
PRESIDENTIAL NORMS AND ARTICLE II

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The nature of the presidency cannot be understood without reference to norms. The written provisions of our constitutional structure do not, by themselves, offer a sufficiently thick network of understandings to create a workable government. Rather, those understandings are supplied by norm-governed practices. Presidential power is both augmented and constrained by these unwritten rules. This Article offers a sustained account of the norm-based presidency. It maps out the types of norms that structure the presidency and excavates the constitutional functions that these norms serve, the substantive commitments that they supply, the decisional arenas where they apply, and the conditions that make some norms (relative to others) more or less fragile. Understanding these characteristics of an unwritten Article II helps to mark abnormal presidential behavior when it arises. It also brings into view core features of structural constitutionalism itself. Norms simultaneously settle constitutional duty for a time and orient contestation over what legitimate practice should be. Norms, however, cannot be understood in contrast to a fixed constitutional structure. Rather, norms bring into view the provisional nature of our constitutional order itself.

The role of presidential norms in constituting a working government raises pressing questions for public law theory. One of those questions is this: What happens when such norms break down — when the extralegal system ceases to enforce them? The Article sketches a spectrum of judicial responses, each of which finds occasional (though often implicit) support in the case law. It argues that the norms of the presidency and of the judiciary interact. Norms supply descriptive features of the institutional presidency upon which practices of judicial deference are sometimes premised. When those presidential norms collapse, judicial practice appropriately adjusts. Courts, however, remain limited players in a norm-based constitutional order. Presidential norms often do not implicate a judicially enforceable legal claim. And the more society depends on courts to check norm breaching by the president, the more fragile judicial norms (such as norms of judicial

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independence) may become. The Article concludes by examining the extrajudicial legal, political, and institutional conditions that sustain, or erode, the norm-based presidency.

INTRODUCTION

The nature of the presidency in American constitutional governance cannot be understood without reference to norms.¹ These unwritten or informal rules of political behavior provide the infrastructure that any particular President inhabits.² Presidential power is both augmented and constrained by these unwritten rules of legitimate or respectable behavior.³ Consider a few examples:

- ◆ The President is the nation’s chief law enforcer but a norm insulates individual investigatory decisions from the President.⁴
- ◆ Norms deem the President bound by a conflict-of-interest statute that, by its terms, excludes the President from coverage.⁵

¹ Cf. Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081–82 (2013) (distinguishing between a “small-c” approach that regards the constitution as “the web of documents, practices, institutions, norms, and traditions that structure American government,” and the “big-C” approach that is rooted in constitutional text and judicial review, *id.* at 1082); cf. also K.N. Lewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3–4 (1934).

² Unwritten rules travel under different labels. Professor Jon Elster has used the term “unwritten constitutional norms.” Jon Elster, *Unwritten Constitutional Norms 2* (Feb. 24, 2010) (unpublished manuscript) (on file with the Harvard Law School Library) [<https://perma.cc/YPN8-764G>]. Legal scholars, working off of the Commonwealth experience, often use the label constitutional “conventions.” See, e.g., David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 27 (2014); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1163 (2013) [hereinafter Vermeule, *Conventions*]; Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1949 (2016) [hereinafter Vermeule, *Third Bound*]; Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1869; see also Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 & n.2 (2004) (identifying the breakdown of conventions, or “‘go without saying’ assumptions[,] that underpin working systems of constitutional government” as a feature of “constitutional hardball”). In the political science literature, the labels “norms,” “unwritten rules,” and “informal institutions” are often used interchangeably. See, e.g., Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSP. ON POL. 37 (2012); David W. Rohde, *Studying Congressional Norms: Concepts and Evidence*, 15 CONGRESS & PRESIDENCY 139, 139 (1988). I elaborate my use of the concept of norms in Part I, *infra* pp. 2195–206.

³ Professor Richard Fallon has suggested the terms “sociological legitimacy” and “moral legitimacy” to distinguish between the questions whether the legal position of an actor such as the Supreme Court is treated as authoritative, at least among certain groups (sociological legitimacy), and whether it ought to be (moral legitimacy). See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005); see also Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101, 105 (2003) (“Legitimacy (where it exists) descends to specific legal acts from the ‘respect-worthiness’ . . . [of the] system, or practice, or ‘regime’ of government.”).

⁴ See *infra* section II.A, pp. 2207–15.

⁵ See *infra* section II.B, pp. 2215–21.

- ◆ Norms require the President to exercise considered, fact-informed judgment on major questions of domestic and foreign policy.⁶
- ◆ Norms confer on the President informal power over both legislative and administrative policymaking. These norms replaced earlier norms that sought to insulate presidential judgment from mass public opinion and to locate policymaking leadership in Congress.⁷
- ◆ Changes in norms shifted a strongly departmentalist presidency to one that generally respects judicial supremacy, a shift reinforced by a related norm: the President's duty to defend the constitutionality of a statute in court.⁸

This Article offers a sustained account of the norm-based presidency. Understanding these “unwritten” aspects of Article II helps to mark abnormal presidential behavior when it arises. It also brings into view core features of structural constitutionalism itself. The textual provisions that define our constitutional structure do not, by themselves, offer a sufficiently thick network of rules or standards to create a workable government. Judicial precedent on the content of presidential duty is also scant.⁹ Rather, the understandings that structure and constrain presidential behavior, in the main, are supplied by norm-governed practices.¹⁰

The norms that structure governance by the branches of government — what we might think of as *structural norms*¹¹ — make concrete, and mediate among, competing values at the crux of American constitutional democracy and a system of separated powers. Structural norms are imperfect; they do not achieve any ideal sense of interbranch balance, representative democracy, or fidelity to law. Structural norms are also inherently provisional; they simultaneously settle constitutional duty for a time and orient contestation over what acceptable behavior

⁶ See *infra* section II.C, pp. 2221–30.

⁷ See *infra* section II.D, pp. 2230–39.

⁸ There are also norm-based exceptions to this rule, which I discuss *infra* note 41 and accompanying text.

⁹ See *infra* notes 31–32 and accompanying text.

¹⁰ My focus is on the norms that govern presidential behavior, as opposed to agency action. But the two are inescapably intertwined. See *infra* notes 176–188 and accompanying text. In this sense, the administrative constitutionalism literature might be seen as an intervention on the norm-based practices of the presidency, although it has not been oriented to that question. See generally Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013).

¹¹ Cf. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969) (arguing that “the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part” gives meaning to the Constitution).

should be.¹² Structural norms, however, cannot be understood in contrast to a fixed constitutional design. Rather, norms bring into view the changing nature of the constitutional order itself.

The role of structural norms in constituting a working government raises underexplored questions for public law theory and practice. One of those questions is this: What is the relationship between presidential norms and judicial practice? At its most striking, the question is about the role of the federal courts when the norms of the presidency break down — when the extralegal system ceases to enforce them. That question is not new. But it becomes especially important in periods of deep political polarization. For the erosion of norms is a phenomenon at the core of polarization,¹³ and it builds on itself over time.¹⁴ Indeed, interactions between the presidency and Congress have long been central to sustaining, and revising, these unwritten aspects of Article II. An increasingly polarized Congress heightens the significance of presidential norms of limitation, even as it makes those same norms more fragile.¹⁵ The question of judicial enforcement is all the more urgent in a constitutional moment defined by a President avowedly committed to trampling the many norms of the presidency.¹⁶

Yet we lack a conceptual framework to understand the role of judicial practice in sustaining, or shaping, the norm-based presidency.¹⁷ I

¹² This need to accommodate, on an ongoing basis, between goals of adaptation and settlement is a feature of any legal system and is reflected in the role of judicial precedent as well. See David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 52–60 (2015); cf. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 110–24 (2004) (analyzing moral and political “provisionality” as a valuable, though complex, characteristic of deliberative democracy).

¹³ Professor Nate Persily defines polarization as “three separate but interacting phenomena” that include “the erosion of norms that historically constrained the discourse and actions of political actors or the mass public.” Nathaniel Persily, *Introduction* to SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 3, 4 (Nathaniel Persily ed., 2015). The other two phenomena are “ideological convergence within parties and divergence between parties” and “the inability of the system to perform basic policy-making functions due to obstructionist tactics.” *Id.*

¹⁴ See *id.* at 9 (“The erosion of . . . politics-constraining norms illustrates how actions previously considered ‘nuclear’ have become conventional.”).

¹⁵ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring) (proposing a constitutional framework for understanding presidential authority in relation to congressional authority, but observing that “only Congress itself can prevent power from slipping through its fingers,” *id.* at 654).

¹⁶ See, e.g., Peter Baker, *For Trump, a Year of Reinventing the Presidency*, N.Y. TIMES (Dec. 31, 2017), <https://nyti.ms/2DBKHWz> [<https://perma.cc/AQA3-G58F>] (quoting President Trump’s Chief of Staff as stating that “[t]he norms and conventions are exactly what he ran against and, in [the President’s] view, are why we’re in the fix we’re in”); see also Jack M. Balkin, *Constitutional Rot*, in CAN IT HAPPEN HERE?: AUTHORITY IN AMERICA (Cass R. Sunstein ed., 2018).

¹⁷ Partial explorations of this question in doctrine and theory have generally centered on the concept of “historical gloss” and sought to distinguish gloss from nonlegal “constitutional conventions.” I discuss this literature and offer an alternative approach *infra* notes 301–305 and accompanying text.

argue, perhaps dishearteningly, that the judicial role is inescapably limited. Courts cannot solve the problems of constitutional governance. They are not immune to political polarization, and the tools that they possess are largely inadequate to the task. This is not to say, however, that courts ignore presidential norm breaching when an independent legal claim is implicated. For judicial practice is sometimes predicated on certain institutional assumptions about the presidency — expectations rooted in the presidency’s governing norms. When those presidential norms collapse, judicial practice appropriately adjusts. To make the argument more concrete, consider two stylized scenarios (only the first has fully come to pass).

The President campaigns on a “total and complete shutdown of Muslims” entering the country.¹⁸ Absent a fact- or policy-informed process inclusive of interagency views, the President issues an executive order imposing an immediate, ninety-day ban on entry by nationals of seven overwhelmingly Muslim countries. The executive order is challenged in court as a violation of the First Amendment and the Immigration and Nationality Act.¹⁹

The President campaigns on a rhetoric of “locking up” his political opponent. Once in office, he orders the Director of the Federal Bureau of Investigation (FBI) to reopen a closed criminal investigation into that opponent’s prior uses of a private email account for official government business and directs the Justice Department to indict her if possible under the criminal code.²⁰ The opponent is indicted and she brings a selective-prosecution challenge under the First and Fifth Amendments.²¹

As this Article will show, each scenario violates a presidential norm. But is that norm breach relevant to the rights-based claims at issue — legal claims that have arisen independently of the norm itself? I argue that it is. Each example implicates a doctrinal area where deference to

¹⁸ E.g., Jenna Johnson, *Trump Calls for “Total and Complete Shutdown of Muslims Entering the United States,”* WASH. POST (Dec. 7, 2015, 7:43 PM), <https://wapo.st/2pGrrTk> [<https://perma.cc/GU7W-7ML3>]; see also *infra* notes 403–408 and accompanying text.

¹⁹ See *infra* notes 403–408 and accompanying text.

²⁰ President Trump campaigned on a “lock her up” rhetoric concerning his political opponent and has continued to press publicly for reopening a criminal investigation into Hillary Clinton’s conduct as Secretary of State. See, e.g., David A. Graham, *Trump Demands the Prosecution of His Defeated Rival*, THE ATLANTIC (Nov. 3, 2017), <https://www.theatlantic.com/politics/archive/2017/11/trump-justice-department-clinton/544928/> [<https://perma.cc/VS2Y-TTX5>]. While at times acknowledging norm-based constraints, see Benjamin Wittes, “*The Saddest Thing*”: *President Trump Acknowledges Constraint*, LAWFARE (Nov. 3, 2017, 1:02 PM), <https://www.lawfareblog.com/saddest-thing-president-trump-acknowledges-constraint> [<https://perma.cc/W5UN-TGJ8>], he has also openly flouted norms of investigatory independence and asserted an “absolute right to do what [he] want[s] to do with the Justice Department,” see Michael S. Schmidt & Michael D. Shear, *Trump Says Russia Inquiry Makes U.S. “Look Very Bad,”* N.Y. TIMES (Dec. 28, 2017), <https://nyti.ms/2lp7n4L> [<https://perma.cc/CP2K-ECBA>].

²¹ See *Wayte v. United States*, 470 U.S. 598, 609 (1985) (developing doctrinal framework for Fifth Amendment selective-prosecution claim based on First Amendment–protected activity).

the Executive is at its apogee. Underlying judicial practice, however, is an antecedent question of comparative institutional choice: should the court or the President decide the legal question at issue?²² The court's answer to that question is premised on (sometimes unarticulated) assumptions about how the presidency actually functions — that the President relies on decisionmaking structures and resources unavailable to the courts, and that the President is not using national security, law enforcement, or military prerogative as a cover for naked partisanship or self-dealing.

Presidential norms thus supply descriptive features of institutional behavior upon which judicial deference is premised. Breach of these types of presidential norms — that is, norms that structure the President's discretion (in the first scenario) or that insulate investigatory decisions from the President (in the second) — is a red flag that those preconditions no longer exist. Absent the presidential norm, the case poses a very different institutional judgment for the court.

Abnormal practice is not itself illegal. The problem, however, is that it can remove conditions that courts implicitly rely upon in their development of a presumption of regularity or other judicial forms of deference. When the court defers to a political judgment that lacks minimal characteristics of respectworthiness, the court risks a formalism dangerous to the concept of legality itself. In developing this argument, I offer a reinterpretation of extant, though episodic, judicial practice. In that sense, I seek to uncover and fortify a judicial tendency that to some extent is already with us, if rarely acknowledged as such.

Courts, however, remain inescapably limited players in a norm-based presidency.²³ Structural norms are constitutive of a constitutional "ethos"²⁴ that touches but does not begin or end in a written Article II or judicial precedent. Most presidential norms do not implicate an independent legal claim, at least most of the time. And the more society depends on courts to check norm breaching by the President, the more fragile judicial norms (such as norms of judicial independence or restraint) may become.

²² See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 158–64, 1009–10 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3–8 (1994) (highlighting the importance of institutional choice and proposing a framework for making institutional selections); Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1411–12 (1996).

²³ Cf. ADRIAN VERMEULE, *LAW'S ABNEGATION* 209–19 (2016) (exploring law as a "marginal phenomenon," *id.* at 209, in both a technical and colloquial sense).

²⁴ Cf. Gerald J. Postema, *Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, in BENTHAM'S THEORY OF LAW AND PUBLIC OPINION 7, 19 (Xiaobo Zhai & Michael Quinn eds., 2014).

A long-running debate considers the nature of presidential constraint. Some scholars have emphasized the role of legalism or legal methods in constraining presidential power.²⁵ Others have argued that politics supplies the necessary restraints.²⁶ Neither account is complete on its own. Neither legalism nor the voting public orients presidential practice toward a fact-based decisional process inclusive of multiple perspectives, restricts presidential interference in investigatory decisions, imposes conflict-of-interest rules on the President, fosters compliance with judicial decrees, or provides for executive branch legal review of questions unlikely to come before the courts at all. To the extent the presidency is so constrained, it is through norms. Norms, in turn, rest on politics, legalism, and other institutional conditions.²⁷

The seeming fragility of many of these norms today only raises the stakes for understanding these features of the presidency. This Article seeks to shed some light on the current constitutional and political moment, albeit indirectly, by bringing into view something more enduring about the nature of the presidency, and the conditions that support or undermine it.

The Article makes two contributions. First, it offers a thick description of the norm-based presidency. It shows how presidential norms serve functions at the crux of structural constitutionalism; it illustrates the sorts of substantive commitments that these norms supply and the different decisional arenas where they apply; and it begins to identify conditions that make some norms (relative to others) more or less fragile.

Second, the Article analyzes the interplay between presidential norms and judicial practice. It sketches out a spectrum of judicial approaches, each of which finds occasional (though often implicit) support in the case law. Descriptively, it argues that the norms of the presidency and of the judiciary interact. Prescriptively, it argues that when those presidential norms that underwrite judicial deference collapse, judicial practice appropriately adjusts. In concluding, the Article seeks to open the discussion beyond courts. It begins to analyze the implications of a norm-based presidency for constitutional theory. And it offers a preliminary mapping of the legal, political, and institutional conditions that sustain or erode these unwritten aspects of Article II.

²⁵ See, e.g., Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1692 (2011) (book review) (arguing that legal constraints exist “that have real, if imperfect, traction even on matters of grave importance and during times of heightened strain”); see also Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1411 (2012) (book review) (arguing that “the world of public and political responses to presidential action is filtered through law itself,” such that “[i]n many contexts, no separation between law and public judgment exists”); cf. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87–116 (2010) (arguing that, over the last half century, the presidency has become increasingly unconstrained by legal institutions).

²⁶ See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 4–5 (2010).

²⁷ Cf. JACK GOLDSMITH, *POWER AND CONSTRAINT* (2012) (arguing that the presidency is constrained through a range of institutions, many internal to the executive branch).

I. STRUCTURAL NORMS AS A LENS ON PRESIDENTIAL POWER

If we think about the sorts of functions that a constitution serves in designing the machinery of governance, we might say that core structural functions include (i) insulating certain types of decisions from certain types of actors; (ii) limiting self-dealing or the corruption of government power; (iii) structuring decisionmaking to make it less arbitrary; (iv) allocating authority among the different branches or institutions of government; and (v) structuring the role of politics in governance. Certainly, the Framers understood themselves to be drafting an instrument that speaks to each of these functions. There is a President, chosen through an institution designed in part to restrict direct popular influence on his selection (the Electoral College), and he wields “[t]he executive Power.”²⁸ He has the authority to appoint officers of the United States and to make treaties with the advice and consent of the Senate.²⁹ He has a duty to “take Care that the Laws be faithfully executed.”³⁰ His powers are complemented and constrained by the other branches of government, in which legislative and judicial powers are vested.

Yet these structural provisions leave the authorities and the duties of the presidency largely unspecified.³¹ Judicial precedent on the content of presidential duty is similarly sparse. Though not entirely absent, judicial doctrine has not developed a robust normative framework for presidential governance. The case law, to the extent that it imposes constitutional constraints on presidential power, is famously vague and abstract, leaving the contours of presidential duty — or the normative understandings that govern day-in, day-out presidential behavior — underspecified in core respects.³² Statutes, too, regulate some forms of

²⁸ U.S. CONST. art. II, § 1, cl. 1.

²⁹ See *id.* § 2, cl. 2.

³⁰ *Id.* § 3; see also *id.* § 2, cl. 1 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”).

³¹ Cf. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) (observing that the “simple but delphic terms” of the Take Care Clause have been interpreted by the Court “in the alternative, either as a source of vast presidential power or as a sharp limitation on the powers of both the President and the other branches of government”).

³² Perhaps the most prominent example of judicial regulation, Justice Jackson’s tripartite framework calibrating presidential powers “depending upon their disjunction or conjunction with those of Congress,” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), is just as famously abstract and underdeveloped, see, e.g., Jack Goldsmith, *The Supreme Court, 2014 Term — Comment: Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 116–18 (2015). See also Goldsmith & Manning, *supra* note 31, at 1863–66 (discussing contradictions, ambiguities, and line-drawing difficulties in Take Care Clause cases). For exceptions in which the Supreme Court has expounded on specific duties, see, for example, *United States v. Nixon*, 418 U.S. 683, 703–13 (1974).

presidential behavior some of the time.³³ But these written features of the presidency do not by themselves offer a sufficiently thick network of normative understandings to create a workable government.

Instead, the thick normative infrastructure that the President inhabits is largely derived through norm-based practice. Structural norms, by which I mean the unwritten or informal rules that govern political behavior, serve each of the five structural functions specified above — at times shifting normative understandings of the presidency away from a Founding- or text-based understanding of the office. Structural norms do not emerge as free-floating ideas disconnected from a culture or ethos of law. But they resist neat categorization as legal or nonlegal rules. Much of this norm-based infrastructure exists in a murkier or more intermediate space, informed by but not clearly characterized as the legal.

Attempts to parse those norms with a more legal quality from those that lack it may do more to obfuscate the normative infrastructure of the presidency than to reveal it.³⁴ For structural norms are constitutive of a system of constitutional governance, if by that term we mean something resembling a sociologically and morally acceptable design of government power.³⁵ The implications for constitutional doctrine, constitutional theory, and constitutional discourse are picked up in later Parts. My goal, first, is to excavate the norm-based features of the presidency.

³³ See, e.g., National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified in scattered sections of 5 and 50 U.S.C.); Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561 (current version at 5 U.S.C. §§ 901–912 (2012)) (creating the Executive Office of the President and allowing limited reorganization of the executive branch).

³⁴ For this reason, I resist the labels of “gloss” and “conventions,” which scholars have sometimes used to distinguish legally enforceable norms from extralegal norms. See *infra* notes 301–305 and accompanying text.

³⁵ Of course, the legal or nonlegal quality of a structural norm is not an entirely escapable question. Sometimes an executive branch lawyer is asked “would X be legal,” and the client (perhaps the President himself) desires an answer. See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 317–18 (2017).

But there is also a danger in understanding the normative questions of presidential behavior in strictly legalistic terms, see Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 893–96 (2017); Philip Zelikow, *Legal Policy for a Twilight War*, 30 HOUS. J. INT’L L. 89, 92–95 (2007), and executive branch lawyers have developed their own norms or practices for how to avoid directly answering it — for example through the development of a “duty to defend,” justified by reference to the constitutional structure but without asserting a clearly legal obligation, see, e.g., The Att’y Gen.’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 60 (1980) (“[T]he traditional opinion has been that the Attorney General, in the due performance of his constitutional function as an officer of the United States, must ordinarily defend the Acts of Congress.”); Recommendation that the Dep’t of Justice Not Defend the Constitutionality of Certain Provisions of the Bankr. Amendments and Fed. Judgeship Act of 1984, 8 Op. O.L.C. 183, 193 (1984) (justifying the duty to defend on “sound reasons of policy” related to constitutional design and function); cf. Ashley S. Deeks, *The Obama Administration, International Law, and Executive Minimalism*, 110 AM. J. INT’L L. 646 (2016).

Part I begins by elaborating the concept of structural norms in the context of presidential power.

A. *Defining Structural Norms*

The term “norm” has varied meanings. These meanings range from expected behavioral patterns or regularities (which may or may not be desirable) to rules rooted in political morality (which may or may not have a foothold in current practice).³⁶ As I am using the term, structural norms are a particular category of norms that straddles this sociological-normative divide. Structural norms are expected behavioral patterns — expected by at least some groups (more on this in a moment). And they generate moral reasons for compliance.³⁷ Put differently, structural norms have interdependent sociological and normative effects.³⁸ Sociologically, they regularize conduct or bring presidential behavior in (imperfect) conformity with a rule. Normatively, they provide an actor like the President with a reason (or reasons) to comply with that rule. They

³⁶ See Richard Fallon, What Are “Norms” and “Conventions”? (2018) (unpublished working paper) (on file with author) (proposing a typology of norms including empirical regularities and categorical moral obligations); cf. Jessica M. Nolan, *Social Norms and Their Enforcement*, in THE OXFORD HANDBOOK OF SOCIAL INFLUENCE 147, 148 (Stephen G. Harkins et al. eds., 2017) (discussing “ought” versus “is” norms in the sociological literature).

