if and when the advice becomes public.

A model of lawyering that recognizes the reality of legal indeterminacy, and self-consciously incorporates a duty to present in a timely way both “best cases” available, brings with it several apparent objections. For instance, one might anticipate, in the real world of government decision-making, no official has time to read competing memoranda, and no official wants an uncertain response. In the starkest terms, STRATCOM’s General Kehler sooner rather than later needs to know very simply whether or not he can launch. Certainly, if the legal question posed is of the variety where conventional professional methods produce an answer that is clear, counsel should not hesitate to say so. But it is not consistent with the experiences senior policy officials described here to imagine that they are incapable of or too impatient to hear that the law surrounding a significant question is unsettled or uncertain, even, and perhaps especially, on matters of great exigency and importance. On the contrary, it was an experience that multiple senior officials described as common. As the official who described his personal policy as “never in the Situation Room without a lawyer” noted with particular emphasis: “I could get law from any trained legal staff. But when we got down to endgames, you wanted more senior lawyers in the room because legal experience matters. In the Situation Room..., these were judgment calls, usually with huge ambiguities.... We were

almost always working in a gray area where law was unsettled.”²¹³ The goal, in his view, was to determine how comfortable he would be defending whatever position he took after the fact. This is surely an official who needs to know the best available legal case for a course of action he is contemplating. And one who would value counsel’s own expert opinion of which side had the better of the argument. But all apart from interests in “constraint,” if the goal is to ensure he will be comfortable defending his action after the fact, he will be better prepared to do so if he is also cognizant of the best available legal case against it.

In all events, as this study suggests, providing real-time advice is far from the only way in which counsel influences policymaker views. Many of the senior policy officials surveyed here had interacted with counsel regularly in different settings over periods of years, often developing relationships with one or more individual lawyers who came to earn the official’s trust. Whether through these longitudinal relationships, or simply through day-to-day discovery of counsels’ utility, officials emphasized counsels’ ability to help policymakers “flesh out our policy interests,”²¹⁴ “think hard about tradeoffs” surrounding certain courses of action,²¹⁵ or more fundamentally “break[] undifferentiated masses of proposed actions into discrete legal questions.”²¹⁶ One in particular highlighted counsels’ skill as meticulous readers of legal and other texts, and as “scrupulous observers of

²¹³ Interview 5.

²¹⁴ Interview 1; see also Interview 8.

²¹⁵ Interview 4.

²¹⁶ Interview 1; see also Interview 8.

minutiae,” capable of leading officials to say, “oh, I hadn't thought about it that way, of educating me.”²¹⁷ All of which is to say counsel is, in direct and indirect ways, already playing a critical educational role in presidential decision-making. Recognizing, and to an extent, formalizing, counsel’s duty to function in that capacity, makes it more likely that the education counsel provides is well rounded.

B. Improving Legal Fluency

However experienced in interactions with legal counsel most officials surveyed here were, there are more than a few reasons to believe that the relative legal fluency of this group is roughly representative of those one might find among similar officials in any administration. Americans’ general knowledge of the basic structure of government is at an all-time low, with recent surveys revealing, for example, that nearly 75% could not name the three branches of the federal government at all.²¹⁸ Even among the more elite pool of college-educated Americans, only a third of American college students can correctly identify Congress as the branch of the U.S. government with the power to “declare war.”²¹⁹ And it is far from certain that those deficits will be corrected before entering even elite levels

²¹⁷ Interview 15.

²¹⁸ See Sarah Shapiro and Catherine Brown, *A Look at Civics Education in the United States*, AMERICAN EDUCATOR (Summer 2018), https://www.aft.org/ae/summer2018/shapiro_brown.

²¹⁹ See Counsel on Foreign Relations, *What College-Aged Students Know About the World: A Survey on Global Literacy*, available <https://www.cfr.org/global-literacy-survey> (finding only a third of American college students can correctly identify the power to “declare war” as belonging to the Article I branch).

of government service. While more than half of total participants in this study had attained graduate degrees in fields other than law, none of the top five U.S. graduate programs in international affairs and foreign policy currently requires even a basic introductory course in international law.²²⁰ As long as the United States has an even modestly representative government, it is likely that this state of knowledge will be represented among at least some executive officials.