³⁷ See GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS 11–12 (1984) (defining “constitutional conventions” as the unwritten rules that “political actors ought to feel obliged by, if they have considered the precedents and [moral] reasons correctly,” *id.* at 12 (emphasis omitted)); Fallon, *supra* note 36, at 5–6 (identifying the category of “contingent moral norms” as norms “that owe their status . . . partly to the fact that they are . . . social norms” (or expected behavioral practices) and partly to the fact that they reflect (contingent) moral understandings); see also STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 101 (2018) (“[Norms] are shared codes of conduct” that, though unwritten, “become common knowledge within a particular community . . . accepted, respected, and enforced by its members.”).

The idea that norms or conventions embrace a character of “oughtness,” even as they describe what generally “is,” has long been explored from a range of methodological perspectives. See, e.g., MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 2–5 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954) (distinguishing, as a sociological matter, between behavioral regularity based on nothing more than longstanding usage and conduct “oriented on the part of the actors toward their idea . . . of the existence of a legitimate order,” *id.* at 3 (emphases omitted)); see also EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS (1977) (offering, from a philosophical perspective, a rational reconstruction of why norms emerge); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC’Y REV. 719, 722 (1973) (analyzing from an anthropological perspective the “semi-autonomous social field,” defined by the “processual characteristic . . . that it can generate rules and . . . induce compliance,” even as it is vulnerable to externally generated rules and other forces); *infra* notes 82, 89 (identifying a sampling of political science works).

³⁸ Not all presidential behavior is governed by structural norms. Some of the characteristics of the presidency may reflect empirical regularities, but lack normative reasons for compliance. Until quite recently, for example, Presidents only appointed men to serve as their White House Counsel. See Nolan to Become 1st Female White House Counsel, L.A. TIMES (Aug. 20, 1999), <http://articles.latimes.com/1999/aug/20/news/mn-1943> [<https://perma.cc/4SD9-YQ8Y>]. While this was an unbroken pattern, it was not a structural norm as I have defined it.

may also provide a standard for others to evaluate the President's behavior — to decide whether the President's behavior is legitimate or respectable.³⁹ When others respond disapprovingly to norm breaking, they enforce — and thereby reinforce — the norm.⁴⁰

To develop this idea of structural norms, consider the President's "duty to defend." The norm requires the President to defend a statute against constitutional challenge in court, even if the President concludes the statute is unconstitutional, unless the statute interferes with the President's own constitutional authority.⁴¹ The norm is generally, though not uniformly, obeyed. The norm is also, however, a reason for the President to comply with the practice. But why? Or, put differently, what sorts of reasons do structural norms supply?

B. Moral Reasons to Comply with Social Expectations

One potential reason is that structural norms enable the President to accomplish moral responsibilities inferred from the constitutional structure.⁴² The President's duty to defend might rest on an inference that the judiciary should resolve the President's constitutional disagreement with Congress. The exception for statutes that impinge on the President's constitutional authority might similarly rest on an inference that the President has a duty to guard against congressional aggrandizement.⁴³ Thus, the duty to defend might draw moral justification from constitutional understandings, even if it is not legally mandated or judicially enforceable.

³⁹ See Michelman, *supra* note 3, at 118–28 (evaluating political systems' "respect-worthiness," *id.* at 118).

⁴⁰ See LEVITSKY & ZIBLATT, *supra* note 37, at 102 ("When norms are strong, violations trigger expressions of disapproval, ranging from head-shaking . . . [to] outright ostracism.")

⁴¹ Pursuant to norm-based practice, the general duty to defend the constitutionality of a statute is limited to those circumstances when a reasonable argument can be made in the statute's defense and does not apply (i) when the President concludes that the law misinterprets the President's constitutional authority, or (ii) when defending the statute would require the Department of Justice to urge the Supreme Court to overrule or alter a constitutional precedent. See Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1084–87 (2001) (explaining these "well-recognized" exceptions, *id.* at 1078); see also David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61; Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 49; Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1198–1201 (2012).

⁴² Cf. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 1 (1999) ("Constitutional construction is the method of elaborating constitutional meaning in [the] political realm.")

⁴³ See Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200–01 (1994); Att'y Gen.'s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 56–57 (1980); see also Meltzer, *supra* note 41, at 1199–201.

A different reason to comply with the norm would be a sense of institutional identity.⁴⁴ The norm might instantiate understandings, shared at least among some groups, about what ethics or professionalism requires in how the duties of an office are to be performed.⁴⁵ The duty to defend might rest on an understanding of the institutional responsibility of the Justice Department to build credibility with the courts by making consistent constitutional arguments — an institutional identity that is advanced when Justice Department lawyers defend even those statutes with which the sitting President disagrees.⁴⁶ For this type of reason to apply, the underlying ethical or professional expectations must first take root or matter to the participants in the practice.⁴⁷

A third reason to comply with a norm is that it reflects, and in turn protects, an equilibrium or settlement that is valuable to governance.⁴⁸ The norm might promote a form of either cooperation or coordination between (or within) the branches of government. It might enable participants to engage in reciprocity and build trust.⁴⁹ Preserving the equili-

⁴⁴ Cf. WEBER, *supra* note 37, at 1 (defining “value-rational conduct” as “conduct . . . determined . . . by the conscious faith in the absolute worth of the conduct as such, independent of any aim, and measured by some such standard as ethics”).

⁴⁵ See generally ANDREW SABL, *RULING PASSIONS* (2002) (arguing that different political offices ought to, and do, act in different ways, or pursuant to different understandings of their public duties and responsibilities).

⁴⁶ See Meltzer, *supra* note 41, at 1217–18. See generally DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* (2010) (analyzing organizational reputation, constructed by multiple overlapping audiences, as a source of political power).

⁴⁷ On the related phenomenon of public acceptance of expertise and how it emerges, see, for example, Brian Wynne, *Misunderstood Misunderstandings: Social Identities and Public Uptake of Science*, in *MISUNDERSTANDING SCIENCE? THE PUBLIC RECONSTRUCTION OF SCIENCE AND TECHNOLOGY* 19 (Alan Irwin & Brian Wynne eds., 1996); and Anna Lvovsky, *Queer Expertise: Urban Policing and the Construction of Public Knowledge About Homosexuality, 1920–1970* (May 2015) (unpublished Ph.D. dissertation, Harvard University), <https://dash.harvard.edu/bitstream/handle/117463142/LVOVSKY-DISSERTATION-2015.pdf?sequence=1> [<https://perma.cc/5J8R-VFLQ>].

⁴⁸ See Lucas Issacharoff & Samuel Issacharoff, *Constitutional Implications of the Cost of War*, 83 U. CHI. L. REV. 169, 173–81 (2016); Samuel Issacharoff, *Meriwether Lewis, the Air Force, and the Surge: The Problem of Constitutional Settlement*, 12 LEWIS & CLARK L. REV. 649, 666–69 (2008). For an early articulation of the principle of institutional settlement, see HART & SACKS, *supra* note 22, at 1–9.

⁴⁹ See Elster, *supra* note 2, at 36–44; cf. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 156–83 (1994) (using game theory to explain the emergence of welfare-maximizing norms in the cattle industry); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 546–49 (1998) (synthesizing law and economics literature focused on social norms); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1120–39 (1999) (offering a game-theoretical account of the emergence and change of customary international law).

brium may be a reason to comply with the norm, even if the rule itself does not reflect any first-best assessment of political morality.⁵⁰

The Prisoners' Dilemma game suggests one familiar type of cooperation equilibrium.⁵¹ As Professor Edna Ullmann-Margalit explains, a "PD [Prisoners' Dilemma] norm"⁵² emerges because "the state which is mutually desired by the participants is such that there is a strong temptation for each to deviate from it unilaterally."⁵³ If all deviate, however, the resulting state is "bad for all, jointly as well as severally."⁵⁴ This sort of cooperation equilibrium supplies another potential reason for the President to comply with the duty to defend. Episodes of executive nondefense have weakened the Executive's practical authority to speak for the political branches in court. Congress has responded to such episodes by creating institutions inside the House or Senate that facilitate litigation by those chambers, and it has undertaken efforts to expand legislative standing in court.⁵⁵ Without the norm, the President's own authority to represent the political branches in court would be weakened. The duty to defend thus prevents a "jointly beneficial state of affairs from deteriorating . . . [into a] jointly destructive one."⁵⁶

The duty to defend might also be supported by a coordination equilibrium. The President and his party pursue various legislative reforms, and an important reason is that the policies codified will outlast the current Administration. A President might be motivated to defend statutes passed under prior administrations to support a practice that will protect his own legislative achievements in the future.⁵⁷ Yet the President desires some assurance that his own legislation will be protected. The norm provides some (albeit, not complete) assurance that a future President would choose this strategy as well.⁵⁸ Distrust of the

⁵⁰ See Fallon, *supra* note 36, at 6 (discussing "contingent moral norms" and drawing an analogy to "Rawls's notion of a general moral duty to support reasonably just institutions that [currently] exist").

⁵¹ Cooperation equilibria "emerge when political actors have the occasion to interact an indefinite number of times and are restrained from seeking short-term gains by the fear of retaliation by others." Elster, *supra* note 2, at 39; see also ULLMANN-MARGALIT, *supra* note 37, at 18–73; Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 CAMBRIDGE L.J. 149, 170 (2005); Vermeule, *Conventions*, *supra* note 2, at 1187.

⁵² ULLMANN-MARGALIT, *supra* note 37, at 22.

⁵³ *Id.* at 9.

⁵⁴ *Id.*

⁵⁵ See Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 628–30 (2014).

⁵⁶ ULLMANN-MARGALIT, *supra* note 37, at 22.

⁵⁷ Similar arguments have been made in connection with judicial review and judicial supremacy. See, e.g., KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 27 (2007); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 427–28 (2005).

⁵⁸ An analogy might be drawn to the Assurance game, although that game imagines simultaneous play and the argument in the text is about sequential moves. In an Assurance game, the players prefer to coordinate around strategy A over strategy B. But because strategy A is the riskier

opposing party and its willingness to conform to the norm, however, diminishes the force of this type of reason. In this sense, the reasons that norms supply cannot be fully disentangled from political conditions such as polarization.⁵⁹

As the duty to defend example suggests, any one structural norm can supply multiple reasons for the President to comply. These reasons, though conceptually distinct, are not disconnected.⁶⁰ A constitutional inference, over time, can help to generate a specific equilibrium.⁶¹ An equilibrium, over time, can give rise to a shared sense of institutional integrity. Indeed, structural norms may be less fragile when they are grounded in multiple reasons for compliance.

That a structural norm supplies multiple reasons to comply does not mean that one (or some combination) of these reasons will prevail in every instance.⁶² While there are myriad examples of Presidents defending statutes with which they disagree, and of attorneys general elaborating the norm-based duty to defend, there are also important departures.⁶³ President Obama sparked controversy when he decided, in 2011, to no longer defend section 3 of the Defense of Marriage Act⁶⁴ (DOMA). Though the duty to defend was not outcome determinative in this instance, it certainly operated as a constraint.⁶⁵ Obama had campaigned on repealing the statute, which he called “abhorrent,” but he

strategy, each needs some assurance that the other will choose this option as well. See Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 220–22 (2009) (explaining the Assurance or Stag Hunt game); see also Russell Hardin, *Why a Constitution?*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 100, 101–02 (Bernard Grofman & Donald Wittman eds., 1989) (arguing that written constitutions emerge as a result of coordination interactions).

⁵⁹ Mixed-motive games, or conditions that involve both coordination and distributional conflict, help to explain norm-based practice as well. For a discussion of the Battle of the Sexes as a basis for conventions, see Vermeule, *Conventions*, *supra* note 2, at 1187.

⁶⁰ See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1115 (2008) (“I doubt that law could exist in the absence of anyone having a normative commitment to obeying it. . . . But once solutions to coordination problems have emerged . . . equilibria may generate expectations and reliance interests, rooted in an ideal of the rule of law, that judges and other public officials should regard themselves as morally obliged to honor.”).

⁶¹ See Vermeule, *Conventions*, *supra* note 2, at 1191–92.

⁶² A norm does not require uniform compliance but rather “the ‘orientation’ of an action toward [it].” WEBER, *supra* note 37, at 13.

⁶³ For a discussion of the historical practice, see Meltzer, *supra* note 41, at 1198–208. See also Johnsen, *supra* note 41, at 54–58; Waxman, *supra* note 41, at 1079–88.

⁶⁴ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2012)); see Letter from Eric H. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter Holder Letter], <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/2E4Y-ABYH>].

⁶⁵ Cf. Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1122 (2013) (“[V]iolations of the law do not necessarily show that law has no influence — it may just be that, in certain cases, the legal constraint was outweighed by other considerations.”).

spent his first years in office defending it.⁶⁶ New cases filed in circuits that had not yet resolved the standard of judicial scrutiny forced the President to decide whether he could reasonably advocate for rational basis review or defend the statute under a more stringent standard of scrutiny.⁶⁷ The question prompted careful review, including a written recommendation from the Attorney General, on whether nondefense was acceptable under these circumstances in light of the norm.⁶⁸

President Obama's ultimate decision to stop defending DOMA was publicly criticized by some as an abdication of presidential duty, even a "constitutional outrage."⁶⁹ Though current and former participants in the practice, and a wider community of legal and political elites, generally agreed that the presidential norm exists, they debated whether Obama's decision violated it. Some argued that the President's decision breached the long-entrenched rule, while others suggested that the decision fit within a rare exception for civil rights protections supported by past practice.⁷⁰ As the duty to defend suggests, structural norms often consist of a widely shared core understanding, but a more contested periphery — even among participants.⁷¹ It also shows that structural norms sometimes compete with countervailing moral, political, and legal or quasi-legal considerations.⁷²

⁶⁶ See Dahlia Lithwick, *Indefensible*, SLATE (Feb. 23, 2011, 6:50 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/02/indefensible.html [<https://perma.cc/KQV7-W2K2>].

⁶⁷ See Holder Letter, *supra* note 64 ("[T]he legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships — precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.").

⁶⁸ See *id.*

⁶⁹ Press Release, Steve King, U.S. Representative, King: Congress Must Defend DOMA and Defund DOJ (Mar. 10, 2011), <https://steveking.house.gov/media-center/press-releases/king-congress-must-defend-doma-and-defund-doj> [<https://perma.cc/4HCQ-ZUSR>]; see also *Huelskamp and 43 Colleagues Send Letter Expressing Disapproval of Refusal to Defend DOMA*, SALINA POST (Mar. 18, 2011), <http://salinapost.com/2011/03/18/huelskamp-and-43-colleagues-send-letter-expressing-disapproval-of-refusal-to-defend-doma/> [<https://perma.cc/4D6A-28HX>].

⁷⁰ See Holder Letter, *supra* note 64 (recognizing the Justice Department's "longstanding practice" but arguing that "[t]his is the rare case where the proper course is to forgo the defense of the statute"). Compare, e.g., Meltzer, *supra* note 41, at 1189–90, with, e.g., Dawn Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather than the Defense of Marriage Act*, 81 *FORDHAM L. REV.* 599, 615–18 (2012).

⁷¹ See Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 88 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

⁷² Cf. Bradley & Morrison, *supra* note 65, at 1102 (identifying similar dynamic with respect to legal constraints); Pildes, *supra* note 25, at 1410–11 (similar).

C. Group-Relative and Normatively Provisional

As mentioned at the outset, norms are group-relative. That is, the behavioral regularity comes to be expected and desired by some group.⁷³ With practice-derived norms, that group or interpretive community is, at least initially, the network of actors that make up the institutional presidency. Other groups, however, observe the practice (or departures from it), and their reactions can either undermine or reinforce the norm, at least sociologically. Structural norms may be more robust, then, when they come to be expected and desired by pluralistic communities or potential norm enforcers.⁷⁴

Structural norms are also provisional — both in the sense that other norms might have realized the same constitutional values just as well (or better), and in the sense that constitutional values might themselves change as the nature of American governance, or the distinctive features of the polity, develops. While our constitutional system developed an institutional reliance on the Executive to defend the constitutionality of statutes in court, for example, this duty is not an essential feature of government, even holding some commitment to judicial review constant. A different norm might instead have developed, and other institutions might likewise have adjusted (perhaps enhancing Congress's authority to defend the constitutionality of statutes over presidential objection). Meanwhile, the normative value of judicial review (in those circumstances when Congress and the President disagree as to a statute's constitutionality) might itself be augmented by the growing powers of the presidency or by the rise of a system of government rooted in statutes.⁷⁵ Though any particular structural norm is morally contingent, however, the existence of structural norms is obligatory at a systemic level: a constitutional democracy depends on structural norms to function.⁷⁶

⁷³ Cf. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006) (arguing that a group-relative understanding of social norms be extended to law itself).

⁷⁴ By norm enforcement, I mean simply that violations of the norm are sanctioned in some way. These sanctions can take different forms, *see, e.g.*, Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 270–72, 283 (2011), and norm enforcement can be more or less “vigorous[.]” Azari & Smith, *supra* note 2, at 40.

⁷⁵ *See* WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES* (2010). And, of course, the normative value of judicial review might itself be group-relative and contested, as longstanding debates about departmentalism, and its desirable scope, suggest.

⁷⁶ *See* David Copp, *The Idea of a Legitimate State*, 28 PHIL. & PUB. AFF. 3, 38 (1999) (“[S]ocieties need to have shared moral norms, and . . . a society's basic needs can better be served by the currency of some such norms than the currency of others.”); *see also* Michelman, *supra* note 3, at 107–09 (discussing the role constitutional norms play in mediating political decisions); Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship->

D. Identification and Pathways of Constraint

To identify a norm, political scientists have emphasized the presence of “sanctions” (which take various forms) when a political actor deviates from the expected behavior.⁷⁷ Structural norms also can be identified by examining the instruments or institutions that develop to *reinforce* the norm *ex ante* (that is, before it is breached). Administrative structures and procedures, professional practices, or congressional processes will sometimes develop to protect a particular form of presidential behavior.⁷⁸ Whether or not the original conduct had normative content, these institutional supports can imbue it with normative content over time.⁷⁹ Looking for these institutional reinforcements can ameliorate to a point, though perhaps not eliminate entirely, the “observational equivalence” between behavioral regularities on the one hand and conduct that has developed normative force over time.⁸⁰ These institutional reinforcements also bring into view a particular pathway of constraint.

Structural norms constrain behavior in different ways. The President himself might accept the norm (expressly, tacitly, or even subconsciously).⁸¹ Or the President might seek to avoid the disapproval or sanction of other actors who accept it.⁸² But structural norms also can constrain a President who does not himself accept the norm and is not concerned with others’ disapproval, because the institutions that develop inside the executive branch (such as administrative protocols or intra-agency offices) make it more difficult for the President to deviate

proposal/ [https://perma.cc/LYJ9-7ZBH] (“[T]he big-C Constitution does its work only because the small-c constitution creates conditions in which that work is possible.”).

⁷⁷ See, e.g., Azari & Smith, *supra* note 2, at 40 (collecting literature).

⁷⁸ See GOLDSMITH, *supra* note 27, at xi–xvi (describing the development of a range of institutions operating as a check on the modern national security presidency); see also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 36–40 (2004).

⁷⁹ With respect to the duty to defend, for example, Congress has passed a statute requiring the Attorney General to notify it when the administration declines to defend the constitutionality of a statute in court. See 28 U.S.C. § 530D (2012).

⁸⁰ See, e.g., Bradley & Morrison, *supra* note 65, at 1114 (explaining the problem of observational equivalence in the context of debates over legal constraint); cf. WEBER, *supra* note 37, at 2–5 (observing that custom can develop into convention or “beg[et] a feeling of oughtness,” *id.* at 3, but arguing that the “transitions [in] orientation . . . are indeterminate in actual life,” *id.* at 4).

⁸¹ The mechanisms of norm internalization are complex and contested. For explorations in the international law scholarship, see, for example, SLAUGHTER, *supra* note 78, at 258–60, which discusses mechanisms of norm socialization; Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 638–54 (2004); and Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204–05 (1996). See also Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1960–62 (2002).

⁸² This mechanism of constraint is emphasized in a range of disciplines. In political science, see, for example, Azari & Smith, *supra* note 2, at 40, 48–49; and Rohde, *supra* note 2. In administrative law, see Vermeule, *Conventions*, *supra* note 2, at 1189–94. And with respect to courts, see Fallon, *supra* note 3, at 1794–801.

from the rule.⁸³ This is in part because prophylactic measures limit the opportunities for breach, in part because participants in the practice contribute to a narrative or shared interpretation that reinforces the norm,⁸⁴ and in part because the President depends on others to implement his decisions and *they* experience the norm as a constraint on their conduct. These participants in the practice, many of whom did not arrive with this President and will not leave with him, resemble the close-knit communities that social-norms scholars have long studied.⁸⁵ In this way, reinforcement institutions can help us to understand why some structural norms are relatively more resilient than others.⁸⁶

As these institutional supports suggest, structural norms tend to be preserved — and norm breaches sanctioned — not in the main through electoral politics, but through the presidency’s institutional surrounding.⁸⁷ The norms of presidential behavior will be more salient to elite political, professional, and social networks than to most voters most of the time.⁸⁸ That said, dramatic policy or moral failures, such as Watergate, can intermittently focus public attention in ways that work either to entrench existing norms or to create the political conditions that help a new norm to emerge.⁸⁹

⁸³ See GOLDSMITH, *supra* note 27, at 95–108 (describing the role of CIA and Justice Department Inspectors General); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1118–23 (2016) (describing the creation and oversight role of the Privacy and Civil Liberties Oversight Board); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 54–55 (2014) (describing intra-agency offices designed to further some “constraining or even conflicting value,” *id.* at 54, the agency might not otherwise pursue); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1027–28 (2013).

⁸⁴ See generally Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

⁸⁵ See, e.g., ELLICKSON, *supra* note 49, at 167 & n.1.

⁸⁶ Cf. SLAUGHTER, *supra* note 78, at 171–95 (describing how government networks induce compliance, cooperation, information sharing, and convergent policies); Koh, *supra* note 81, at 204–05.

⁸⁷ Cf. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 391 (2016) (terming a “complex ecosystem of intrabranched and entirely external actors” the “thick political surround”).

⁸⁸ Cf. CHARLES TILLY, *DEMOCRACY* 39 (2007) (analyzing the causes of de-democratization across multiple regimes around the world and arguing that “rapid de-democratization resulted not from popular disaffection with democracy but chiefly from elite defection”).