Without at all suggesting national security policy officials should be required to learn the many intricacies and uncertainties surrounding aspects of the law regulating the use of force, ensuring that officials are equipped with knowledge of at least the basic legal frameworks under which they are operating can help serve as an additional check not only on extreme policy initiatives in the first instance, but also on legal advice that transgresses the most basic limits of executive power. Consistent with the educational model of presidential lawyering just sketched, legal counsel's influence need not, and does not, function only in moments of great exigency. The notion that new government officials should receive at least some training in the basic obligations of good government is hardly unprecedented. Quite the contrary, as part of another era of reform, the Ethics in Government Act of 1978 established the U.S. Office of Government Ethics (OGE), which helps ensure (among other things) that all new Presidential appointees are made aware of their ethical obligations and are in a position to help promote ethical culture within their

²²⁰ This is based on the published academic requirements of the Harvard Kennedy School of Government, Princeton University Woodrow Wilson School, Columbia, Georgetown, SAIS.

own offices and agencies.²²¹ Federal law likewise requires training for new employees on topics from maintaining information systems security,²²² to (for employees for whom it is relevant) the proper handling of classified materials.²²³

The notion that the basic law in this field is either too interpretively or politically contested, or too vague or uncertain, to be reduceable to training briefings is belied by ample instances of bipartisan agreement among lawyers and courts on key points even in this rarefied realm, including, not least: that the federal government comprises 3 co-equal branches, each with the power and responsibility to check the functions of the other; that the President has the duty to “take care that the law be faithfully executed;” and that the President’s constitutional power is at its “lowest ebb” when contrary to the law as enacted by Congress. Refresher briefings on these and other commonly agreed on principles – agreement this study suggests extends to more points than just these – can help shape official thinking at the outset of their service about the basic contours of their authority. They can help prepare officials to question the validity of manifestly wrong or extreme claims advanced by counsel about the scope of executive authority. They can help counteract cognitive effects like the availability heuristic, putting front-of-mind (or nearer to) the notion that executive power is subject to fundamental legal limits. And, if Congress assigns the task of crafting such

²²¹ See 5 C.F.R. 2638.705.

²²² See Public Law 100-235; 5 C.F.R. 930.301.

²²³ See, e.g., Executive Order 12958 of April 17, 1995, 60 Fed. Reg. 19825.

briefings, and keeping them up to date, to a bi- or nonpartisan group of career or outside counsel, can help reinforce the extent to which longstanding legal rules and norms survive across administrations, whatever the “best” opinion of particular executive branch counsel in a particular case.

C. Protecting Legal Influence

The extent to which senior executive branch policy officials have internalized a sense of obligation to consult legal counsel before pursuing any use of military force is remarkable in many respects. Far from the classical realist vision in which legal rules not backed by some autonomous mechanism for enforcement could not rightly be considered “law” at all,²²⁴ the decidedly non-autonomous structure provided by executive branch counsel surely has at the least the *capacity* to influence policy decision-making because of their status as counsel. While there is little question that counsel’s influence in this respect is explained in part by officials’ desire to avoid negative political or personal consequences they fear may flow from legally unsupported actions (whether or not such consequences are in fact likely), officials surveyed here as commonly emphasized counsel’s cultural integration and functional flexibility – “their” lawyers’ approachability, their broad-ranging utility, their common purpose in advancing the administration’s success – as they did counsel’s deep knowledge and expertise. Whatever steps more formal

²²⁴ Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1 (Krasner ed., 1983).

advising bodies – whether OLC or an interagency lawyers’ group – take to ensure the relative “independence” of advice – the advice is delivered and consumed by clients who experience counsel as a colleague on their team.

If these characteristics are indeed critical to maintaining counsel’s effective influence, then reformers take a risk by adopting changes that might jeopardize them. Thus, for example, proposals that would remove the bulk of White House Counsel staff from the White House (in favor of DOJ) may gain counsel some institutional independence,²²⁵ but may correspondingly leave that office with less influence over White House decision-making. Likewise, reforms that shift counsel’s interpretive role toward more judge-like independence and away from the mission of facilitating official policy goals may make counsel more likely to highlight legal limits on what the President can do,²²⁶ but also risk undermining the sense of team loyalty that lead officials to seek out and trust their advice. And reforms that would limit particular counsel to overly rigid, highly structured forms of advice and channels of communication may reduce the likelihood that counsel will freelance or advance his or her own, policy-independent agenda, but they also risk compromising officials’ access to the informal guidance and rigorous analytical methods multiple officials cited as a key element of counsel’s value.

IV. CONCLUSION

²²⁵ See BAUER & GOLDSMITH, *supra*, note __; Berman, *supra* note __, at 43.

²²⁶ See Berman, *supra* note __, at 42-43.

As scholars and policymakers alike grapple with the apparent fragility of many of the legal rules thought essential to guarding against an authoritarian executive, the post-Trump era is poised to join past periods in U.S. history as a time of sweeping structural reforms aimed at better checking the exercise of presidential power. Yet just as with those previous eras of reform, the risk is real that changes intended to limit the scope of presidential power will have, however inadvertently, the effect of further entrenching those features of executive power that, along with challenges to other Madisonian institutions, has left America's constitutional democracy's more vulnerable than was once assumed. By highlighting the importance of identifying clear and specific goals of reform, thinking anew about the complex dynamics of existing structures, and sketching key considerations for reformers to track, the foregoing discussion is intended to help avoid past pitfalls. There is no singular set of reforms that is certain to achieve some ideal degree of presidential "constraint." But by providing a more granular account of a range of decisional dynamics, the hope is that reform may avoid making matters worse.