⁸⁹ Political scientists have long explored the structural and political conditions that facilitate or erode democratic norms in presidential systems. See, e.g., Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990); see also Robert A. Dahl, *Thinking About Democratic Constitutions: Conclusions from Democratic Experience*, in NOMOS XXXVIII: POLITICAL ORDER 175, 178 (Ian Shapiro & Russell Hardin eds., 1996). Much of that work has focused on developing democracies, but it increasingly explores the U.S. context as well. See, e.g., Robert C. Lieberman et al., *Trumpism and American Democracy: History, Comparison, and the Predicament of Liberal Democracy in the United States* (Aug. 29, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3028990> [<https://perma.cc/S8B7-HXR4>].

Polarization, meanwhile, focuses public attention on norm breaching in a potentially corrosive way. Political elites become quick to assert, for partisan gain, that the other side has breached norms of constitutional governance.⁹⁰ This fuels the perception among the public that norms are less resilient, and perhaps less important, and also that “norms talk” is merely a chip in partisan fights.⁹¹

Norm-based practice is thus supported or eroded by legal, social, political, and institutional conditions — an interconnected constitutional order that the President inhabits and can work to influence, but that the President does not himself control.⁹²

II. THE NORM-BASED PRESIDENCY

To develop this account of the norm-based presidency, this Part shows how structural norms serve functions at the crux of structural constitutionalism. Those functions include restraining politics by insulating certain types of decisions from the President; imposing constraints on self-dealing or the corruption of government power; structuring decisionmaking to promote epistemic values or otherwise make governance less arbitrary; and coordinating or allocating authority among the different branches and institutions of government. This Part excavates the sorts of substantive commitments that structural norms supply and decisional arenas where they apply; the institutions that develop over time to reinforce these norms; and conditions that appear to make some structural norms relatively more resilient than others.⁹³

⁹⁰ See Persily, *supra* note 13, at 4–10; see also Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1751 (2016).

⁹¹ Such norms-related discourse is both a symptom and a potential contributor to “affective polarization.” Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405, 407 (2012). In contrast to policy-based division, affective polarization considers “the extent to which partisans view each other as a disliked out-group.” *Id.* at 406; see also *id.* at 407 (“Democrats and Republicans not only increasingly dislike the opposing party, but also impute negative traits to the rank-and-file of the out-party.”); Patrick R. Miller & Pamela Johnston Conover, *Red and Blue States of Mind: Partisan Hostility and Voting in the United States*, 68 POL. RES. Q. 225, 235 (2015) (“Democrats and Republicans with strong identities perceive the opposing party as rivals who are fundamentally immoral and cannot be trusted; likewise, they are enraged at each other for ‘destroying American democracy.’”).

⁹² See KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 14–15 (2004) (defining “political order” as “a constellation of rules, institutions, practices, and ideas that hang together over time [as] a bundle of patterns,” *id.* at 14, and using this concept to clarify a “constitutional order,” but emphasizing that, upon closer scrutiny, there is not one but multiple orders each with its own “limits, contingencies, varieties, and incongruities,” *id.* at 15 (emphasis omitted)).

⁹³ Cf. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 166 (2015) (“[A]ny theory of power allocation must emerge from institutional and historical context.”).

A. *Insulation Norms: Investigatory Independence*

One type of structural norm insulates certain forms of executive branch decisionmaking from the President.⁹⁴ Insulation norms can be further decomposed into subtypes. They might limit the President's authority to remove a particular officer of the executive branch, even though that officer enjoys no formal or legal protections against removal.⁹⁵ They might limit the President's directive authority over certain types of decisions. Or they might create other forms of insulation, such as limiting presidential control of communications between a particular agency and Congress.⁹⁶ Such norms might fill gaps or silences in written constitutional and statutory text, or even develop in ways that push against prevailing understandings of the written text.⁹⁷ Indeed, norms might insulate certain officers or decisions that statutes could not regulate under prevailing understandings of the written Article II.

To illustrate, consider the norm of investigatory independence from the President. Although many understand law enforcement to be a paradigmatic executive function,⁹⁸ there is today a set of structural norms that insulate some types of prosecutorial and investigatory decisionmaking from the President. These rules constrain the President's choice of FBI Director and limit the authority of the President to fire the FBI Director without cause. The norm also prohibits presidential direction in individual investigatory matters. These unwritten rules coexist with the President's authority, if not responsibility, to set law enforcement

⁹⁴ Insulation norms might be understood as an example of what political scientists Steven Levitsky and Daniel Ziblatt call "institutional forbearance" norms, relevant to the President, Congress, and the courts. LEVITSKY & ZIBLATT, *supra* note 37, at 106.

⁹⁵ See Vermeule, *Third Bound*, *supra* note 2, at 1950–52.

⁹⁶ See, e.g., Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 316 (2015) (describing an understanding between the Privacy and Civil Liberties Oversight Board and White House officials that the Board need not obtain White House clearance on its reports to Congress).

⁹⁷ Cf. Strauss, *supra* note 12, at 3 (describing a series of "anomalies" or tensions between the written constitutional text and the constitutional meaning derived from judicial precedent).

⁹⁸ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 688–97 (1988); see also *id.* at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."); STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 377–78, 402–03 (2008). As a claim about constitutional history, this understanding of the law enforcement function is contested. Compare, e.g., William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 490–94 (1989) (disputing the argument that criminal prosecution is "purely 'executive' in character," *id.* at 491, and arguing that, in the early years of the republic, the prosecuting attorney was regarded as a judicial officer, *id.* at 493–94), with Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 526 (2005) (arguing that "[h]istorical claims . . . about the insulation of federal prosecution from presidential control are largely wrong").

policy and priorities, and also to exercise law enforcement discretion through mechanisms such as clemency and pardon.⁹⁹

Investigatory independence was not always a presidential practice.¹⁰⁰ When the organizational structure that would become the FBI was first created, it was pursuant to a secret presidential directive,¹⁰¹ paid for with discretionary funds,¹⁰² and designed to be uniquely responsive to the President and his perceived intelligence and investigatory needs. In the early- through mid-twentieth century, the FBI Director regularly pursued the President's policy priorities and political enemies,¹⁰³ operating pursuant to secret authorities granted to the FBI by the President himself through confidential and closely held directives, some of which were never formally documented.¹⁰⁴ Director J. Edgar Hoover, who presided over the burgeoning investigatory bureau for nearly half a century,¹⁰⁵ catered to the appetites of every President from FDR through Nixon for "intelligence and innuendo" about citizens and groups opposed to the President's policies or politics.¹⁰⁶ Hoover was in

⁹⁹ See generally Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802 (2015). It might be useful, then, to think of this family of norms as "unbundling" the President's law enforcement functions and insulating some of them from the President himself. See Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010) (arguing that policy responsibilities can be separated (unbundled) or combined and analyzing the implications of this constitutional design choice for constitutional values, such as accountability and energetic administration); see also Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008).

¹⁰⁰ See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1050–54 (2013) (describing early presidential practice, including an Attorney General opinion written by (later Chief Justice) Roger B. Taney in 1831, concluding that the President has the power to direct the federal district attorney to discontinue a particular prosecution); Prakash, *supra* note 98, at 552–65 (documenting presidential direction of individual law enforcement decisions in the new republic, including President John Adams's control over prosecutions against political enemies under the Sedition Act of 1798).

¹⁰¹ Attorney General Order of July 26, 1908, in *THE FBI: A CENTENNIAL HISTORY*, 1908–2008, at 3 (2008); see RONALD KESSLER, *THE BUREAU: THE SECRET HISTORY OF THE FBI* 9 (2002); TIM WEINER, *ENEMIES: A HISTORY OF THE FBI 10–12* (2012).

¹⁰² See WEINER, *supra* note 101, at 11.

¹⁰³ See *id.* at 89–90; see also CURT GENTRY, *J. EDGAR HOOVER: THE MAN AND THE SECRETS* 237 (1991) ("During the 1940 presidential campaign, the FBI conducted more than two hundred full or partial investigations of Roosevelt's political enemies."); KESSLER, *supra* note 101, at 71 ("Within a month [of President Truman's inauguration], the White House was asking for specific information about political opponents, and the FBI was conducting secret investigations for Truman.")

¹⁰⁴ See WEINER, *supra* note 101, at 88 (describing President Franklin D. Roosevelt's order that Hoover continue wiretapping, notwithstanding *Nardone v. United States*, 302 U.S. 379 (1937)).

¹⁰⁵ Hoover served as FBI Director from 1924 to 1972. See *THE FBI: A CENTENNIAL HISTORY*, 1908–2008, *supra* note 101, at 118.

¹⁰⁶ WEINER, *supra* note 101, at 89 (discussing Hoover's relationship with President Franklin D. Roosevelt); see also KESSLER, *supra* note 101, at 70–71 (discussing Hoover's relationship with President Truman).

regular contact with most of the Presidents he served, engaging, for example, in twice-a-day phone calls with Vice President Nixon through a direct line installed in the FBI Director's home.¹⁰⁷ By trading in secrets and intrigue, and wielding expansive and unchecked surveillance powers, Hoover developed a form of independence even from the President himself. But it was a relationship structured around the Director's pursuit, furtively, of individual Presidents' most sensitive political and personal agendas.

Presidential practice was pressed to conform with still-nascent expectations for a more insulated investigatory function in response to a confluence of political, legal, and sociological developments. Watergate and the Saturday Night Massacre reverberated through Washington, and the national public,¹⁰⁸ just as the full scope of the FBI's domestic COINTELPRO programs were coming into public view.¹⁰⁹ These developments prompted proposed legislation, which did not ultimately pass, that would have converted the FBI into an independent agency.¹¹⁰ Changing Supreme Court jurisprudence on wiretapping shaped the legal context in which these political debates unfolded.¹¹¹ And the police-professionalization movement was just taking hold.¹¹² Presidents Ford and Carter each responded to the felt imperative to rebuild trust in the Justice Department and to commit to the independence of the nation's law enforcement establishment.¹¹³

Presidents came to recognize that they could no longer expect other players in the game (including both Congress and law enforcement ac-

¹⁰⁷ WEINER, *supra* note 101, at 179; *see also id.* at 239–48 (discussing Hoover's frequent contact with President Lyndon B. Johnson).

¹⁰⁸ *See* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 361–62 (1997) (describing a “firestorm” of public opinion in response to what the press immediately dubbed “The Saturday Night Massacre,” *id.* at 361, and analogizing this “explosion of public sentiment” to public responses to Pearl Harbor or President Kennedy's assassination, *id.* at 362 (internal quotation marks omitted)).

¹⁰⁹ *See, e.g.,* Victor S. Navasky, *Loyalty to a President or Loyalty to the Law?*, N.Y. TIMES (May 5, 1974), <https://nyti.ms/2GkPnlr> [<https://perma.cc/N39C-GJLJ>] (describing contemporary proposals for FBI reform in light of Watergate and COINTELPRO).

¹¹⁰ *See* 119 CONG. REC. 11,350 (1973) (statement of Sen. Robert C. Byrd) (introducing bill to establish the FBI as an independent agency and emphasizing that “[t]he key issue . . . [is] to assure that the agency will never become the political arm of any administration”).

¹¹¹ *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972); *see also* WEINER, *supra* note 101, at 311–14.

¹¹² *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1858–62 (2015); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2003–15 (2017); *cf.* Kenneth Culp Davis, *Observation, An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 703–04 (1974) (describing police departments in 1974 as “among our most backward agencies,” *id.* at 703, and proposing reforms).

¹¹³ *See* NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE*, 1789–1990, at 140–65 (1992) (documenting the “[n]eutral type” attorneys general chosen by Presidents Ford and Carter, and each President's public efforts to demonstrate respect for the independence of the Justice Department); *see also* Renan, *supra* note 35, at 817–27.

tors) to accept a strategy of presidential control over investigatory decisions. An expanding law enforcement function was itself contingent on a more circumscribed presidential role in law enforcement decisions. So too, understandings of professional ethics or institutional identity altered the extent to which law enforcement officials were willing to accept presidential preference as a reason to conduct a law enforcement investigation in a particular way, or against a particular target. And Presidents embraced a “small-c” constitutional understanding of their role that recognized limits on their power to control the investigatory function. The investigatory-independence norm thus suggests the interaction of a new coordination equilibrium, changing precepts of political morality or law enforcement ethics, and legal or quasi-legal developments. It has been tested, but repeatedly reinforced, under both Democratic and Republican administrations.

Reinforcement. The rule that the President cannot direct specific investigatory decisions is reinforced through several mechanisms, including bureaucracy, congressional oversight, leaks, and media attention. A significant form of bureaucratic reinforcement has been prophylactic policies limiting contacts between White House officials and the Justice Department, including the FBI. Beginning in the Carter Administration under Attorney General Griffin Bell, attorneys general have issued memoranda restricting these communications.¹¹⁴ The independence of the FBI Director has been reinforced as well through legislation establishing Senate confirmation and a ten-year term limit.¹¹⁵ Neither members of Congress nor executive branch lawyers understood

¹¹⁴ See Griffin B. Bell, Att’y Gen., Address Before Department of Justice Lawyers (Sept. 6, 1978), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf> [<https://perma.cc/4VEH-B2MC>]. For a discussion of Attorney General Bell’s approach to Justice Department independence in the context of executive branch legal review, see Renan, *supra* note 35, at 818–25. See also Memorandum from Benjamin R. Civiletti, Att’y Gen., to Heads of Offices, Bds., Bureaus, and Divs. (Oct. 18, 1979), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-18-1979.pdf> [<https://perma.cc/364L-RHJS>] (regarding “Communication from the White House and Congress”); Letter from Janet Reno, Att’y Gen., to Lloyd N. Cutler, Special Counsel to the President (Sept. 29, 1994), in S. REP. NO. 110-203, at 13 (2007); Memorandum from John Ashcroft, Att’y Gen., to Heads of Dep’t Components and U.S. Att’ys (Apr. 15, 2002), in S. REP. NO. 110-203, at 14 (2007) [hereinafter Ashcroft Memo] (regarding “Department of Justice Communications with the White House”); Memorandum from Alberto Gonzales, Att’y Gen., to Heads of Dep’t Components and U.S. Att’ys (May 4, 2006), in S. REP. NO. 110-203, at 17 (2007) (regarding “Communications with the Executive Office of the President”); Memorandum from Michael B. Mukasey, Att’y Gen., to Heads of Dep’t Components and U.S. Att’ys (Dec. 19, 2007) [hereinafter Mukasey Memo] (regarding “Communications with the White House”); Memorandum from Eric Holder, Att’y Gen., to Heads of Dep’t Components and All U.S. Att’ys (May 11, 2009) [hereinafter Holder Memo] (regarding “Communications with the White House and Congress”). Attorneys General’s White House Contacts Policies have varied greatly in their stringency and coverage. I discuss the repercussions of the considerably more lax policies adopted by Attorneys General Ashcroft and Gonzales *infra* in notes 126–131 and accompanying text.

¹¹⁵ Crime Control Act of 1976, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427 (codified as amended at 28 U.S.C. § 532 (2012)).

the ten-year term to create for-cause removal protection from the President as a matter of formal law.¹¹⁶ But debates over the bill in Congress set an expectation that the ten-year term would work informally to protect the independence of the director.¹¹⁷ Congress has further reinforced this expectation through the confirmation process of each director since Hoover.¹¹⁸ Finally, professional networks and institutional culture inside the Justice Department and the FBI have reinforced the norm, including through momentous episodes under both Republican and Democratic administrations where the FBI found itself in the role of investigating the President and his White House staff.¹¹⁹

The norm has been tested and, in the process, further entrenched by publicized breaches, understood as such across different interpretive

¹¹⁶ See S. REP. NO. 93-1213, at 6 (1974) (“The bill does not place any limit on the formal power of the President to remove the FBI Director from office . . . [which] may well [be an] illimitable constitutional power [of the President] . . .”). Indeed, the Office of Legal Counsel (OLC) has suggested that such removal protection would raise “serious constitutional question[s].” See *Constitutionality of Legislation Extending the Term of the FBI Director*, 35 Op. O.L.C., 2011 WL 2566125, at *3 (June 20, 2011); see also Memorandum from Daniel L. Koffsky, Acting Assistant Att’y Gen., Office of Legal Counsel, to Stuart M. Gerson, Acting Att’y Gen. (Jan. 26, 1993) (regarding “Removal of the Director of the Federal Bureau of Investigation”).

¹¹⁷ See S. REP. NO. 93-1213, at 6 (suggesting that the term “would, as a practical matter, preclude a President from arbitrarily naming a new FBI Director for political reasons without showing good reasons for dismissal of his predecessor since the chances for confirmation by the Senate of a new nominee would be remote”).

¹¹⁸ The first nominee after Hoover’s retirement was Louis Patrick Gray, acting director of the FBI during the Watergate scandal. At his confirmation hearing, Gray faced pointed questions about his conduct during the Watergate investigation and his relationship with John Dean, White House Counsel. See *Nomination of Louis Patrick Gray III, of Connecticut, to Be Director, Federal Bureau of Investigation: Hearings Before the S. Comm. on the Judiciary*, 93d Cong. 55–75 (1973) (questions of Sen. Philip Hart). After the details of Watergate emerged, President Nixon withdrew his nomination. The Senate Judiciary Committee used Clarence Kelley’s hearing — and that of his successor William Webster — to refine their expectations of the director, questioning both men on their conceptions of independence. See *Nomination of Clarence M. Kelley, of Missouri, to Be Director of the Federal Bureau of Investigation: Hearings Before the S. Comm. on the Judiciary*, 93d Cong. 95 (1973) (questions of Sen. Robert C. Byrd); *Nomination of William H. Webster, of Missouri, to Be Director of the Federal Bureau of Investigation: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 18 (1978) (questions of Chairman James Eastland). By the time that William Sessions and Louis Freeh were nominated, independence was no longer a question; it was a firm requirement. See *Nomination of William S. Sessions to Be Director of the FBI: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 2–3 (1987) (opening statement of Chairman Joseph R. Biden, Jr.); *Nomination of Louis J. Freeh to Be Director of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 3 (1993) (statement of Sen. Orrin G. Hatch). At Robert Mueller’s hearing, the Committee began to question whether the Attorney General should have more control over the FBI, though the FBI’s political independence remained a shared express commitment. See *Confirmation Hearing on the Nomination of Robert S. Mueller, III to Be Director of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 3, 5 (2001) (statement of Chairman Patrick J. Leahy); *id.* at 19 (statement of Sen. Charles E. Grassley).

¹¹⁹ See Tim Weiner, *How Donald Trump Misunderstood the FBI*, N.Y. TIMES MAG. (June 27, 2017), <https://nyti.ms/2rX8ef9> [<https://perma.cc/LM29-5YCV>].

communities, and sanctioned by pluralist enforcers. White House officials under President Clinton, for example, prompted controversy, a public rebuke by the Attorney General, and formal reprimands resulting from an internal review when they violated the White House Contacts Policy and exerted other forms of pressure on the FBI in connection with a White House Travel Office investigation.¹²⁰ President Clinton himself repeatedly clashed with FBI Director Louis J. Freeh, a Republican and former U.S. district court judge unanimously confirmed to replace William Sessions, whom Clinton fired for abuse of office.¹²¹ Clinton and Freeh's relationship was described as "downright rancid."¹²² The President saw Freeh as running a "deeply politicized agency . . . that often was overtly antagonistic" to the President, and Freeh regarded Clinton as an "untrustworthy character, whose scandals dishonored the presidency."¹²³ Tensions mounted when the President discovered, through an article in the *Washington Post*, that the FBI was investigating illicit contributions from China to his reelection campaign, and that members of Congress but not the President had been briefed on the matter.¹²⁴ Yet the investigatory-independence norm appears to have constrained Clinton, at least for fear of political blowback if he fired Freeh or sought to control the agency's investigatory decisions.¹²⁵

When President George W. Bush came to office, his first Attorney General, John Ashcroft, issued a memorandum weakening the White House Contacts Policy that had been in place under President Clinton.¹²⁶ Bush also fired, during the middle of his second term, a

¹²⁰ See Ann Devroy & Michael Isikoff, *Clinton Staff Went Past Reno to FBI*, WASH. POST (May 25, 1993), <https://wapo.st/2E1Skp1> [<https://perma.cc/K8KV-DA8M>]; Thomas L. Friedman, *White House Rebukes 4 in Travel Office Shake-Up*, N.Y. TIMES (July 3, 1993), <https://nyti.ms/2utVQcc> [<https://perma.cc/HDR6-KVNZ>].

¹²¹ See *Senate Confirms Freeh as FBI Director*, L.A. TIMES (Aug. 7, 1993), http://articles.latimes.com/1993-08-07/news/mn-21355_1_senate-confirms-freeh-as-fbi-director [<https://perma.cc/8WDS-8QXR>]; David Johnston, *Defiant F.B.I. Chief Removed from Job by the President*, N.Y. TIMES (July 20, 1993), <https://nyti.ms/2pNISAC> [<https://perma.cc/5H4A-CSJJ>].

¹²² John F. Harris & David A. Vise, *With Freeh, Mistrust Was Mutual*, WASH. POST (Jan. 10, 2001), <https://wapo.st/2GCax8k> [<https://perma.cc/S6YE-B4VA>].

¹²³ *Id.*

¹²⁴ See JOHN F. HARRIS, *THE SURVIVOR: BILL CLINTON IN THE WHITE HOUSE* 274–77 (2005). Their relationship had already unraveled in response to what became known as "Filegate" — disclosures that a midlevel White House aide had improperly collected hundreds of FBI files at the White House, many of them of prominent Republicans. The President told reporters this was a "completely honest bureaucratic snafu," and the independent counsel ultimately agreed that there was no illegality, but Freeh at the time of the disclosures accused the White House of "victimiz[ing]" the FBI. See *id.* at 278–79; see also Harris & Vise, *supra* note 122 (quoting a former Clinton aide as saying that the Clinton-Freeh relationship "went nuclear" at this point).

¹²⁵ See Harris & Vise, *supra* note 122; see also HARRIS, *supra* note 124, at 280.

¹²⁶ See Ashcroft Memo, *supra* note 114.

group of U.S. Attorneys that his political advisors determined were pursuing cases that did not advance the President's interests.¹²⁷ The political firestorm that followed culminated in the resignation of Bush's second Attorney General, Alberto Gonzales.¹²⁸ Gonzales himself was already beleaguered by this point. Yet the firing — and, more generally, the response to it from a range of political, professional, and civil society actors — had the effect of reinforcing the normative expectations of investigatory independence. Congress held multiple hearings and considered legislation that would have codified restrictions on contacts between the White House and the Justice Department.¹²⁹ And the Justice Department's internal Office of Professional Responsibility (OPR) and Office of the Inspector General (OIG) conducted a series of administrative investigations finding that administration lawyers had breached professional obligations to protect the independence and integrity of the Justice Department and of the law enforcement function.¹³⁰ Bush's next Attorney General, Michael Mukasey, confronted repeated questioning from members of Congress about the Justice Department's White House Contacts Policy.¹³¹ He committed to and, promptly upon his confirmation, did issue detailed procedures restricting contacts between the White House and the Justice Department¹³² — procedures that the Obama Administration would largely adopt.¹³³

¹²⁷ See U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 144, 356–58 (2008), <https://oig.justice.gov/special/so809a/final.pdf> [<https://perma.cc/85WX-F3XZ>].

¹²⁸ See Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, N.Y. TIMES (Aug. 27, 2007), <https://nyti.ms/2GfRD1b> [<https://perma.cc/9L3Y-DU49>].

¹²⁹ The initial Senate bill, Security from Political Interference in Justice Act of 2007, S. 1845, 110th Cong. (July 23, 2007), would have required communications about ongoing Justice Department civil or criminal investigations to only be between named senior Justice Department and White House officials or those they designate. See *id.* § 3. The House released its own version, creating a reporting requirement on communications between the Justice Department and the White House, instead of a prohibition on such communications by noncovered personnel, see H.R. 3848, 110th Cong. § 3 (2007), and the Senate subsequently adopted the House language, see S. 1845, 110th Cong. (Oct. 23, 2007); see also S. REP. NO. 110-203, at 7–8 (2007) (detailing legislative context).

¹³⁰ U.S. DEP'T OF JUSTICE, *supra* note 127; see also U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2008), <https://oig.justice.gov/special/so901/final.pdf> [<https://perma.cc/2BRT-Z99Y>]; U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), <https://oig.justice.gov/special/so807/final.pdf> [<https://perma.cc/B84G-6VSB>].

¹³¹ See *Nomination of Michael B. Mukasey to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 99–100 (2007) (questions of Chairman Patrick J. Leahy); *id.* at 147–49 (questions of Sen. Sheldon Whitehouse).

¹³² See Mukasey Memo, *supra* note 114.

¹³³ See Holder Memo, *supra* note 114. President Trump's White House Counsel issued a memorandum as to Justice Department contacts in his first week in office. See Memorandum from Donald F. McGahn II, Counsel to the President, to All White House Staff (Jan. 27, 2017), <https://>

The norm of investigatory independence is being tested again by President Trump. James Comey testified to his efforts as FBI Director to protect the norm in response to President Trump's request for "loyalty" from the Director and attempts to affect, if not implicitly direct, investigatory decisions pertaining to his then-National Security Advisor Michael Flynn.¹³⁴ Reactions to Comey's firing prompted the appointment of former FBI Director Robert Mueller as a special counsel¹³⁵ apparently investigating, among other things, whether the President himself obstructed justice. Though reports suggest, and the President has repeatedly said, that he would like to see terminated the investigation into Russian interference with the 2016 presidential election and any links between the Russian government and the Trump campaign,¹³⁶ the President at least so far has refrained from firing Mueller or directing his investigation.¹³⁷ Political and media opposition to the President's initial consideration of a more partisan candidate to replace Comey was swift and expressed across party lines, and the new FBI Director, a career prosecutor widely perceived to be a nonpartisan choice, made a firm case for his independence from the President and commitment to the Mueller investigation during his confirmation hearing.¹³⁸ Even as the norm appears, for the moment, to have constrained President Trump to a point, he has also continued to publicly pressure the Justice Department to reopen criminal investigations into his former political opponent and worked publicly to repudiate the norm and to alter public expectations around investigatory independence.¹³⁹

www.politico.com/f/?id=000015a-dde8-d23c-a7ff-dfef4d530000 [<https://perma.cc/J33N-DSSQ>] (regarding "Communications Restrictions with Personnel at the Department of Justice").

¹³⁴ *Open Hearing with Former FBI Director James Comey: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. 3-4 (2017) (opening statement of Sen. Mark R. Warner discussing the prepared statement of James Comey).

¹³⁵ See Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), <https://nyti.ms/2qxFhGA> [<https://perma.cc/77HG-XUUL>].

¹³⁶ See Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), <https://www.justice.gov/opa/press-release/file/967231/download> [<https://perma.cc/Y77Q-4DHQ>].

¹³⁷ Compare, e.g., Noah Bierman, *Trump Friend Says President Might Fire Special Counsel Robert Mueller*, L.A. TIMES (June 12, 2017, 6:31 PM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-confidant-says-president-may-1497315503-htmlstory.html> [<https://perma.cc/KU4M-3Z8B>], with Gregory Korte & Kevin Johnson, *President Trump Says He Won't Fire Special Counsel Robert Mueller: "I'm Not Dismissing Anybody,"* USA TODAY (Aug. 10, 2017, 4:46 PM), <https://www.usatoday.com/story/news/politics/2017/08/10/president-trump-says-he-wont-fire-special-counsel-robert-mueller-im-not-dismissing-anybody/557159001/> [<https://perma.cc/KCQ9-TQJH>].

¹³⁸ See *Nomination of Christopher Wray to Be Director of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 45 (2017) (responses of Christopher Wray), <https://www.judiciary.senate.gov/meetings/07/12/2017/nominations> [<https://perma.cc/HX49-H6VY>].

¹³⁹ See, e.g., Michael S. Schmidt & Maggie Haberman, *Justice Dept. to Weigh Inquiry into Clinton Foundation*, N.Y. TIMES (Nov. 13, 2017), <https://nyti.ms/2mmWtQL> [<https://perma.cc/>].

Robustness. Several conditions contribute to the robustness of the investigatory-independence norm, even as its resilience under President Trump, as a sociological matter, remains an open question. Differentiated institutions and instruments reinforce the norm. These include bureaucracy, in the form of both bureaucratic policies and procedures, like the White House Contacts Policies, and bureaucratic structures, like OPR and OIG at the Justice Department.¹⁴⁰ Agency leaders inside these bureaucracies have also felt the reputational stakes of norm breaches and developed practices to ensure compliance.

Congress, historically, played a pivotal role in reinforcing the norm through confirmation and oversight hearings, congressional investigations and reports, interpretations of the norm in the legislative history of enacted statutes, and the threat of codifying the norm's requirements.¹⁴¹ Meanwhile, media and civil society organizations have been quick to respond to norm breaching when it has been made public and, together with these other institutional actors, to have advanced a generally consistent interpretation of the norm over time.¹⁴²

These institutional actors have leveraged pluralist and complementary mechanisms to reinforce the norm. OPR reports feed congressional oversight hearings, bolstered by public and media attention. Further, these diverse institutional actors inhabit separate groups that have converged on a common, public interpretation of the norm through variegated instruments (bureaucratic, professional, political, and journalistic). There are relatively clear lines of institutional responsibility when the norm is breached, and there are multiple types of institutional actors that can be sanctioned. These include not just the President, but also political appointees as well as civil servants who suffer reputational, professional, and political costs (and, in rarer cases, potential exposure to criminal liability) if they are seen to support or facilitate the breach.

B. *Self-Dealing Norms: Conflict-of-Interest Rules*

A second norm type prohibits presidential self-dealing or the corruption of government power. Unwritten rules impose limits beyond the textual provisions on emoluments and the ethics-related statutes, many

6GP3-QNSX]; see also Sam Schwarz, *Trump Suggests Hillary Clinton's Former Top Aide Huma Abedin Should Be Jailed*, NEWSWEEK (Jan. 2, 2018, 9:01 AM), <http://www.newsweek.com/donald-trump-huma-abedin-jailed-clinton-twitter-767826> [<https://perma.cc/SJW4-GHCZ>].

¹⁴⁰ See generally Schlanger, *supra* note 83; Sinnar, *supra* note 83; see also Renan, *supra* note 83, at 1118–23.

¹⁴¹ For a general theory of soft lawmaking by Congress, see Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 620–21 (2008).

¹⁴² Fissures in the media landscape and increasingly polarized modes of news delivery and reception may be changing these conditions. See *infra* notes 501–502 and accompanying text.

of which formally exclude the President from coverage.¹⁴³ An example of this norm type also helps to draw out a distinction among structural norms: that some operate with greater specificity than others. The unwritten conflict-of-interest rule has this character of concreteness. While the principal conflict-of-interest statute excludes the President from its coverage,¹⁴⁴ Presidents have long complied with a structural norm pursuant to which the President conducts himself as if bound by those statutory restrictions.¹⁴⁵

Section 208, enacted as part of comprehensive conflict-of-interest legislation in 1962,¹⁴⁶ generally prohibits officers and employees of the executive branch from participating in particular matters in which they or their immediate family members have a financial interest, subject to criminal penalties.¹⁴⁷ The 1962 Act codified a normative understanding, increasingly salient in American politics, that conflicts of interest inside the executive branch must be “effectively controlled.”¹⁴⁸ In the words of an influential report of the Association of the Bar of the City of New York, published in 1960, such a normative understanding served five policy objectives: government efficiency, equal treatment of equal claims, public confidence, preventing the use of public office for private gain, and preserving the integrity of government policymaking institutions.¹⁴⁹ This goal, the Bar Association Report emphasized, must be reconciled with another, the “need for adequate staffing of the federal government,”¹⁵⁰ thus giving urgency to the construction of a careful regulatory framework.

¹⁴³ Executive branch precedent has applied the Emoluments Clause to the President, *see* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 33 Op. O.L.C., 2009 WL 6365082, at *32 (Dec. 7, 2009), but the question is contested and currently being litigated, *compare, e.g.*, NORMAN L. EISEN ET AL., GOVERNANCE STUDIES AT BROOKINGS, THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 7–10 (2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf [<https://perma.cc/T4JT-D3XF>] (defending interpretation that encompasses the President), *with* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 181–82 (2013) (defending interpretation that excludes the President and other elected officials).

¹⁴⁴ *See* 18 U.S.C. § 208(a) (2012); *see also id.* § 202(c) (defining “officer[s]” and “employee[s]” covered by § 208 not to include the President or Vice President).

¹⁴⁵ *See* Letter from Walter M. Shaub, Jr., Dir., Office of Gov’t Ethics, to Thomas R. Carper, Ranking Member, Senate Comm. on Homeland Sec. and Governmental Affairs 10 (Dec. 12, 2016) [hereinafter Shaub Letter].

¹⁴⁶ Act of Oct. 23, 1962, Pub. L. No. 87-849, § 208, 76 Stat. 1119, 1124–25.

¹⁴⁷ *See* 18 U.S.C. § 208.

¹⁴⁸ SPECIAL COMM. ON THE FED. CONFLICT OF INTEREST LAWS, ASS’N OF THE BAR OF N.Y.C., CONFLICT OF INTEREST AND FEDERAL SERVICE 7 (1960) [hereinafter BAR ASSOCIATION REPORT].

¹⁴⁹ *Id.* at 6–7.

¹⁵⁰ *Id.* at 7.

The scheme that the Bar Association Report proposed explicitly reserved the “conflict of interest problems of the President and the Vice President.”¹⁵¹ These persons, the Report concluded, “must inevitably be treated separately,” as “illustrated by the fact that disqualification of the President from policy decisions because of personal conflicting interests is inconceivable.”¹⁵² The Report formed much of the intellectual and policy framework for the legislation that was ultimately enacted in 1962.¹⁵³ While the formal rules were not designed to address the President himself, the statute made illicit behavior that previously operated on murkier normative terrain. As the statute helped to entrench obligations to limit self-dealing in the federal service, norm-based practice extended those duties to the presidency.

The question whether § 208 itself covers the President and the Vice President was closely scrutinized in the aftermath of the Nixon scandals, in connection with President Gerald Ford’s nomination of Nelson A. Rockefeller as Vice President. Rockefeller not only had extensive financial holdings but also was a member of one of the nation’s wealthiest families. Concerns about Rockefeller’s potential conflicts of interest were a focus of extensive hearings before Congress on his appointment to fill the vice presidency under the Twenty-Fifth Amendment.¹⁵⁴

Laurence Silberman, then the acting Attorney General, prepared a memorandum that concluded, based on the text, legislative history, and constitutional avoidance canon, that § 208 did not cover the President or Vice President.¹⁵⁵ His memo also emphasized, however, that § 208 appears implicitly to permit the use of a blind trust to address conflict-of-interest problems, that President Eisenhower had previously used

¹⁵¹ *Id.* at 17.

¹⁵² *Id.*

¹⁵³ See Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1116 (1963) (detailing the legal and political events leading to the passage of the 1962 Act, including the influence of the Bar Association Report).

¹⁵⁴ In a 200-page report on Rockefeller’s nomination, the Senate Committee on Rules and Administration stated that “[p]robably the single most troublesome and central issue in the Committee’s hearings and consideration of the nominee’s qualifications, fitness, and capability to hold the Office of Vice President . . . was the conflict-of-interest question and its broad ramifications — a key public policy consideration made acutely more important by the vast wealth and business holdings nationwide and worldwide of Governor Rockefeller and his family.” S. EXEC. REP. NO. 93-34, at 91 (1974); see also H.R. REP. NO. 93-1609 (1974).

¹⁵⁵ See Memorandum from Laurence H. Silberman, Deputy Att’y Gen., to Richard T. Burrell, Office of the President 3–5 (Aug. 28, 1974), <https://fas.org/irp/agency/doj/olc/o82874.pdf> [<https://perma.cc/2N7A-PE9Q>] [hereinafter Silberman Memo] (regarding “Conflict of Interest Problems Arising out of the President’s Nomination of Nelson A. Rockefeller to Be Vice President Under the Twenty-Fifth Amendment to the Constitution”). A condensed form of his legal analysis was provided to Congress in connection with the Rockefeller hearings. See Letter from Laurence H. Silberman, Acting U.S. Att’y Gen., to Howard W. Cannon, Chairman, Senate Comm. on Rules & Admin. (Sept. 20, 1974), <https://fas.org/irp/agency/doj/olc/o92074.pdf> [<https://perma.cc/U4CS-PUDA>].

such a procedure to “obviate conflict problems,”¹⁵⁶ and that Rockefeller should be prepared to do the same, if Congress so requested.¹⁵⁷

Rockefeller testified in his opening statement for the congressional hearings that he was prepared to put his financial assets in a blind trust,¹⁵⁸ but the Senate committee ultimately concluded that such a mechanism would be meaningless in Rockefeller’s case given the “immensity of his financial holdings,”¹⁵⁹ and that actual divestiture could have dire effects on some parts of the U.S. economy.¹⁶⁰ Ultimately, the Senate committee concluded that the best course, under these unique circumstances, was full public disclosure of Rockefeller’s “wealth and financial holdings, . . . [which was] promptly carried out by the nominee, [and which] would permit a monitoring of those business interests by the public and the news media.”¹⁶¹

Presidents by this point had already become sensitive, at least politically, to real and perceived conflicts of interest. Following precedent established by President Eisenhower, the practice of creating a blind trust appears to have become routine, though at the time such an instrument was itself unregulated by the ethics laws and — as President Johnson’s efforts to pressure the FCC to protect his family’s radio stations (then in a so-called “blind trust”) showed — deeply susceptible to manipulation.¹⁶²

¹⁵⁶ Silberman Memo, *supra* note 155, at 7.

¹⁵⁷ *See id.* at 7–8.

¹⁵⁸ *Nomination of Nelson A. Rockefeller of New York to Be Vice President of the United States: Hearings Before the S. Comm. on Rules & Admin.*, 93d Cong. 20 (1974) (statement of Nelson A. Rockefeller).

¹⁵⁹ S. EXEC. REP. NO. 93-34, at 178 (1974).

¹⁶⁰ *Id.* at 178–79.

¹⁶¹ *Id.* at 179.

¹⁶² Some of the secondary literature traces presidential blind trusts to President Johnson, *see, e.g.*, Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 U. KAN. L. REV. 43, 54 (2007); *see also Conflicts of Interest and the Presidency*, CRS LEGAL SIDEBAR (Oct. 14, 2016), <https://fas.org/sgp/crs/misc/conflicts.pdf> [<https://perma.cc/YH43-92NB>] (tracing the historical practice to Presidents Lyndon B. Johnson, Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, and noting that a blind trust for President Obama was unnecessary given the makeup of his financial portfolio). President Eisenhower, however, appears to have used one, *see* Perkins, *supra* note 153, at 1134; Silberman Memo, *supra* note 155, at 7, and other Presidents may have as well, *see* Question-and-Answer Session at the Annual Convention of the Associated Press Managing Editors Association, 9 WEEKLY COMP. PRES. DOC. 1345, 1350 (Nov. 26, 1973) (quoting President Nixon that he is “the first [president] who has not had a blind trust since Harry Truman,” because he thought that “real estate was the best place to put it” so as to “have no question about the President’s personal finances”). A note tucked in President Ford’s files suggests the possibility that he also used one, though I have not found confirming evidence. *See* President-Personal Finances, Gerald R. Ford Presidential Library, Box 49, at 42 (stating that “William C. Bireley of Ashton, Maryland, handles blind trust for the President”). On President Johnson’s abuses of office to benefit his broadcast properties, *see, for example*, WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION 41 (1990).

Renewed congressional interest in the conflict-of-interest laws after Watergate culminated in the Ethics in Government Act of 1978,¹⁶³ legislation that for the first time regulated the types of blind trusts that would satisfy the statutory conflict-of-interest prohibition.¹⁶⁴ The Ethics in Government Act did not extend the statutory requirements of § 208 to the President, and subsequent legislation would expressly exclude the President and Vice President from § 208's coverage.¹⁶⁵

Yet compliance with the conflict-of-interest norm, under which Presidents conduct themselves as if bound by the formal prohibitions, became further institutionalized and regularized as a result of the Ethics in Government Act's passage. Every President since Carter (until President Trump) has complied with the dictates of § 208, either by “establish[ing] [a] blind trust[] or limit[ing] . . . investments to non-conflicting assets like diversified mutual funds, which are exempt under the conflict of interest law.”¹⁶⁶

Reinforcement. A form of the norm's institutional reinforcement has been a legal advisory from the Director of the Office of Government Ethics (OGE), in place since 1983, so advising the President,¹⁶⁷ as well as the growth of ethics compliance institutions including OGE itself (created as part of the Ethics in Government Act) and ethics officials inside the White House Counsel's Office.¹⁶⁸ Even before the 1983 advisory from OGE, the Justice Department's Office of Legal Counsel (OLC), in

¹⁶³ Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of the U.S. Code).

¹⁶⁴ *Id.* § 202(f)(3), 92 Stat. at 1841-43.

¹⁶⁵ In 1989, the conflict-of-interest statute was amended (as part of a comprehensive package of ethics reform) to explicitly exclude the President and Vice President from coverage. The change was introduced, without much discussion, as a last-minute revision on the day of the Senate vote. *See* 135 CONG. REC. S16,069 (daily ed. Nov. 17, 1989) (Mitchell and Dole Amendment); *see also* 135 CONG. REC. S15,956 (daily ed. Nov. 17, 1989) (statement of Sen. Levin) (suggesting presidential exemption as “consistent with existing law”); Josh Gerstein, *Trump Owes Ethics Exemption to George H.W. Bush*, POLITICO (Nov. 23, 2016, 5:06 AM), <http://www.politico.com/story/2016/11/trump-bush-ethics-exemption-231773> [<https://perma.cc/6ZAX-RYFW>] (reporting on interviews with participants and suggesting that the new text “appears to have been drafted by lawyers in Bush's White House counsel's office”).

¹⁶⁶ Walter M. Shaub, Jr., Dir., Office of Gov't Ethics, Remarks at the Brookings Institution 2 (Jan. 11, 2017) [hereinafter Shaub Remarks], https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf [<https://perma.cc/74U7-G7BD>]. Following the passage of the Ethics in Government Act, President Carter broke open his then-existing blind trust in order to comply with the new statute's requirements. *See* Philip Taubman, *Carter Drops “Blind Trust” Secrecy and Divulges Finances for 1978-9*, N.Y. TIMES (May 31, 1979), <https://nyti.ms/2GgdrTG> [<https://perma.cc/5H8C-VQ3L>].

¹⁶⁷ *See* Letter from David H. Martin, Dir., Office of Gov't Ethics, to Richard Hauser, Deputy Counsel to the President (Oct. 20, 1983) [hereinafter Martin Advisory], <https://bit.ly/2Hxp6S7> [<https://perma.cc/AYM6-GAC6>] (“[T]he Department of Justice's views, with which we agree, are that the President and the Vice President are not legally subject to the restrictions of . . . the conflict of interest laws . . . but as a matter of policy, the President and the Vice President should conduct themselves as if they were so bound.”).

¹⁶⁸ *See* Morrison, *supra* note 25, at 1733.

an opinion signed by then-head of the office Antonin Scalia, took the position that while the conflict-of-interest rules do not “legally bind the President or Vice President, it would obviously be undesirable as a matter of policy for the President or Vice President to engage in conduct [that they] proscribed.”¹⁶⁹ And, indeed, since the creation of OGE, White House Counsels have regularly sought informal guidance from OGE on how to bring the President’s behavior into conformity with the rules that, as a formal or legalistic matter, do not apply to him.¹⁷⁰

The conflict-of-interest norm, however, has had little effect on President Trump. The Director of OGE concluded that the plan that the President put forward “is meaningless from a conflict of interest perspective”;¹⁷¹ it is not a blind trust and it does not comply with the conflict-of-interest norm that has governed presidential practice for nearly half a century.¹⁷² What accounts for the norm’s seeming fragility, at least as a sociological matter?

Robustness. In contrast to the investigatory-independence norm, the unwritten conflict-of-interest rule lacks pluralist forms of institutional reinforcement. The Director of OGE is an isolated watchdog with only advisory power in this context.¹⁷³ At least as important, while multiple participants can be sanctioned in various ways for compromising the investigatory-independence norm — including through reputational and professional sanctions — any sanction for violating the unwritten conflict-of-interest rule targets the President alone.

Perhaps counterintuitively, it might also be that consistent conformity with the norm over time has prevented the development of an entrenching narrative, supported by other institutional actors, in response to periodic counterpressures. Ultimately, the norm appears to have been sustained either by prior Presidents’ moral understanding of their office or by the sense of presidential advisors that the public expects it (or some combination of these reasons). As Scalia wrote in the 1974 OLC

¹⁶⁹ Memorandum from Antonin Scalia, Assistant Att’y Gen., Office of Legal Counsel, to Hon. Kenneth A. Lazarus, Assoc. Counsel to the President 3 (Dec. 16, 1974) [hereinafter *Scalia Memo*], <https://ssrn.com/abstract=2889011> [<https://perma.cc/SL58-RMUJ>] (regarding “Applicability of 3 C.F.R. Part 100 to the President and Vice President”).

¹⁷⁰ See, e.g., *Martin Advisory*, *supra* note 167 (advising the Deputy Counsel to President Reagan regarding presidential participation in entertainment industry matters while ensuring compliance with the conflict-of-interest laws); *Shaub Letter*, *supra* note 145, at 2 (“OGE has for more than three decades asserted authority to make nonbinding recommendations regarding a President’s conflicts of interest.”).

¹⁷¹ *Shaub Remarks*, *supra* note 166, at 1.

¹⁷² See *id.* at 2 (describing how President Trump’s plan “does not comport with the tradition of our Presidents over the past 40 years”).

¹⁷³ As the Director has described his agency’s function, “OGE is not [an] enforcement mechanism but [a] prevention mechanism.” *Id.* at 1; see also *Shaub Letter*, *supra* note 145, at 10 (“[A]lthough every President in modern times has adopted OGE’s recommended approach, OGE has no power to require adherence to this tradition.”).

opinion, “Failure to observe these standards [would] furnish a simple basis for damaging criticism, whether or not [the conflict-of-interest rules] technically apply.”¹⁷⁴ President Trump, however, does not appear to hold himself to the same moral constraints, and expectations about what the public would accept have not borne out in practice.¹⁷⁵ Whether future Presidents will comply with this norm remains to be seen, but for now it appears to be moribund in practice.

C. *Discretion-Structuring Norms: Deliberative Presidency*

A third norm type structures the exercise of presidential discretion to promote certain epistemic values or a form of institutional expertise; it dictates the conditions that render the exercise of presidential judgment nonarbitrary. A family of unwritten rules comprising what we might call the deliberative presidency illustrates this norm type. The deliberative-presidency norm requires a considered, fact-informed judgment in certain decisional domains. From this overarching norm, lower-level rules flow. These unwritten rules structure the process of presidential decisionmaking and its informational inputs in the context of high-stakes domestic and foreign policy decisions. Over time, as government has become more complex and presidential power more robust, unwritten rules have developed in specific decisional domains to require a process that (i) engages multiple perspectives from the agencies, (ii) is grounded in facts, and (iii) is informed by a conscientious assessment of legality by administration lawyers.

As the President’s responsibilities in domestic policy, foreign affairs, and national security have become more comprehensive, complex, and persistent, the President’s structures for decisionmaking have become more institutionalized and robust. Those structures have not functioned uniformly across administrations, and their development has not been linear.¹⁷⁶ As this section will show, they have grown in fits and starts,

¹⁷⁴ Scalia Memo, *supra* note 169, at 3.

¹⁷⁵ While the Director of OGE resigned as a result, *see Government Ethics Watchdog Walter Shaub Resigns* (CBS television broadcast July 6, 2017), <https://www.cbsnews.com/videos/government-ethics-watchdog-walter-shaub-resigns/> [<https://perma.cc/0E7A-QAWR>] (interviewing Shaub upon his resignation), and former government officials, serving in the White House Counsel’s Office under both Democratic and Republican administrations, called for the President to comply with this norm, *see* Richard Painter & Norman Eisen, Opinion, *Trump’s “Blind Trust” Is Neither Blind nor Trustworthy*, WASH. POST (Nov. 15, 2016), <https://wapo.st/2ftVutb> [<https://perma.cc/FVP4-NNU6>], the President’s ongoing breach does not appear to have carried a political sanction.

¹⁷⁶ *See, e.g.,* Zbigniew Brzezinski, *The NSC’s Midlife Crisis*, FOREIGN POL’Y, Winter 1987–1988, at 80, 83–89 (arguing that “[o]ver time the NSC as an institution has passed through three broad phases, each generating its own distortions,” *id.* at 83: a process of “institutionalization,” *id.*, and “bureaucratization,” *id.* at 85, beginning in the late Truman Administration and peaking under President Eisenhower; a process of deinstitutionalization and “personalization,” *id.*, under Presidents Kennedy and Nixon; and a process of “degradation,” *id.* at 89, under President Reagan);

each iteration altering the status quo and creating a new baseline against which Presidents, presidential advisors, and external enforcers assess the deliberative-presidency norm in action. Even as the methods of presidential decisionmaking are fluid and deeply responsive to the personalities and styles of individual Presidents, the structural commitments might be described as sedimentary, with the structural innovations of one President settling over time into hard-to-dislodge expectations regarding presidential behavior.

The deliberative-presidency norm has developed alongside the institutional resources to deliver on it. For example, a presidency capable of receiving intelligence from nonpartisan analysts that strive for accuracy and impartiality has given rise, over time, to a presidential duty to consider this information in formulating a national security judgment.¹⁷⁷ A President obligated to consider impartial data in the formation of domestic policy and national security, meanwhile, has sought to improve the quality of those information systems.¹⁷⁸ In this way, capabilities or “entitlements” of the presidency are intertwined with the norm-based responsibilities or “duties” of the office.¹⁷⁹

The deliberative-presidency norm is instantiated through different pathways, depending both on the policy domain and on the instrument of presidential decision. When the President issues executive orders, for example, the norm generally requires a process of interagency consultation on the proposed executive order and its policy implications,¹⁸⁰ as well as a review for “form and legality” conducted by OLC.¹⁸¹

The norm operates along a spectrum, from decisional domains more closely tethered to legal regulation (under the Administrative Procedure Act¹⁸² (APA), for example) to domains more removed from such a legal

see also Clark M. Clifford & Philip Geyelin, *The Workings of the National Security System: Past, Present, and Future*, SAIS REV., Winter–Spring 1988, at 19.

¹⁷⁷ See generally JOHN P. BURKE, *HONEST BROKER?: THE NATIONAL SECURITY ADVISOR AND PRESIDENTIAL DECISION MAKING* (2009); MICHAEL MORELL WITH BILL HARLOW, *THE GREAT WAR OF OUR TIME* (2015); DAVID PRIESS, *THE PRESIDENT’S BOOK OF SECRETS: THE UNTOLD STORY OF INTELLIGENCE BRIEFINGS TO AMERICA’S PRESIDENTS FROM KENNEDY TO OBAMA* (2016).

¹⁷⁸ For an analogous argument in the context of international law norms, see SLAUGHTER, *supra* note 78, at 51–55.

¹⁷⁹ Geoffrey Marshall emphasized the distinction, in the Commonwealth context, between “duty-imposing conventions” and “entitlement-conferring conventions.” MARSHALL, *supra* note 37, at 8. The discussion in the text highlights, however, that the two might also have important interconnections.

¹⁸⁰ OFFICE OF MGMT. & BUDGET, *OPEN GOVERNMENT PLAN 5* (2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/open/open_government_plan_9_14.pdf [<https://perma.cc/DC58-VM74>].

¹⁸¹ *Id.* The Attorney General’s authority to approve the “form and legality” of all executive orders or proclamations has been delegated to OLC since 1962. See Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33, 35 (1971).

¹⁸² Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

anchor. Because the institutional forms of this norm differ across decisional domains, the norm itself is best described through its more concrete manifestations and the institutions that reinforce it.

Applications and Reinforcements. In the domestic policy context, the President usually makes policy through the agencies. In that context, intra-executive structures and processes, along with judicial review of final agency action under the APA, have worked to reinforce a deliberative presidency.¹⁸³ The APA itself excludes the President from its coverage.¹⁸⁴ Yet, as the President's mechanisms of domestic policymaking have grown increasingly administrative,¹⁸⁵ the President is indirectly regulated by arbitrariness review under the APA.¹⁸⁶ Reviewing agency action under the APA, courts police the extent to which presidential policy is grounded in reliable data and a reasoned decisional process.¹⁸⁷ A presidency empowered by domestic agencies, exercising administrative authorities, is thus indirectly shaped by the deliberation-forcing rules of administrative law.¹⁸⁸

The pathways through which the deliberative-presidency norm is reinforced in the national security context often lack this judicially enforceable legal anchor. The responsibility that the President formulate national security policy based on reliable facts, for example, is reinforced

¹⁸³ See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1286–87, 1297–302 (2017). See generally Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

¹⁸⁴ See *Franklin v. Massachusetts*, 505 U.S. 788, 796, 800–01 (1992) (declining to extend the APA to the President “[o]ut of respect for the separation of powers,” *id.* at 800).

¹⁸⁵ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); see also Mariano-Florentino Cuéllar, “Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. CHI. L. REV. 587, 678–79 (2009).

¹⁸⁶ See, e.g., Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1140–46 (2010) (pointing to arbitrariness review as a “safeguard,” *id.* at 1145, against certain inappropriate presidential involvement in and influence over agency decisionmaking); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 740–45 (2016).

¹⁸⁷ Courts do not police uniformly, and scholars disagree about which version of arbitrariness review does and should dominate. Compare Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1358 (2016) (arguing that arbitrariness review should be and, to some extent already is, “thin” and “(merely)” forces “decisions on the basis of reasons”), with Catherine M. Sharkey, *State Farm “with Teeth”: Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1619–34 (2014) (arguing that courts should, and might already, “calibrate the stringency of their review of cost-benefit analysis” based on presidential involvement, *id.* at 1620).

¹⁸⁸ See Cass R. Sunstein, *Deliberative Democracy in the Trenches*, DAEDALUS, Summer 2017, at 129 (describing how the executive branch has traditionally embodied deliberative democracy by valuing reflection, reason giving, and public engagement in decision- and policymaking); see also David J. Barron, *Foreword — From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1140–41 (2008); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51.

in certain decisional domains by a bureaucratic structure and an institutional process designed to produce for the President a daily intelligence assessment that strives to be accurate, impartial, and nonpartisan. Known as the President's Daily Brief (PDB), or sometimes simply as "the book," the PDB has been a daily institution of the presidency for over fifty years.¹⁸⁹ In assessing the President's national security judgment, political actors in Congress, administrative oversight structures inside the executive branch, and media and civil society actors increasingly ask both what was *not* in the PDB that should have been, and what was in the PDB that should have resulted in a different presidential response.¹⁹⁰

Presidential decisionmaking that is fact- and law-informed, and inclusive of multiple perspectives, is reinforced through the National Security Council (NSC), and the institutional apparatus that rests beneath it. The initial absence of an institutional actor to coordinate the agencies and structure deliberation in the service of presidential decisionmaking was felt powerfully during World War II — both by the President and his advisors, and by congressional overseers.¹⁹¹ Toward the end of World War II, two ad hoc coordinating structures began to take form, including a "Committee of Three" made up of the Secretaries of State, War, and the Navy.¹⁹² James S. Lay, Jr., who would become executive secretary of the newly formed NSC under Presidents Truman and Eisenhower, wrote in a presidential transition memorandum:

[These committees] had no fixed agenda and no integrated staff. The result consisted of either general discussions or *ad hoc* decisions . . . [that failed to] recognize[] or assist[] the role of the President as the leader and policy-maker. As a result, policies were either developed without his knowledge . . . , or he was informed after the die was cast and his principal

¹⁸⁹ See PRIESS, *supra* note 177, at 45. The intelligence community has produced a daily summary specifically for the President since 1946, *id.* at 5, although the document did not become known as the "PDB" until 1964, *id.* at 46.

¹⁹⁰ See MORELL WITH HARLOW, *supra* note 177, at 85; PRIESS, *supra* note 177, at 259, 264–67 (describing the unprecedented access to past PDBs given to the 9/11 Commission and to the Weapons of Mass Destruction Commission, both of which released public reports including PDB excerpts); see also COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 14, 26–27 (2005) [hereinafter WMD COMMISSION REPORT] (finding that the "daily reports sent to the President and senior policymakers discussing Iraq over many months proved to be disastrously one-sided," *id.* at 26, and making recommendations on "ways in which intelligence products can be enhanced, including [the PDB]," *id.*).

¹⁹¹ See BURKE, *supra* note 177, at 15–16. Prior to World War II, the President similarly lacked formal, systematic access to intelligence analysis. PRIESS, *supra* note 177, at 1–2.

¹⁹² See Memorandum from James S. Lay, Jr., Exec. Sec'y, Nat'l Sec. Council 1 (Jan. 19, 1953) [hereinafter Lay Memo] (regarding "Suggestions for Further Strengthening of the National Security Council"). Prior to that point, political scientist John Burke writes, that President Franklin D. Roosevelt "as per custom, relied on the informal coordinating efforts of Admiral William Leahy and White House aide Harry Hopkins." BURKE, *supra* note 177, at 16.

Cabinet members presented him with a single recommendation and no alternatives or background analysis.¹⁹³

A study prepared for the Navy Secretary, and presented to the Senate Committee on Naval Affairs, urged the creation of a new “policy-forming and advisory” structure, comprised of the relevant agency leadership, to assist the President in “over-all policies in the political and military fields.”¹⁹⁴

Congress responded with the creation of a statutory NSC, established as part of the National Security Act of 1947.¹⁹⁵ Initially “an unwanted bureaucracy imposed upon the President by Congress,” the statutory NSC was “viewed with suspicion” by President Truman and largely ignored through much of his presidency.¹⁹⁶ President Truman questioned Congress’s constitutional authority to structure presidential decisionmaking and saw the creation of the NSC as an attempt to diminish the powers of the presidency by creating an analogue to the British Cabinet.¹⁹⁷ Truman did not regularly participate in Council meetings, an absence “aimed at clearly establishing the Council’s position with respect to the President and at preventing any apparent dilution of his role.”¹⁹⁸

The informal or nonstatutory NSC began to emerge with the presidency of Dwight D. Eisenhower, and it is today central to the deliberative-presidency norm in practice.¹⁹⁹ President Eisenhower campaigned, in 1952, on the NSC and what he pressed to the public was President Truman’s inadequate use of it.²⁰⁰ Once in office, Eisenhower created the role of National Security Advisor and oversaw the development of

¹⁹³ Lay Memo, *supra* note 192, at 1; *see also* BURKE, *supra* note 177, at 16.

¹⁹⁴ S. COMM. ON NAVAL AFFAIRS, 79TH CONG., REP. TO HON. JAMES FORRESTAL, SEC’Y OF THE NAVY, ON UNIFICATION OF THE WAR AND NAVY DEPARTMENTS AND POSTWAR ORGANIZATION FOR NATIONAL SECURITY 7 (Comm. Print 1945); *see also* Stanley L. Falk, *The National Security Council Under Truman, Eisenhower, and Kennedy*, 79 POL. SCI. Q. 403, 403–04 (1964).

¹⁹⁵ Pub. L. No. 80-253, 61 Stat. 495 (codified in scattered sections of 5 and 50 U.S.C.); *see also* Lay Memo, *supra* note 192, at 2 (“The main distinction between the Council as established and the Eberstadt proposal, was that the Council became an advisory staff agency to the President rather than being an interdepartmental ‘policy-forming’ body in its own right.” (emphases omitted)).

¹⁹⁶ ALAN G. WHITTAKER ET AL., *THE NATIONAL SECURITY POLICY PROCESS* 6 (2011); *see* Brzezinski, *supra* note 176, at 83 (“Truman let it be known that he viewed the NSC as an instrument foisted on the president by Congress . . . as a means of limiting discretionary presidential authority,” but Truman also turned to the structure and commenced its institutionalization with the outbreak of the Korean War). *But see* AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 54–57 (1999).

¹⁹⁷ *See* Falk, *supra* note 194, at 405–06.

¹⁹⁸ *Id.* at 406.

¹⁹⁹ *See* WHITTAKER ET AL., *supra* note 196, at 7.

²⁰⁰ *See* Falk, *supra* note 194, at 418.

a complex organizational structure to foster informed and candid deliberation on significant national security decisions.²⁰¹ Eisenhower himself understood such a structure as crucial to the exercise of responsible national security judgment, and he made this commitment felt inside his Administration and in the public.²⁰²

Much of the institutional apparatus constructed by President Eisenhower was dismantled under President Kennedy.²⁰³ But the norm served by that structure — the requirement for a considered, fact-informed judgment, informed by interagency views — proved difficult to dislodge. Eisenhower himself, together with his former National Security Advisors, worked to cement the ideas behind a deliberative national security process.²⁰⁴ Some regarded the bureaucratization of the NSC under President Eisenhower as a force of ossification, including to varying degrees Presidents Kennedy, Johnson, and Nixon, each of whom opted for a more “personaliz[ed]” variant.²⁰⁵ Pressures to dismantle the complex institutional web created by Eisenhower were reinforced by an influential Senate subcommittee on “National Policy Machinery,” which was created to review the President’s national security policy process.²⁰⁶ The core structural commitment of a considered, fact-informed presidential decision, however, was further entrenched by that review.²⁰⁷

²⁰¹ See Dillon Anderson, *The President and National Security*, THE ATLANTIC, Jan. 1956 (describing internal practice of the NSC, “still a relatively new mechanism in our Government,” *id.* at 46, and recounting how it developed “[i]n the concept of President Eisenhower,” *id.* at 45); Brzezinski, *supra* note 176, at 83 (detailing that President Eisenhower personally “presid[ed] over 329 of the 366 NSC sessions held during his tenure”); see also BURKE, *supra* note 177, at 23–42; Falk, *supra* note 194, at 418.

²⁰² See Anderson, *supra* note 201, at 45 (“As [President Eisenhower] once put it, the function of the Council members ‘should be to search for and seek, with their background and experience, the most statesmenlike answers to the problems of national security.’”).

²⁰³ See Brzezinski, *supra* note 176, at 85–86.

²⁰⁴ In 1967, then at Walter Reed Hospital, President Eisenhower dictated a letter to his former National Security Advisor: “I share your conviction that it is impossible for any President to be constantly in possession of the coordinated and analysed security information, except through a well-organized staff . . . similar to the National Security Council.” Letter from President Dwight D. Eisenhower to Gordon Gray (May 10, 1967), *quoted in* BURKE, *supra* note 177, at 51. He encouraged “all three of you together . . . [to] publish something that would help the public to understand the value of such an organization.” *Id.*

²⁰⁵ See Brzezinski, *supra* note 176, at 85; see also *id.* at 85–88.

²⁰⁶ Falk, *supra* note 194, at 426. The committee conducted a two-year review and issued recommendations “to ‘deinstitutionalize’ . . . the NSC process” that the incoming Kennedy Administration too happily implemented. *Id.* at 427 (quoting *Organizing for National Security: Hearings Before the Subcomm. on Nat’l Policy Machinery of the S. Comm. on Gov’t Operations*, 87th Cong. (1961) [hereinafter *National Security Hearings*]); see also *id.* at 426–29.

²⁰⁷ Among the committee’s recommendations, it argued that the NSC should advise the President on major policy decisions, that it should present the President with “clear” and well-argued alternatives, and that a “written record of decisions should be kept.” See Falk, *supra* note 194, at 427–28 (quoting *National Security Hearings*, *supra* note 206).

The institutional reinforcements of a deliberative presidency developed over time in response to both the perceived needs of Presidents seeking to exercise a sound and credible national security judgment²⁰⁸ and perceived norm breaches that, when they became public, had the effect of weakening trust in the President by Congress and among elites, if not the broader public. A turning point, in this regard, was the Iran-Contra Affair.²⁰⁹ The Tower Commission — created by President Reagan in the aftermath of Iran-Contra — emphasized noncompliance with the deliberative-presidency norm.²¹⁰ As a result, the Tower Commission concluded, “[t]he arms transfers to Iran and the activities of the NSC staff in support of the Contras are case studies in the perils of policy pursued outside the constraints of orderly process”; these activities “ran directly counter to the Administration’s own policies on terrorism, the Iran/Iraq war, and military support to Iran.”²¹¹ Regardless of whether deliberative failure or substantive misjudgments contributed to Iran-Contra, the received wisdom — documented at length in the Commission’s report — was the need to fortify and comply with the deliberative-presidency norm. In response to the Tower Commission Report, President Reagan’s subsequent National Security Advisors revitalized an institutional process that — though not uniformly complied with — would further reinforce the norm in practice.²¹²

A “Deputies Committee” that sits beneath the formal NSC developed over time as a core mechanism of bureaucratic reinforcement.²¹³ This group of senior subcabinet officials (generally the “number two[.]” at each of the relevant agencies) is responsible for ensuring that the policy questions put before the President and the NSC have been analyzed thoroughly with options considered, legal issues addressed, and relevant data uncovered.²¹⁴ President George H.W. Bush created the Deputies

²⁰⁸ See BURKE, *supra* note 177, at 251–57.

²⁰⁹ See, e.g., Clifford & Geyelin, *supra* note 176, at 25–26 (calling for several changes to the structure of the NSC as a result of the Iran-Contra Affair).

²¹⁰ See REPORT OF THE PRESIDENT’S SPECIAL REVIEW BOARD, at IV-1 (1987) [hereinafter TOWER COMMISSION REPORT] (“Established procedures for making national security decisions were ignored. Reviews of the initiative by all the NSC principals were too infrequent . . . [and] [a]pplicable legal constraints were not adequately addressed.”); see also Brzezinski, *supra* note 176, at 93 (“[T]he President’s Special Review Board . . . correctly concluded that the NSC’s failures in recent years stemmed not from the failures of the NSC system but from the failure to use the system properly.”).

²¹¹ TOWER COMMISSION REPORT, *supra* note 210, at IV-1.

²¹² See BURKE, *supra* note 177, at 227.

²¹³ See WHITTAKER ET AL., *supra* note 196, at 16.

²¹⁴ MORELL WITH HARLOW, *supra* note 177, at 108, 135; see also WHITTAKER ET AL., *supra* note 196, at 16.

Committee, and its deliberative obligations became regularized over time.²¹⁵

Role obligations of central actors in the President's decisionmaking apparatus are an additional reinforcement mechanism. One such role obligation is the National Security Advisor's responsibility to ensure an informed presentation of competing views and contested data to the President, as well as to supervise an institutional process that airs competing perspectives.²¹⁶ While "honest brokerage," as the role obligation is often called,²¹⁷ cannot be described as an unbroken practice, its most pronounced absences have contributed both to outcomes undesirable to a rational President and to responses suggestive of a moral breach.

Prominent examples include President Kennedy's decisionmaking process in the Bay of Pigs fiasco. "[W]hat filters through most accounts" of the Bay of Pigs, writes political scientist John Burke, "is how faulty were the assumptions underlying key facets of the planned invasion."²¹⁸ The decisional process initially adopted by President George W. Bush in the aftermath of 9/11 offers another illustration. Deliberative processes were curbed or circumvented, and the executive branch legal opinions and policies on interrogation that resulted could not withstand legal, moral, or political scrutiny.²¹⁹ While inadequacies of the decisional process quite likely were just one of a confluence of factors in each of these episodes, the shared narrative that developed around them among participants and elites was one of deliberative and process failure.²²⁰

²¹⁵ See WHITTAKER ET AL., *supra* note 196, at 9; see also WHITE HOUSE, PRESIDENTIAL POLICY DIRECTIVE 1: ORGANIZATION OF THE NATIONAL SECURITY COUNCIL SYSTEM 4 (2009) (directing the "NSC/DC [to] ensure that all papers to be discussed by the NSC or the NSC/PC fully analyze the issues, fairly and adequately set out the facts, consider a full range of views and options, and satisfactorily assess the prospects, risks, and implications of each"); WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 1: ORGANIZATION OF THE NATIONAL SECURITY COUNCIL SYSTEM (2001).

²¹⁶ See generally BURKE, *supra* note 177 (analyzing case studies of honest brokerage and its absence in administrations from Eisenhower to George W. Bush).

²¹⁷ Burke draws a distinction between "honest brokerage" and "neutral brokerage," describing how the role of the National Security Advisor has shifted over time from a disinterested broker of competing policy views to a significant policy advocate, who nevertheless must structure a process that facilitates multiple perspectives and consideration of diverse policy perspectives. See generally *id.*

²¹⁸ *Id.* at 69; see also *id.* at 78 (emphasizing this deliberative "[f]ailure . . . with [National Security Advisor] Bundy as a fitful broker, some of the other participants thwarted in their dissent, and a broader deliberative process that failed to register either their concerns or the unexamined assumptions of the proponents of an invasion").

²¹⁹ See JACK GOLDSMITH, THE TERROR PRESIDENCY 147-77 (2007); see also David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 335-36 (2010).

²²⁰ The Tower Commission itself undertook an extensive case study of the Bay of Pigs and described it as another illustration of the significance of deliberative failures in the office of the presidency. See TOWER COMMISSION REPORT, *supra* note 210, at V-2. Similarly, a significant response to revelations of "enhanced interrogation" and warrantless surveillance under President

The institutional supports of a deliberative-presidency norm have not remained constant.²²¹ I have elsewhere documented changes in the structure of executive branch legal review — a core component of the norm.²²² A model of “OLC supremacy,” whereby OLC issues formal, authoritative legal opinions generally binding on the executive branch, has been more prominent in some administrations than in others.²²³ A different model of executive branch lawyering, reflected for example in a National Security Lawyers Group active throughout the Obama Administration, rejects the OLC-centric approach. That more diffuse structure, comprised of lawyers from the White House, the Justice Department, and the national security agencies, operates on a consensus-based model and provides more iterative and informal legal review, often in the form of working group papers.²²⁴ Yet when President Obama decided to continue military operations in Libya, notwithstanding the statutory constraints of the War Powers Resolution, he made the decision through a process that evaded both OLC and the consensus-based structure of the National Security Lawyers Group.²²⁵ Legal elites, including former officials and academics sympathetic to the Administration’s policy position, condemned the process as contrary to governing norms.²²⁶

Bush, among former participants and legal elites, was an emphasis on reinvigorating deliberation-forcing institutions of OLC and other offices. See, e.g., Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) (discussing and reprinting as an appendix guidelines for OLC review prepared by former participants in executive branch legal review).

²²¹ See, e.g., Brzezinski, *supra* note 176, at 93 (“In the 1950s the NSC was excessively institutionalized. In the 1970s it was excessively personalized. In the 1980s it [had] been excessively degraded.”); see also PRIESS, *supra* note 177, at xiii (“[T]he [PDB] has seen its format, highly classified content, and mode of delivery tailored to the current commander in chief. The PDB’s first three recipients alone demonstrated great variety in how they received it.”).

²²² See generally Renan, *supra* note 35.

²²³ See *id.* at 815–35.

²²⁴ See *id.* at 835–48.

²²⁵ See CHARLIE SAVAGE, POWER WARS 643–45 (2015); see also Renan, *supra* note 35, at 839–41.

²²⁶ See, e.g., Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 62–63 (2011); Bruce Ackerman, Opinion, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <https://nyti.ms/2p7sRDm> [<https://perma.cc/7NJQ-Z2XG>]; Jack Goldsmith, *President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution*, LAWFARE (June 17, 2011, 11:38 PM), <https://www.lawfareblog.com/president-obama-rejected-doj-and-dod-advice-and-sided-harold-koh-war-powers-resolution> [<https://perma.cc/C27S-VZWT>]; Michael Isikoff, *On Libya, President Obama Evaded Rules on Legal Disputes, Scholars Say*, NBC NEWS (June 21, 2011, 6:09 AM), http://www.nbcnews.com/id/43474045/ns/politics-white_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/#.Wn8d86inHIU [<https://perma.cc/B5HF-Q33Z>]. But see Harold Hongju Koh, Essay, *The Legal Adviser’s Duty to Explain*, 41 YALE J. INT’L L. 189 (2016); cf. Robert F. Bauer, *The National Security Lawyer in Crisis: When the “Best View” of the Law May Not Be the Best View* (N.Y.U. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 17-08, 2017), <https://ssrn.com/abstract=2931165> [<https://perma.cc/HM5W-M9AQ>].

Robustness. While the core expectation of a considered, fact-informed judgment in high-stakes domestic and national security decisions appears relatively entrenched and largely shared among participants, there is less consistency in the interpretation of the structural norm beyond that core commitment. This divergence in norm interpretation can be understood in part as a level-of-generality problem. While participants would agree that the President should make a fact-, policy-, and law-informed judgment, the specific forms of decisionmaking — at the level of the particular institutional structures required and the conditions under which those requirements apply — remain contested. Here again, a broadly shared consensus over the core commitment opens into a more hotly contested periphery. Genuine debates over the deliberative-presidency norm's scope and sites of application are exacerbated by partisan polarization, with Democrats quick to latch onto the process failures of a Republican President, and Republicans quick to identify those failures when a Democrat is in office. These dynamics contribute to the fragility of the norm in operation, even as its core substantive commitment appears largely shared among participants.

The robustness of the norm also varies across decisional domains, at least in part because some of those domains consist of relatively more — and more differentiated — types of norm enforcers. In the national security context (as compared to the domestic policy context), there are fewer lines of accountability when the President chooses to depart from the norm. Historically, Congress has played a significant role responding to perceived breaches, often in the context of a particular policy failure. A Congress mired in partisanship and gridlock has put added pressure on courts as enforcers of a deliberative-presidency norm, including in contexts like national security and immigration — a discussion picked up in Part III.

D. Authority-Allocating Norms

A final norm type coordinates governance by allocating (and reallocating) effective power among the branches of government, even though the text-based or formal allocation of power remains unchanged.²²⁷ The shift from a departmentalist presidency to the embrace of judicial su-

²²⁷ See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 215–16, 255–68 (2015); see also Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 67–68 (2016); Pildes, *supra* note 25, at 1392 (observing that “[f]or many decades, legal scholarship on presidential power was confined to assessing how much formal legal power the President should be understood to have, as a matter of [constitutional interpretation],” and celebrating emergent focus on “actual (rather than formal) scope of presidential power”).

premacY — and the related duty to defend — has enhanced the authority of the judiciary,²²⁸ even if it also has some political advantages for the President.²²⁹ Authority-allocating norms in the main, however, have accreted power to the presidency. This section describes three interlocking examples.²³⁰ It sacrifices some of the granularity of the earlier sections to show how norms can interact in ways that reinforce each other. It shows as well norm change or the erosion of earlier norms of limitation.

I. Going Public. — One example of this norm type is what political scientists sometimes call “going public”²³¹ or the rhetorical presidency. At its core, the norm requires the President to exercise policy leadership through rhetoric directed at the mass public.²³² Going public shifts agenda setting and other facets of policymaking power from Congress to the President.

Going public was not always a norm of the presidency. Scholars have identified in the Framers’ conception of the presidency a norm *against* presidential policy rhetoric directed to the mass public. Concerned especially with the dangers of demagoguery, the Founders understood themselves to be forging a constitutional structure that would guard against the emergence of a “popular leader.”²³³ Political scientist

²²⁸ See, e.g., WHITTINGTON, *supra* note 57, at 230–84; see also Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 467–70 (2018).

²²⁹ See, e.g., WHITTINGTON, *supra* note 57, at 85–87.

²³⁰ My focus in the text is on domestic policy, but norm-based practice also has shifted power from Congress to the President in the international law context, for example, in connection with treaty termination and executive agreements. See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 801–20 (2014) (documenting the shift toward unilateral presidential treaty termination in the twentieth century); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1203–06 (2018) (discussing the expansion of the President’s power in the realm of international law); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 468–76 (2012).

²³¹ Professor Samuel Kernell defined “going public” as “a strategy whereby a president promotes himself and his policies in Washington by appealing to the American public for support.” SAMUEL KERNELL, *GOING PUBLIC I* (1986).

²³² See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (1987); see also James W. Ceaser et al., *The Rise of the Rhetorical Presidency*, 11 PRESIDENTIAL STUD. Q. 158, 161 (1981).

²³³ See TULIS, *supra* note 232, at 27 (“For most federalists, ‘demagogue’ and ‘popular leader’ were synonyms, and nearly all references to popular leaders in their writings are pejorative.”); Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 435 (2000) (“At the time of the founding, demagoguery was seen as a central threat to the stability of democratic regimes, and popular rhetoric was associated with the power to sway the masses behind a charismatic leader who would break the fetters of constitutional office.”); see also THE FEDERALIST NO. 1, at 29 (Alexander Hamilton) (“[O]f those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants.”), NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 2003) (“[I]t is the reason, alone, of the public, that ought to control and regulate the government . . . [while] [t]he passions ought to be controlled and regulated by the government.”).

This understanding of the Framers’ theory is contested, however. See, e.g., Terri Bimes, *The Practical Origins of the Rhetorical Presidency*, 19 CRITICAL REV. 241, 243 (2007) (arguing that

Jeffrey Tulis identifies a particular form of presidential rhetoric that he argues comprised the Founding-era understanding: presidential positions on new laws or policy objectives were to be written and directed to Congress.²³⁴

Scholars disagree on how to interpret the nineteenth-century practice. An influential account argues that “[o]ur pre-twentieth-century polity proscribed the rhetorical presidency as ardently as we prescribe it.”²³⁵ On this account, President Andrew Johnson was the “great exception,”²³⁶ with consequences that underscore a nineteenth-century norm against going public. “Johnson sought to reconfigure the President as a popular leader with unmediated access to the electorate.”²³⁷ He repeatedly turned to popular rhetoric, directed at the mass public, as a mechanism to go around Congress, including during a three-week tour to advocate for his policies on Reconstruction.²³⁸ Johnson’s uses of popular rhetoric directed at the mass public were part of a broader strategy to consolidate policymaking authority in the presidency.²³⁹ And Johnson’s impeachment, though deeply partisan and falling one vote shy of conviction in the Senate, is interpreted by some as a repudiation of his attempts to rewrite the presidential norms of his time.²⁴⁰

Others maintain that nineteenth-century practice reveals a different story of, for example, norms that diverge on party lines.²⁴¹ On this account, Democratic Presidents during the nineteenth century embraced a

“[d]istrust of popular election arose less from the fear that presidents would capitalize on public ignorance, or that they would be captives of public opinion than[] that manipulation of the elections by factions might distort the presidential selection process itself”); Karen S. Hoffman, *Misunderstanding Executive Representation: Causes and Consequences*, 28 CONGRESS & PRESIDENCY 185, 198 (2001) (“While an examination of the debate at the Convention easily shows that many of the founders wanted an apolitical executive, it also shows that the substance of the debate was so contradictory and contentious that it is difficult to connect the executive defined in Article II . . . with any consistent understanding of executive power.”).

²³⁴ See TULIS, *supra* note 232, at 46.

²³⁵ *Id.* at 5; see also Ceaser et al., *supra* note 232, at 161; Whittington, *supra* note 233, at 435.

²³⁶ Whittington, *supra* note 233, at 447.

²³⁷ *Id.* at 434.

²³⁸ See TULIS, *supra* note 232, at 88.

²³⁹ These included Johnson’s abuses of the spoils system and his rejection of a removal power shared with Congress. See Whittington, *supra* note 233, at 434–42.

²⁴⁰ See TULIS, *supra* note 232, at 87–93; Whittington, *supra* note 233, at 446–47; see also Keith E. Whittington, *The Rhetorical Presidency, Presidential Authority, and President Clinton*, 26 PERSP. ON POL. SCI. 199, 200 (1997). Only the tenth article of impeachment charged Johnson with improper rhetorical practice and the significance of this article is contested. See Terri Bimes & Quinn Mulroy, *The Rise and Decline of Presidential Populism*, 18 STUD. AM. POL. DEV. 136, 146 n.66 (2004) (collecting critiques).

²⁴¹ See Bimes & Mulroy, *supra* note 240, at 136–37. For related critiques contesting the claim that nineteenth-century practice conformed around a constitutional norm against going public, see, for example, MEL LARACEY, *PRESIDENTS AND THE PEOPLE 100–21* (2002); David Zarefsky, *The Presidency Has Always Been a Place for Rhetorical Leadership*, in *THE PRESIDENCY AND RHE-*

norm of popular presidential authority and rhetorical leadership, while the Whigs (and to a lesser extent, Republican Presidents) repudiated it.²⁴² President Andrew Johnson was no “great exception” but a continuation of the governing Democratic norm at the time and its rejection by Republicans (and the Whigs before them).²⁴³

Notwithstanding interpretive debates over the nineteenth-century practice, twentieth-century practice reveals a convergence. Scholars emphasize President Theodore Roosevelt’s role in developing the “bully pulpit,”²⁴⁴ and President Woodrow Wilson’s articulation of a constitutional doctrine that grounded presidential authority in democratic accountability.²⁴⁵ In “reviv[ing] the practice (abandoned by Jefferson) of appearing in person before Congress to deliver the State of the Union Address,” Wilson self-consciously reformed a century-old practice to comport with his normative argument about the President’s constitutional role.²⁴⁶

In contrast to the institutional supports discussed in prior sections, many of the institutions that reinforce the going-public norm reflect rationalistic or political self-interest. Institutional structures in the modern Executive Office of the President craft presidential rhetoric both to respond to and shape public opinion, a development reinforced by the professionalization of public opinion polling, communications strategy, and speech writing.²⁴⁷ That said, participants understand the President

TORICAL LEADERSHIP 20 (Leroy G. Dorsey ed., Presidential Rhetoric Ser. No. 6, 2002); and collected writings in *BEFORE THE RHETORICAL PRESIDENCY* (Martin J. Medhurst ed., Presidential Rhetoric Ser. No. 19, 2008).

²⁴² See Bimes & Mulroy, *supra* note 240, at 142–49.

²⁴³ *Id.* at 147. Scholarly disagreement over the rhetorical presidency and its nineteenth-century manifestations turns in part on methodological disagreements over what sources substantiate a rhetorical presidency in the context of nineteenth-century practice. These debates are discussed in *BEFORE THE RHETORICAL PRESIDENCY*, *supra* note 241. Compare, e.g., Mel Laracey, *Talking Without Speaking, and Other Curiosities*, in *BEFORE THE RHETORICAL PRESIDENCY*, *supra* note 241, at 18, 20–22 (counting Presidents’ uses of partisan newspapers to publicize presidential policy stances as “going public” during the nineteenth century), with Jeffrey K. Tulis, *On the Forms of Rhetorical Leadership*, in *BEFORE THE RHETORICAL PRESIDENCY*, *supra* note 241, at 29–31 (arguing that reliance on the partisan newspapers of this period to document a rhetorical presidency is inappropriate because “presidents did not sign or endorse messages printed on their behalf, and . . . they troubled to distance themselves from their partisan organs,” *id.* at 31).

²⁴⁴ DORIS KEARNS GOODWIN, *THE BULLY PULPIT*, at xi (2013); see also DAVID GREENBERG, *REPUBLIC OF SPIN* 5, 13–23 (2016).

²⁴⁵ See TULIS, *supra* note 232, at 133–34; see also Ceaser et al., *supra* note 232, at 162; Whittington, *supra* note 240, at 200. Other hypothesized causes of going public include technology and the rise of partisanship. See KERNELL, *supra* note 231, at 98–107.

²⁴⁶ See TULIS, *supra* note 232, at 133.

²⁴⁷ See Jay G. Blumler & Dennis Kavanagh, *The Third Age of Political Communication: Influences and Features*, 16 *POL. COMM.* 209, 213–14 (1999) (describing the “[i]ntensified [p]rofessionalization of [p]olitical [a]dvocacy,” *id.* at 213); see also JEFFREY E. COHEN, *THE PRESIDENCY*

to have a *duty* to exercise rhetorical leadership. And Presidents who decline to go public on issues of major national concern are sanctioned by media actors and other politicians, if not the public.²⁴⁸ Political commentators criticized President Obama during his first term, for example, for being “missing in action — unwilling, reluctant or late to weigh in on the issue of the moment”²⁴⁹ and for “leading from behind” on matters of foreign policy.²⁵⁰

2. *Chief Legislator*. — A related norm shifted effective power over legislative policymaking from Congress to the President, a move made possible in part by the growing acceptance of the President’s democratic accountability. The “chief legislator” might be understood as a family of unwritten rules, each of which developed at different times, through different pathways, and under distinct political conditions.²⁵¹ Changing norms around uses of the presidential veto — initially used only sparingly and generally as a result of constitutional concerns with a proposed bill — created a powerful mechanism for the President to act on his public policy preferences and to shape legislative priorities *ex ante* in the shadow of a veto threat.²⁵²

IN THE ERA OF 24-HOUR NEWS 1, 18–20 (2008); TULIS, *supra* note 232, at 185 (“The speechwriting shop has become an institutional locus of policymaking in the White House, not merely an annex to policymaking.”).

²⁴⁸ See Azari & Smith, *supra* note 2, at 48 (arguing that the rhetorical presidency is an unwritten rule, not a political equilibrium, and emphasizing the role of media actors in sanctioning).

²⁴⁹ E.g., Ruth Marcus, Opinion, *Obama’s “Where’s Waldo?” Presidency*, WASH. POST (Mar. 2, 2011, 12:00 AM), <https://wapo.st/2If3byim> [<https://perma.cc/99SC-ZXLM>].

²⁵⁰ E.g., David Jackson, *Obama Never Said “Leading from Behind,”* USA TODAY: THE OVAL BLOG (Oct. 27, 2011, 1:14 PM), <http://content.usatoday.com/communities/theoval/post/2011/10/obama-never-said-lead-from-behind/1#.WluleZM-f2Q> [<https://perma.cc/TE3A-BWJK>]. The idea that President Obama was “leading from behind” initially came from an anonymous adviser to the President in a *New Yorker* piece on Obama’s foreign policy. *Id.* The phrase was repeatedly used by politicians and political commenters to criticize the President’s approach to governance — prompting steps by the President himself to disavow the phrase and its implicit conception of presidential duty. See, e.g., *id.*; Charles Krauthammer, Opinion, *The Obama Doctrine: Leading from Behind*, WASH. POST (Apr. 28, 2011), <https://wapo.st/2uC6FJq> [<https://perma.cc/4R3N-9ZBJ>].

²⁵¹ See HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* 114–15 (1927); see also FORREST McDONALD, *THE AMERICAN PRESIDENCY* 348–64 (1994); James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POL. SCI. Q. 613, 622 (1988) (tracing the concept of the chief legislator to Professor Howard Lee McBain’s book, *supra*).

²⁵² See MCBAIN, *supra* note 251, at 170; see also ROBERT J. SPITZER, *THE PRESIDENTIAL VETO* 67 (1988); RICHARD A. WATSON, *PRESIDENTIAL VETOES AND PUBLIC POLICY* 14 (1993) (emphasizing that early Presidents “were generally reluctant to substitute their judgments on public-policy matters for those of the Congress”). Congress responded to the rising use of presidential vetoes by creating its own norms, including the use of legislation riders. See McDONALD, *supra* note 251, at 350–51. The so-called “legislative veto” developed later. And norm-based practice has preserved it long after the Supreme Court invalidated the formal practice in *INS v. Chadha*, 426 U.S. 919, 959 (1983), thus reserving a “real” allocation of structural authority that departs from the written rules of text and judicial precedent. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 273 (1993); see also Renan, *supra* note 227, at 238.

Normative understandings of the President's role in proposing legislative reforms and driving the legislative process changed as well.²⁵³ Early Presidents participated in the bill drafting process. But a nineteenth-century norm of presidential restraint soon developed, with few departures.²⁵⁴ President Theodore Roosevelt paved the way for the new norm by shifting the rhetoric, if not the substance, of presidential leadership in the legislative process.²⁵⁵ It was President Wilson, coming to power contemporaneously with Democratic control of the Senate "for the first time in a generation"²⁵⁶ and a dwindling Republican old guard, who was first able to realize the ambitions of a chief legislator and, again, to cement its constitutional narrative.²⁵⁷ Writing just after the election of 1912, Wilson observed that the "character of the Presidency is passing through a transitional stage" such that now "[h]e must be Prime Minister, as much concerned with the guidance of legislation as with the just and orderly execution of law."²⁵⁸

A final norm that helped to cement the President's function as chief legislator was presidential control over the budget process, which Presidents developed into a broader instrument of legislative control.²⁵⁹ Before 1920, federal agencies submitted their own budget requests to Congress.²⁶⁰ During the 1920s, at the urging of Republican Presidents, the budget process became increasingly centralized and subject to presidential control. The Budget and Accounting Act,²⁶¹ enacted in 1921, for the first time required the President to present a single, consolidated budget to Congress and created the Bureau of the Budget (what would become the modern Office of Management and Budget) to assist the President in overseeing the budget process.²⁶² The new Bureau issued a circular instructing agencies "by direction of the President" and in keeping with the "spirit" of the Act, to submit legislative proposals or positions on pending legislation to the Bureau, if they would have fiscal

²⁵³ See MCDONALD, *supra* note 251, at 346–81 (contending that while nineteenth-century Presidents (excepting Lincoln) initiated legislation "sparingly and cautiously and often scarcely at all," the Presidents soon drifted "[i]nto the legislative vacuum," *id.* at 347); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818–19 (1996).

²⁵⁴ See MCDONALD, *supra* note 251, at 355 (identifying Jackson's presidency as an important exception).

²⁵⁵ See *id.* at 356–58 ("[Roosevelt] urged reform, but if it was not forthcoming, he picked out legislation that might loosely be described as reform and went on the hustings to claim responsibility for it," *id.* at 358).

²⁵⁶ *Id.* at 359.

²⁵⁷ See *id.* at 358–64.

²⁵⁸ Letter from President Woodrow Wilson to Rep. A. Mitchell Palmer (Feb. 13, 1913), in HENRY JONES FORD, *WOODROW WILSON* 322–23 (1916).

²⁵⁹ See MCDONALD, *supra* note 251, at 364–65; Sundquist, *supra* note 251, at 622.

²⁶⁰ See MCDONALD, *supra* note 251, at 364.

²⁶¹ Pub. L. No. 67-13, 42 Stat. 20 (1921) (current version in scattered sections of 31 U.S.C. (2012)).

²⁶² *Id.* §§ 201, 207, 42 Stat. at 20, 22.

implications.²⁶³ Cabinet members pushed back and the protocol at first was largely honored in the breach.²⁶⁴ Enforcement of the protocol by the Bureau, backed by presidential support, began in earnest in 1924.²⁶⁵

Initially used as a mechanism to curb fiscal requests from the agencies to Congress, centralized “legislative clearance” became an instrument of presidential control over a substantive legislative agenda under President Franklin D. Roosevelt.²⁶⁶ A revised circular from the Budget Bureau was no longer grounded in the authority of the Budget and Accounting Act, but rather in executive power itself. A 1937 memorandum from an assistant Budget Director states, “[T]here is no authority whatever in the Budget and Accounting Act for our procedure with respect to reports on legislation. And I would not try to make believe that there is. The authority we have over [these] reports comes from Executive authority and *not* from any Act of Congress.”²⁶⁷

By midcentury, “[t]he President proposes and the Congress disposes” had become “the catch phrase to describe the legislative process.”²⁶⁸ Executive branch actors, congressional actors, and other elites articulating the expected practices of American governance looked to the presidency to drive the legislative process.²⁶⁹

3. *Controlling Administrative Policymaking.* — With normative understandings of the President’s role in the policy process firmly entrenched, changes in the underlying political conditions — in particular, the rise of divided government — helped to cement another norm: presidential control over domestic policymaking through the administrative process.²⁷⁰ Notwithstanding ongoing debate over the Founders’ original intent, early practice appears to have supported “a more pluralistic understanding of the executive branch,” whereby at least some cabinet members were seen as extensions of Congress and legislative interests

²⁶³ Richard E. Neustadt, *Presidency and Legislation: The Growth of Central Clearance*, 48 AM. POL. SCI. REV. 641, 644 (1954) (quoting BUREAU OF THE BUDGET, CIRCULAR NO. 49 (1921)).

²⁶⁴ See *id.*

²⁶⁵ See MCDONALD, *supra* note 251, at 364.

²⁶⁶ See Neustadt, *supra* note 263, at 645–54.

²⁶⁷ *Id.* at 650 n.28 (internal quotations omitted) (quoting assistant Budget Director). Congress reasserted its role in the budget process, and enhanced its own institutional capacities to oversee the budget, in response to Nixon’s sweeping uses of presidential impoundment. See WHITTINGTON, *supra* note 57, at 162–73. For a discussion of the current institutions of the President’s budget as it relates to policy control, see Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

²⁶⁸ Sundquist, *supra* note 251, at 621.

²⁶⁹ See *id.* at 622 (“By the 1940s, no textbook on American government failed to highlight the president’s legislative role, usually in a section carrying the phrase ‘chief legislator’ in the title.”).

²⁷⁰ See generally Kagan, *supra* note 185.

and understood to exercise a policy mandate independent of the President's.²⁷¹

The contemporary norm of presidential control over agency policy-making — what then-Professor Elena Kagan labeled “presidential administration”²⁷² — reflects, and has been entrenched over time by a now-accepted constitutional narrative of democratic accountability through the President, changed understandings of political morality (in particular, growing skepticism from legal elites of expertise as a workable constraint on administrative governance), and equilibria shaped by an increasingly gridlocked Congress.²⁷³ Its institutional supports have been closely studied in the political science and administrative law scholarship.²⁷⁴

4. *Interaction with Partisanship Norms.* — Each of these authority-allocating norms has been sustained by concurrent developments of a fifth norm type: *partisanship norms* structure the President-party relationship, and they have changed dramatically since the Founding. The Framers themselves sought to prevent the influence of parties — which they regarded as “faction[s]” or “cabal[s]” — on American constitutional governance.²⁷⁵ They devised an institution for presidential selection, the Electoral College, intended to curb direct popular influence.²⁷⁶ Norm-based practice quickly “hollowed out” that institution and replaced it with a partisan one.²⁷⁷

From President Wilson through the first half of the twentieth century, a normative duty of the political party to restructure government

²⁷¹ Whittington, *supra* note 233, at 449 n.159; *see also* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 241 (1989) (distinguishing, during the Washington presidency, between Congress's treatment of the departments of State and War as “‘executive’ in nature,” and its treatment of the Treasury Department as an “indispensable, direct arm of the House”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 22–32 (1994) (emphasizing variation in Congress's treatment of departments, with some subject to and others insulated from presidential control).

²⁷² *See* Kagan, *supra* note 185, at 2246.

²⁷³ *See* Flaherty, *supra* note 253, at 1819–21; *see also* MCDONALD, *supra* note 251, at 329–45; Kagan, *supra* note 185; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1677–78, 1703–13 (1975); Watts, *supra* note 186, at 685–87, 692–706.

²⁷⁴ For canonical works in political science, *see* Terry M. Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 235 (John E. Chubb & Paul E. Peterson eds., 1985); and Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1 (1994). *See also* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 88–106 (2003); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1096 (2002). And in administrative law scholarship, *see* Kagan, *supra* note 185; and Barron, *supra* note 188. An extensive legal literature explores OIRA review, *see, e.g.*, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 836–41 (2013), as well as more recent forms of presidential control, *see, e.g.*, Watts, *supra* note 186, at 684–92.

²⁷⁵ Sundquist, *supra* note 251, at 615.

²⁷⁶ *See id.*

²⁷⁷ Whittington, *supra* note 2, at 1860.

gained prominence — an understanding captured in the “doctrine of responsible party government.”²⁷⁸ During this time, divided government was anomalous,²⁷⁹ and a government unified by political party, mobilized through presidential leadership, was understood by elites to be the unwritten *solution* to the problem of a written structure of separated powers.²⁸⁰

Meanwhile, and in some tension with these understandings of party government, structural norms also shifted effective power from the political party to the presidency.²⁸¹ Until 1912, it was the party that conducted a presidential campaign, while the presidential candidate “with few exceptions, restricted [his] communications to letters of acceptance of the nomination.”²⁸² Over time, however, the President became the face and active voice of his party in both campaigns and governance. President Wilson “was the first victorious presidential candidate to have engaged in a full-scale speaking tour during the campaign.”²⁸³ The disjunction between presidential leadership and party control was reinforced during the New Deal period, in what one scholar has described as the “emancipation” of the presidency from the political party.²⁸⁴ That

²⁷⁸ See Sundquist, *supra* note 251, at 614. See generally AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT* (1954).

²⁷⁹ See JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 93 (1992) (“When President Dwight Eisenhower was sworn in for his second term in 1957, he became the first president since Grover Cleveland seventy-two years earlier to confront on inauguration day a Congress in which either house was controlled by the opposition party.”).

²⁸⁰ See RANNEY, *supra* note 278, at 25–110 (tracing the origins and development of a “doctrine of responsible party government” from Woodrow Wilson through Frank Goodnow); SUNDQUIST, *supra* note 279, at 91 (“The consensus was so complete that when the Committee on Political Parties of the American Political Science Association produced its landmark report in 1950 it did not even feel the need to argue the case for political parties, but simply asserted that they are ‘indispensable instruments of government’ necessary for, among other things, ‘integration of all of the far-flung activities of modern government.’” (alteration in original) (quoting COMM. ON POLITICAL PARTIES, AM. POLITICAL SCI. ASS’N, *TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM* 15–16 (1950))). See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (arguing that separation of powers doctrine should recognize that divided government, not the division of formal powers among the branches, decides the nature of American checks and balances).

²⁸¹ See SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES* 10–11 (1993) (arguing that the rise of administrative government under presidential control “caused the decline of the traditional party system by displacing parties as the principal instrument of popular rule,” *id.* at 11).

²⁸² Ceaser et al., *supra* note 232, at 166. Indeed, through much of the nineteenth century, voting occurred on a “party-strip ballot,” such that “votes were effectively cast for parties [rather than] individual candidates.” JOHN H. ALDRICH, *WHY PARTIES? A SECOND LOOK* 256 (2011).

²⁸³ Ceaser et al., *supra* note 232, at 166; see also *id.* (describing “[President Wilson’s] view [that] it was essential that the candidates replace the parties as the main rhetorical instruments of the campaign”). See generally John H. Aldrich, *Presidential Campaigns in Party- and Candidate-Centered Eras*, in *UNDER THE WATCHFUL EYE* 59 (Mathew D. McCubbins ed., 1992) (tracing “the change from party-centered to candidate-centered elections,” *id.* at 60, and exploring how this change affects “the patterns of decision making in the campaign . . . [and] in office,” *id.* at 79).

²⁸⁴ MILKIS, *supra* note 281, at 12.

transformation has itself been reinforced through the norms of presidential administration, which facilitate presidential policy leadership through the agencies rather than through the (party-controlled) legislative process.

E. Conclusion: Structural Norms of the Presidency

As the foregoing has shown, the role of the presidency — both its duties and its authorities — in the constitutional structure cannot be adequately understood without reference to structural norms. This Part has documented several types of structural norms constitutive of presidential power. These categories are not exhaustive, but they comprise core features of the modern presidency.²⁸⁵

The rise of presidential power over the course of the twentieth and early twenty-first centuries is in part a result of the norms of limitation that the presidency itself developed. A President armed with nuclear capabilities, overseeing a sprawling criminal code and a sweeping domestic administrative establishment grew to be tolerated in our culture, or understood by many legal and political elites to be constitutionally legitimate, at least in part because of the structural norms that the presidency over time cemented.

The normative value of these unwritten rules differs, and may be difficult to assess in the abstract — in part because any one structural norm can have both beneficial and detrimental effects. Take the investigatory-independence norm. When the relationship between a sitting President and the FBI Director sours and trust dissolves, dysfunctions can develop in how the administration handles sensitive information vital to national security or makes consequential policy decisions.²⁸⁶ At the same time, the norm has played a vital role in restraining presidential uses of wide-ranging investigatory powers to political and personal ends, and in fostering conditions that support a professional assessment of criminality in any particular investigatory matter.

The normative value of many structural norms is also institutionally and historically contingent. Consider the chief-legislator norm. While our constitutional system developed, especially at times of unified government, to facilitate energetic governance through presidential leadership over the legislative process, it is certainly possible to imagine an alternative system where Congress had retained more authority over

²⁸⁵ An important category of norms that I do not discuss is what Professor Adrian Vermeule has called “conventions against saying things.” Vermeule, *Third Bound*, *supra* note 2, at 1963; *see id.* at 1959–63. On Vermeule’s typology, my focus has been “conventions about doing things.” *Id.* at 1959; *see id.* at 1959–63.

²⁸⁶ *See, e.g.*, Harris & Vise, *supra* note 122 (reporting that, under Clinton, White House officials were kept in the dark about the FBI’s policy decision to develop the “Carnivore” surveillance system to monitor email traffic, and that national security matters suffered from poor coordination between the FBI and the rest of the executive branch).

legislation and administration and the President had become a more marginalized constitutional player. Had the presidential veto remained an instrument for Presidents to reject only legislative schemes that they deemed unconstitutional, had the budget process developed in a way to make agencies more accountable to their appropriations committees and less accountable to the presidency, had political parties developed in a way to perform some of the organizational and agenda-setting functions that the presidency today performs, we would have a very different constitutional order. But it need not be a normatively impoverished one.²⁸⁷

While any particular structural norm may be normatively contingent, however, the existence of such unwritten rules *in some form* appears crucial to realizing constitutional values. Take the conflict-of-interest norm. The specific protection against self-dealing that it provides is not mandated by political morality. Yet some type of constraint on the corruption of government power would seem vital to a functioning model of American governance.²⁸⁸ Similarly, while the investigatory-independence norm implicates the tradeoffs suggested above, it also helps to protect two moral principles indispensable to a working constitutional democracy — the legitimacy of a political opposition and the idea that even the President is not above the law.²⁸⁹ And while the content of the deliberative-presidency norm is not specified by political morality, some commitment to epistemic values and expertise appears vital to a presidency with the technological capacity to end life on earth at the push of a button. A respectable presidency thus requires, at a systemic level, *some* structural norms to be in operation.²⁹⁰ These rules supply institutional integrity to the presidency.

As a sociological matter, however, the resilience of structural norms turns in part on political conditions. Polarization — as a partisan, ideological, and affective phenomenon²⁹¹ — erodes shared narratives about acceptable political behavior, and it can undermine the conditions for

²⁸⁷ In this sense, norms show the impact of path dependence on the normative infrastructure of the presidency. See generally Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000). The development of certain institutions, practices, and arrangements leads to norms of a particular kind.

²⁸⁸ See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009) (describing “the concept of corruption [as] literally a threat to the integrity of self-government” and arguing that “[t]he Constitution carries within it an anti-corruption principle”).

²⁸⁹ See LEVITSKY & ZIBLATT, *supra* note 37, at 212 (“Treating rivals as legitimate contenders for power and underutilizing one’s institutional prerogatives in the spirit of fair play are not written into the American Constitution. Yet without them, our constitutional checks and balances will not operate as we expect them to.”).

²⁹⁰ See Michelman, *supra* note 3 (elaborating the concept of a “respect-worthy” regime or government); see also Fallon, *supra* note 3, at 1798 (“[M]inimal theories of moral legitimacy define a threshold above which legal regimes are sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable alternatives.” (emphasis omitted)).

²⁹¹ See *supra* notes 90–91 and accompanying text.

reciprocity and public trust.²⁹² As detailed at the outset, presidential practice has multiple audiences.²⁹³ Some norms — and norm breaches — will be more acceptable to certain groups than to others.²⁹⁴ Polarization heightens contestation about the norms themselves and about the experience of norm breaching — whether it has occurred, and whether it is justified.²⁹⁵ And it blunts the capacity of Congress to enforce presidential norms of limitation. Rising inequality might also affect the sociological force of structural norms: it makes more compelling a political rhetoric that depicts norm-based practice as rewarding, or preserving power in, a governing class unresponsive to public needs.²⁹⁶ Structural norms thus become terrain for fights over status in the polity, with those groups seeking to change their status more receptive to a political rhetoric that is hostile to the governing norms.²⁹⁷

These sociological and normative dimensions of norms interact. The presidency has undergone significant transformations since the Founding. In those periods when it has been so changed, it is because presidential challenges to the governing norms, supported by elites, won

²⁹² See Lieberman et al., *supra* note 89, at 3 (emphasizing the intersection of three developments in American politics: “polarized two-party presidentialism; a polity fundamentally divided over membership and status in the political community, in ways structured by race and economic inequality; and the erosion of democratic norms at the elite and mass levels”); cf. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 3, 7 (Juan J. Linz & Arturo Valenzuela eds., 1994) (contrasting the U.S. system, in 1994, with “the development of modern [] parties” in countries with more “socially or ideologically polarized societies” and arguing that those conditions make the “dual democratic legitimacy” problems of presidential systems “especially complex and threatening”).

²⁹³ See CARPENTER, *supra* note 46, at 26, 33, 59 (identifying audience as a “central concept in a reputation-based perspective on regulation,” *id.* at 33, and arguing that “[m]uch of the politics of reputation in modern organizations would appear to require the management of an ambiguous image among multiple audiences,” *id.* at 59).

²⁹⁴ See *id.*

²⁹⁵ See Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 *TEX. L. REV.* 485, 486 (2016) (explaining that judgments about “the legitimate authority of the President, Congress, and the Supreme Court” often depend on “who currently controls the relevant institutions”).

²⁹⁶ See Samuel Issacharoff, *Democracy’s Deficits*, 85 *U. CHI. L. REV.* 485, 488 (2018) (arguing that “democratic uncertainty draws from” institutional conditions that include “the loss of a sense of social cohesion”); Lieberman et al., *supra* note 89, at 15–20 (“[O]ur framework considers institutions, the boundaries of civic membership and status [including racial and economic inequality], and norms as bearing an interactive relationship to one another.” *Id.* at 25.); see also Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78, 81 (2018) (“[I]t is well established that economic inequality is associated with increasing acceptance of authoritarian rule.”).

²⁹⁷ See RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 39 (1965) (attributing the “paranoid style” in politics to “a confrontation of opposed interests which are (or are felt to be) totally irreconcilable, and thus by nature not susceptible to the normal political processes,” a situation exacerbated when groups “[f]eel[] that they have no access to political bargaining or the making of decisions”); see also LEVITSKY & ZIBLATI, *supra* note 37, at 173–74 (building on Hofstadter’s account of “status anxiety,” *id.* at 173, to explain an “intense animosity,” *id.* at 174, in contemporary American politics and the erosion of democratic norms).

out as a normative matter — at least among those groups with power to enforce the then-existing constitutional order.²⁹⁸ The idea that a governing norm was no longer working gained traction. The reasons to comply with the norm lost purchase. In describing the norm-based character of the American presidency, then, I hope to show, not dispute, the idea that periodic norm contestation is inevitable and can be valuable. I want to argue against, however, a conception of the presidency that understands structural norms as irrelevant to the content of, and normative constraints on, that office.

A final conceptual wrinkle: contestation over the level of generality or precision at which any norm should be specified can foster disagreement over whether a rule governing the particular situation exists, and whether it has been violated. This challenge, however, exists with any form of precedent. Common law judging or arguments from original understandings of the constitutional structure share this difficulty.²⁹⁹ It is an intractable feature of constitutionalism, rather than a reason to be relatively more concerned about structural norms as opposed to other forms of normative precedent — that is, other types of analytic tools for discerning the “office” of the presidency. Of course, with judicial common law, and sometimes with arguments from original understanding, the Supreme Court can intervene to express the authoritative level of precision at which to specify the precedent.³⁰⁰ But this doesn’t change the nature of precedent. Rather, it underscores the significance of its relationship to a specific enforcement institution.

The norm-based character of the presidency thus raises important questions for public law theory and practice. One of those questions is this: how should courts respond to norm breaching?

III. JUDICIAL ENFORCEMENT: POTENTIAL APPROACHES

Legal theory and doctrine have not settled on a singular conception of the interplay between presidential norms and judicial practice. This Part sketches a spectrum of potential approaches, each of which finds occasional (though often implicit) support in the case law. My principal aim is to map out the conceptual possibilities and to assess their advantages and drawbacks. Descriptively, I argue that the structural norms of the presidency and of the judiciary interact. Practices of judi-

²⁹⁸ On such developments during the Progressive period, see, for example, Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, PEPP L. REV. (forthcoming 2018) (manuscript at 10) (on file with author).

²⁹⁹ Indeed, the problem is exacerbated in arguments from original understandings because the Founding-era precedents fit so poorly with the nature of modern governance. On the relationship between a norm-based presidency and originalism theories, see *infra* notes 451–454 and accompanying text.

³⁰⁰ See Tushnet, *supra* note 298 (manuscript at 15–16) (distinguishing constitutional conventions and judicial common law, in part along this dimension).

cial deference are sometimes premised on certain norm-based understandings of the presidency. When those presidential norms collapse, the norms of judicial deference adjust. Though my focus remains descriptive and analytic, section D concludes with a limited prescriptive claim.

Before beginning, a brief comment on the language that courts and legal scholars often use to discuss — and sometimes to sort — structural norms. In those cases where the Court has decided to enforce presidential norms through separation of powers doctrine, it has used the framework of “historical gloss.”³⁰¹ Leading scholars have sought to distinguish historical gloss from “constitutional conventions,” which they argue are *not* legally enforceable (unlike gloss), by looking to whether participants in the practice, such as executive branch lawyers, have understood the norm in legal or nonlegal terms.³⁰² Structural norms, however, are reinforced through a variety of mechanisms (such as administrative procedures or congressional oversight) that are not amenable to neat categorization as legal or nonlegal. Whether participants describe the practice in legal or nonlegal terms is as much a matter of who those participants are, why they are discussing the practice, and what institutional benefits or costs exist for understanding the rule in those terms. Indeed, executive branch lawyers — perhaps especially those creating precedential legal opinions inside the executive branch, such as OLC — are more likely to characterize structural norms that *empower* the presidency as legally salient “gloss,” but structural norms that *restrain* presidential behavior in less clearly legalistic terms.³⁰³

Another attempt to distinguish “gloss” from “conventions” would be an argument from constitutional text: that some norms provide a gloss on written structural provisions, while others operate independently from any such constitutional hook. I am skeptical of this distinction as well, for the written Constitution’s more open-textured provisions, like the Take Care Clause, could plausibly provide a textual hook for any number of unwritten structural norms.³⁰⁴

³⁰¹ The concept of historical gloss originated with Justice Frankfurter’s concurrence in the *Steel Seizure* case. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”). See generally Bradley & Morrison, *supra* note 230 (developing a theory of historical gloss and the separation of powers).

³⁰² See Bradley & Siegel, *supra* note 35, at 318.

³⁰³ As scholars (including myself) have elaborated, there are many pressures on executive branch lawyers to frame limitations on presidential power in more policy-inflected (rather than legal) language. See Renan, *supra* note 35, at 835–37, 872–75.

³⁰⁴ Cf. Goldsmith & Manning, *supra* note 31.

If a line between gloss and conventions exists, it does not appear to me to be a line that courts could easily administer, nor a line that would remain particularly stable. And, of course, courts themselves participate in shaping the legal/nonlegal quality of structural norms. They do not simply find gloss but also mold some norm-governed practices into it.³⁰⁵ My hope is that the framework developed here offers a way to understand the spectrum of relationships between presidential norms and judicial practice that is inclusive of more phenomena, brings into view new questions, and illuminates some important tensions in the Court's current practices.

A. *Non-Enforcement*

On one view, the structural norms of Article II are simply irrelevant to judicial practice.³⁰⁶ Legal doctrine conceptualizes political actors in more abstract and formalist terms, uninterested in the obligations that norms supply.³⁰⁷ *NLRB v. Noel Canning*³⁰⁸ illustrates this approach in holding that the President's appointments violated the Recess Appointments Clause,³⁰⁹ even as other components of the decision were firmly grounded in norm-based practice. The Court addressed three questions in *Noel Canning*: (1) does an *intrasession* recess count as a recess under the Clause?; (2) can the vacancy predate the recess?; and (3) do "pro forma" sessions count in calculating the duration of a recess for purposes of the President's recess appointment power?³¹⁰ As I discuss in the next section, norm-based practice was determinative on the first two questions. But the Court deemed it irrelevant on the third.

The case arose because Republican leadership in the House declined to authorize adjournment by the Senate in order to prevent the Democratic President from making appointments to the National Labor Relations Board and other agencies.³¹¹ In response, the Senate engaged in a series of uninterrupted "pro forma" sessions, labeled as such in the

³⁰⁵ See Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 83 (2013) ("A complete account of historical gloss . . . must address the question of courts as gloss producers.")

³⁰⁶ See Adrian Vermeule, *Conventions in Court* 8 (Harvard Pub. Law Working Paper No. 13-46, 2013), <https://ssrn.com/abstract=2354491> [<https://perma.cc/S69H-3FHV>] ("The classical approach in Commonwealth legal theory, stemming from the pre-eminent Victorian theorist Albert Venn Dicey, holds that conventions 'are not enforced or enforceable by the Courts.'" (quoting Roger E. Michener, *Foreword* to A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 15 (Liberty Fund ed. 1982))).

³⁰⁷ See Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2-3.

³⁰⁸ 134 S. Ct. 2550 (2014).

³⁰⁹ U.S. CONST. art. II, § 2, cl. 3.

³¹⁰ See *Noel Canning*, 134 S. Ct. at 2560-61, 2567, 2573-74.

³¹¹ David J. Arkush, *The Senate and the Recess Appointments*, 127 HARV. L. REV. F. 1, 2-3 (2013).

Senate schedule, during which no business was to be conducted.³¹² The sessions lasted for less than one minute and were generally attended only by the convening senator.³¹³ A question at the crux of *Noel Canning* is whether the use of pro forma sessions to obstruct presidential appointments violates norms relevant to the recess appointment power.

Until 2007, a practice had developed by which pro forma sessions were used on occasion by either chamber for a very brief period, sometimes as little as one day, to satisfy the technical requirements of constitutional adjournment.³¹⁴ Pro forma sessions thus smoothed out short-term scheduling conflicts between the chambers. But in 2007, Senate Majority Leader Harry Reid used pro forma sessions for the first time to prevent recess appointments by President George W. Bush near the end of his Administration.³¹⁵ In 2011, the decision not to adjourn was made by the Republican Speaker of the House to prevent recess appointments by President Obama, including the appointment of the first head of the newly created Consumer Financial Protection Bureau so that the agency could not commence operations.³¹⁶

So understood, the case implicated a structural norm that now appeared increasingly fragile: that the Senate does not use pro forma sessions to prevent the business of governance, including the exercise of presidential authority under Article II.³¹⁷ The Supreme Court, however, did not want to see *Noel Canning* on those terms. “[E]ngaging in [that] kind of factual appraisal,” the Court reasoned, “is [neither] legally [nor] practically appropriate.”³¹⁸ Instead, the Court “[h]eld] that, for purposes

³¹² See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C., 2012 WL 168645, at *1 (Jan. 6, 2012) [hereinafter OLC Recess Opinion]; see also, e.g., 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011) (statement of Sen. Ron Wyden) (asking for consent to “adjourn and convene for pro forma sessions only, with no business conducted”).

³¹³ See OLC Recess Opinion, *supra* note 312, at *2. The then-Democratic-majority Senate does not appear to have used these sessions to prevent recess appointments by the Democratic President, which they generally supported. See Arkush, *supra* note 311, at 8.

³¹⁴ See Memorandum from Christopher M. Davis, Analyst on Cong. and the Legislative Process, to Sen. Minority Leader (Mar. 8, 2012), published in 158 CONG. REC. S5954–56 (Aug. 2, 2012) (regarding “Certain Questions Related to Pro Forma Sessions of the Senate”) (“In the normal course of business, party leaders in one or both chambers may wish to schedule periods of absence that exceed the three day constitutional limit by only a short period, perhaps by as little as one day. . . . In instances of this type, the chambers have evolved a practice of holding a short session sometime during the absence to comply with the constitutional limit . . . [and labeled these] ‘pro forma’ sessions, or sessions held for the sake of formality” *Id.* at S5954.).

³¹⁵ See Carl Hulse, *Democrats Move to Block Bush Appointments*, N.Y. TIMES (Nov. 21, 2007), <https://nyti.ms/2GqFZNj> [<https://perma.cc/ARN6-HPQE>].

³¹⁶ THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS 100 (2016); Arkush, *supra* note 311, at 2–3.

³¹⁷ See LEVITSKY & ZIBLATT, *supra* note 37, at 135 (“In theory, the Senate could block presidents from appointing any of their preferred cabinet members or justices — an act that, though nominally constitutional, would hobble the government.”).

³¹⁸ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2576 (2014).

of the Recess Appointments Clause, the Senate is in session when it says it is.”³¹⁹ Separation of powers doctrine, on this view, simply has no effect on the making or unmaking of the unwritten aspects of Article II. These two forms of regulation occupy separate, “acoustically sealed chamber[s].”³²⁰

We might worry, however, about a body of judge-made separation of powers law that refuses to consider the implications of abnormal political practice. Our constitutional culture tends to collapse questions of legitimacy into questions of legality.³²¹ In deciding questions of structural constitutional law, the Court inescapably articulates normative expectations of political behavior. By constructing a normative picture of inter- (and intra-) branch dynamics that is blind to structural norms, public law doctrine changes what it means for participants to violate those obligations.³²²

The norm at issue in *Noel Canning* can be understood as a prisoners’-dilemma norm. A problem specific to this type of cooperation equilibrium is “that of protecting an unstable yet jointly beneficial state of affairs from deteriorating . . . into a stable yet jointly destructive one.”³²³ Ullmann-Margalit argues that, in such circumstances, an external stabilizing agent can help protect the desirable but fragile equilibrium.³²⁴ One might argue that courts are uniquely situated to alter the temptation to deviate further from a beneficial but unstable arrangement between or within the political branches.³²⁵ The availability of the recess appointment power prevents the Senate from disabling an agency indefinitely by refusing to confirm its head. More generally, by providing a

³¹⁹ *Id.* at 2574.

³²⁰ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984).

³²¹ On the “legitimizing function” of the Court, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 29–33 (1962), discussing CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960). See also Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293–95 (1957) (arguing that “[t]he main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition,” *id.* at 294).

³²² See, e.g., Fallon, *supra* note 3, at 1811 (“Many Americans experience the Constitution as part of an integrated normative universe in which no sharp boundaries divide the legal from the moral.”).

The facts of *Noel Canning* concern intrabranched practice as much as interbranch relations, for it was the House that prevented the Senate from adjourning, in order to exercise power over the President’s removal authority. See Arkush, *supra* note 311, at 2–3.

³²³ See ULLMANN-MARGALIT, *supra* note 37, at 22.

³²⁴ See *id.*

³²⁵ See Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 84 (2003) (“Independent judicial review is valuable to political competitors when those competitors would prefer to exercise mutual restraint but the necessary monitoring and enforcement of this restraint are not possible or are prohibitively costly.”).

presidential instrument to counter — and thereby sanction — congressional obstruction, the capacity to appoint agency leadership is protected from further deterioration.³²⁶

By ignoring the norm breach, however, the Court in *Noel Canning* acted as a destabilizing agent. Its formalistic understanding of the Senate's availability to advise and consent — a “session” on paper only — alters the available moves and countermoves between the President and Congress. It disrupts a potential solution to the prisoners' dilemma.³²⁷ And it provides an impoverished set of analytic tools to understand the inter- and intrabranched dynamics at issue. The opinion paints a presidential power grab unmoored from congressional obstruction.³²⁸

B. Direct Enforcement

A second approach, then, would be for courts to embrace structural norms as a source of judicially enforced separation of powers law. Direct enforcement might take two forms, which raise very different normative questions.

In the context of norm *compliance*, the Court has used historical gloss as a method to accept as constitutionally permissible the structural norms that the political branches have come to expect — an approach illustrated by the two other components of *Noel Canning*. Even as the Court ignored the role of norm-based practice in deciding how to understand the pro forma sessions at issue, the majority relied on structural norms to decide that “the recess of the Senate” includes *intrasession* recesses,³²⁹ and that “vacancies that may happen during the recess” includes vacancies that arise prior to the recess.³³⁰ Relying on the political branches' understandings of how the recess power is appropriately exercised — norms reflected in longstanding presidential practice — the Court reasoned that it should not “upset the compromises and working arrangements that the elected branches of Government themselves have reached.”³³¹ Justice Scalia, writing for four Justices to concur in the

³²⁶ Cf. Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1692–93 (2015).

³²⁷ *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076 (2015), is another norm destabilizing opinion from the Court. Ignoring longstanding, though not unbroken, norms of presidential compliance with statutory constraints on the President's foreign affairs powers, see, e.g., DAVID J. BARRON, WAGING WAR xiii (2016), the Court, for the first time, upheld “a President's direct defiance of an Act of Congress in the field of foreign affairs,” *Zivotofsky II*, 135 S. Ct. at 2113 (Roberts, C.J., dissenting). On the destabilizing implications of the decision for presidential practice, see generally Goldsmith, *supra* note 32.

³²⁸ See Pozen, *supra* note 2, at 76–80 (arguing that constitutional discourse is worse off for overlooking the importance of self-help and conventions).

³²⁹ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (emphasis omitted).

³³⁰ *Id.* at 2567 (emphasis omitted).

³³¹ *Id.* at 2560.

judgment only, would have rejected this norm-based practice as inconsistent with what he concluded was the plain meaning of the constitutional text.³³² Yet the majority was more willing to find ambiguity in the constitutional text and to interpret Article II to permit the norm-based practice.³³³

With respect to norm compliance, scholars have mined the arguments for and against judicial treatment of norm-based practice as evidence of constitutionality.³³⁴ Arguments in favor of historical gloss have tended to focus on “deference to the constitutional views of nonjudicial actors; limits on judicial capacity; Burkean consequentialism; and reliance interests.”³³⁵ Though not uniformly embraced,³³⁶ this approach to structural norms is deeply entrenched in our legal culture, familiar in doctrine and scholarship, and in important respects essential to a working legal conception of the presidency. The constitutional contours of presidential authority are not really knowable in the abstract or in the imaginings of a Founding moment, but through the iterative development of inter- and intrabranched practice. The Court recognizes that practice-derived understandings shape our constitutional order when it embraces norm compliance as constitutionally permissible conduct.³³⁷

A much different, and understudied, question arises in the context of norm *breach*. When the Court itself marks a structural norm as legally enforceable and uses its breach (as the Court sees it) to strike down presidential behavior under Article II, the Court adopts an interventionist posture that raises distinct concerns.³³⁸ Arguments made under the Take Care Clause in *Texas v. United States*³³⁹ provide an illustration.

³³² See *id.* at 2595–600, 2606–10 (Scalia, J., concurring in the judgment).

³³³ See Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 46–49; David A. Strauss, *Constitutional Fundamentalism and the Separation of Powers: The Recess Appointments Case*, 83 U. CIN. L. REV. 347, 354–55 (2014). Meanwhile, Justice Scalia, inclined toward the text-based interpretation, was more willing to emphasize the inevitable breaks or inconsistencies in norm-based practice. See Strauss, *supra*, at 354–55.

³³⁴ See, e.g., Bradley & Morrison, *supra* note 230, at 432–47; see also Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 59–60 (2017).

³³⁵ Bradley, *supra* note 334, at 59.

³³⁶ An argument against has focused on the problem of constitutional “adverse possession.” See *Noel Canning*, 134 S. Ct. at 2592–93 (Scalia, J., concurring in the judgment).

³³⁷ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); see also Bradley & Morrison, *supra* note 230, at 451 (“It is a form of judicial deference for a court to privilege historical practice.”). See generally BICKEL, *supra* note 321, at 111–99 (on passive virtues).

³³⁸ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483–84 (2010); see also Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1478 (2017) (arguing that “Burkean traditions” can be used as a “sword” to strike down laws or as a “shield” to protect laws from constitutional challenge); cf. *PHH Corp. v. CFPB*, 839 F.3d 1, 18 (D.C. Cir. 2016), *vacated and reh’g en banc granted*, No. 15-1177, 2018 WL 627055 (D.C. Cir. Jan. 31, 2018) (en banc).

³³⁹ 809 F.3d 134, 149 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

The case concerned a sweeping exercise of prosecutorial discretion, directed by President Obama and implemented administratively, which would have made as many as 3.6 million noncitizen parents of U.S. citizen or lawful permanent resident children eligible for temporary relief from deportation under a “deferred action” program.³⁴⁰ A recipient of DAPA, as the program was called, would be deemed “lawfully present” for a three-year period and thus eligible to apply for work authorization during that time.³⁴¹ The President had initially suggested that he lacked the authority to effect this policy change without Congress, but changed his position as the potential for congressional action dissipated.³⁴² At its core, the Article II question was whether a constitutional line can be drawn separating permissible prosecutorial discretion from impermissible executive suspension of a statute.³⁴³ The Supreme Court expressed some interest in the Article II question, having added it in the grant of certiorari,³⁴⁴ though the Court did not ultimately decide it.³⁴⁵

Attempts to identify (and contest) that line looked, in effect, to norms. The States challenging DAPA initially argued that the President could only exercise prosecutorial discretion on an individualized or case-by-case basis, but not as a matter of “across-the-board” policymaking.³⁴⁶ In departing from this understanding, the States argued, President Obama violated Article II.³⁴⁷ Though the States repeated this argument in their briefing

³⁴⁰ See Cox & Rodríguez, *supra* note 93, at 107.

³⁴¹ President Barack Obama, Address to the Nation on Immigration Reform, 2014 DAILY COMP. PRES. DOC. 877 (Nov. 20, 2014), <https://www.gpo.gov/fdsys/pkg/DCPD-201400877/pdf/DCPD-201400877.pdf> [<https://perma.cc/XB9P-28XM>]; see also Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1754–55 (2016) (describing DAPA in detail).

³⁴² See, e.g., Bellia, *supra* note 341, at 1755.

³⁴³ See Cox & Rodríguez, *supra* note 93, at 142–43.

³⁴⁴ *United States v. Texas*, 136 S. Ct. 906 (2016).

³⁴⁵ The Fifth Circuit did not reach the constitutional question because it decided the case on APA grounds. See *Texas v. United States*, 809 F.3d 134, 146 & n.3 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam). After Justice Scalia unexpectedly passed, the Fifth Circuit decision was affirmed by an equally divided Court. See *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

³⁴⁶ Plaintiffs’ Motion for Preliminary Injunction and Memorandum in Support at 9, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254), 2014 WL 11515957; see also Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014) (arguing that executive officials generally “lack discretion to categorically suspend enforcement or prospectively exclude defendants from the scope of statutory prohibitions”). Even OLC, while focused on a different line-drawing principle, emphasized the significance of case-by-case discretion in finding the program to be legal. See The Dep’t of Homeland Sec.’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C., 2014 WL 10788677, at *17 (Nov. 19, 2014) (emphasizing that “[t]he guarantee of individualized, case-by-case review helps avoid potential concerns that . . . the Executive is attempting to rewrite the law”).

³⁴⁷ For an argument that no such norm exists in practice, see Cox & Rodríguez, *supra* note 93, at 144, 176–97, who recast the central legal and theoretical question as a choice between rules and standards, and between centralized and decentralized discretion.

to the Supreme Court, they surprised many by abandoning it at oral argument.³⁴⁸ Instead, the focus shifted to another suggested norm: that prosecutorial discretion could not be used to confer a legal benefit but only to refuse to impose a legal penalty.³⁴⁹

The justifications for historical gloss do not translate easily to this context, where litigants or a court are using what they perceive to be a norm breach to prohibit conduct undertaken by one or sometimes both of the political branches in concert.³⁵⁰ The theory might instead be that direct enforcement of structural norms interjects courts as a stabilizing agent into a volatile political process. Direct enforcement might even hold special appeal in deeply polarized times, when core components of a functioning constitutional democracy appear to be at stake. In those circumstances, one might argue that judicial enforcement of structural norms is a valuable “compensating adjustment.”³⁵¹ Because the branches no longer comply with the norms that undergird a functioning

³⁴⁸ See Transcript of Oral Argument at 52–53, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-674_b97d.pdf [<https://perma.cc/2RFV-K2UG>]; see also Ilya Somin, Opinion, *Thoughts on the Supreme Court Oral Argument in US v. Texas*, WASH. POST: VOLOKH CONSPIRACY (Apr. 18, 2016), <https://wapo.st/2Gmsj5L> [<https://perma.cc/KCR4-ELW7>] (observing that the Texas Solicitor General, arguing on behalf of the States, “appear[ed] to have abandoned the central argument . . . that [DAPA] is illegal because it replaces ‘case by case’ discretion on deportation with a categorical rule”).

³⁴⁹ See Brief for the State Respondents at 15–16, 49, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674). In their briefing, the States advanced this argument as a violation of the Take Care Clause and as a question of statutory interpretation. See *id.* at 72 (“DAPA violates the Take Care Clause . . . because it declares unlawful conduct to be lawful.”). With Justice Scalia’s passing, the Article II issue was not a focus of the questioning at oral argument.

³⁵⁰ For disagreement over the legal salience of such departures from practice, compare *PHH Corp. v. CFPB*, No. 15-1177, 2018 WL 627055, at *21–22 (D.C. Cir. Jan. 31, 2018) (en banc) (“[N]ovently *itself* [is not] a source of unconstitutionality. . . . [The judiciary] does not use the Constitution merely to enforce old ways.”), with *id.* at *71–76 (Kavanaugh, J., dissenting) (identifying a perceived norm of agency design in prior practice — that independent agencies must contain a multimember (rather than a single-director) structure so as to prevent the exercise of arbitrary power and protect presidential control — and finding breach of that norm in the design of the CFPB to constitute a violation of Article II).

³⁵¹ See, e.g., Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 14 (1988) (“As the enumerated powers are given an increasingly expanded interpretation, . . . constitutional rights assume a greater importance within the constitutional scheme.”); Flaherty, *supra* note 253, at 1832 (arguing that “the Court . . . manage[s] to get matters exactly wrong . . . [when it] invalidate[s] mechanisms that the political branches . . . develop[] as responses to presidential government”); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994) (arguing “that if we accept sweeping delegations of lawmaking power to the President, then to capture accurately the framers’ principles . . . we must also accept some (though not all) congressional efforts at regulating presidential lawmaking”); Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (arguing that the rise of delegation has rendered administrative procedure constitutionally obligatory); see also Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 398–400 (1997) (synthesizing and critiquing the “notion of compensating adjustments” in constitutional theory, *id.* at 398).

democracy, the argument would go, courts should step in and convert those norms into judicially enforceable rules.

On closer examination, however, there are strong reasons to question the desirability of converting structural norms of the presidency into judicially enforceable law. Several underexamined assumptions underlie this approach: that courts are institutionally adept at identifying structural norms and when they apply; that courts are good judges of norm effectiveness (by effectiveness, I mean simply that the norm continues to support a working system of constitutional governance),³⁵² that there is a discernable line, administrable by courts, to sort those structural norms that should operate as a hard legal prohibition from those that should not;³⁵³ and that judges — and, in particular, the Supreme Court — can play something resembling a neutral “stabilizing” role in protecting institutional equilibria that the political branches have become too polarized to preserve. Each of these assumptions falters on closer inspection.³⁵⁴

To begin to see why, consider *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.³⁵⁵ The case struck down, as violating Article II, a particular institutional design that the political branches had agreed to adopt.³⁵⁶ The Public Company Accounting Oversight Board, created as part of a series of accounting reforms in the Sarbanes-Oxley Act of 2002,³⁵⁷ enjoyed for-cause removal protection from the President by statute, and it was located inside the Securities and Exchange Commission (SEC), which the Court understood also to enjoy for-cause removal protection from the President.³⁵⁸ The scope of the President’s removal power, and the extent to which legislation can restrict it consistent with Article II, is not settled in the constitutional text.

³⁵² Cf. Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2255–56 (1996); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996) (contending that, under many circumstances, group-developed norms are inefficient).

³⁵³ See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473–76 (2001); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1302–03 (2006) (identifying the nondelegation doctrine as an “[u]nderenforced [n]orm[],” *id.* at 1299, and explaining that the reason for this is “judicial manageability,” *id.* at 1302); Cass R. Sunstein, *Non-Delegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) (arguing that the nondelegation doctrine has been “relocated” to “more specific” canons that “forbid administrative agencies from making [certain] decisions on their own”).

³⁵⁴ These assumptions operate mainly as assumptions about judicial capacity, although they also embed ideas about norm desirability and norm consistency. If most norms are desirable, and if norms are generally stable, then we might worry less about judicial capacity to identify their continued effectiveness.

³⁵⁵ 561 U.S. 477 (2010).

³⁵⁶ *Id.* at 484.

³⁵⁷ Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

³⁵⁸ *Free Enter. Fund*, 561 U.S. at 484, 486, 495.

Instead, the acceptable boundaries on presidential removal have developed over time through norm-based practice.³⁵⁹ The Court decided in *Free Enterprise Fund* that two layers of removal protection — a “Matryoshka doll of tenure protections”³⁶⁰ — departed from the governing norm, which the Court interpreted to permit only one layer of tenure protection from the President. Deviance from this norm (as identified by the majority) was impermissible under Article II.

To get there, the Court imagines a baseline for interbranch practice that is rigid, fixed, and legally tractable. It treats some structural norms — in particular, those protecting presidential removal authority — as *legal* restrictions implicit in Article II.³⁶¹ Meanwhile, structural norms that restrain presidential control are deemed legally irrelevant. As the dissent points out, longstanding understandings (derived from both practice and statutes) insulate certain officials, such as those exercising adjudicatory functions, from the President and restrict political control over technical and scientific expertise, such as accounting.³⁶² Different insulation norms exist, perhaps stated at different levels of generality, and they are sometimes in tension. Indeed, the Court’s haphazard treatment of insulation norms is underscored by the simple fact that the legal question at issue — whether two layers of removal protection is permissible under Article II — arose only because the Court accepted as legally salient a different insulation norm: that the SEC Commissioners *themselves* are protected from at-will removal by the President.³⁶³

Ultimately, the Court in *Free Enterprise Fund* imagines a presidency both more and less in control of the executive establishment than the existing norms might suggest.³⁶⁴ By focusing on removal protection, to the exclusion of other indicia of agency independence, the Court misses much of the action of governance.³⁶⁵ Decisions such as “who controls

³⁵⁹ See, e.g., Brief for Constitutional and Administrative Law Scholars as *Amici Curiae* in Support of Respondents at 12–24, *Free Enter. Fund*, 561 U.S. 477 (No. 08-861) (describing practice-based development of the removal power).

³⁶⁰ *Free Enter. Fund*, 561 U.S. at 497.

³⁶¹ *Id.* at 499–501 (suggesting that removal is “the key” constitutional method by which the President oversees the bureaucracy, *id.* at 501); see also *id.* at 503–04 (deeming other means of control, such as budgetary approval, “problematic,” *id.* at 504); *id.* at 528–29 (Breyer, J., dissenting) (criticizing the majority for ignoring other mechanisms of control).

³⁶² See *id.* at 530–32 (Breyer, J., dissenting); see also *id.* at 531–32 (arguing that financial regulation has historically “been thought to exhibit a particular need for independence”).

³⁶³ See Vermeule, *supra* note 306, at 12 (discussing the SEC Commissioners’ removal protection as a constitutional convention “recognized” by the Court in *Free Enterprise Fund*).

³⁶⁴ See Levinson, *supra* note 227, at 67–68 (critiquing the Court’s assessment and arguing that “[d]istinguishing empowering from disempowering constraints is . . . [a] challenge for constitutional assessments of structural power,” *id.* at 68).

³⁶⁵ See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Datla & Revesz, *supra* note 274; Vermeule, *supra* note 306.

the agency's budget requests" have tended to have more practical bite than the often untested and politically cabined removal power.³⁶⁶ At the same time, by foreclosing institutional innovation in how the political branches might insulate certain forms of administrative regulation from politics, the Court impedes the revision of structural norms to meet changing political or social conditions such as the accounting scandals that gave rise to Sarbanes-Oxley.³⁶⁷

The error costs are quite high.³⁶⁸ By declaring norm deviance unlawful, the court makes it difficult if not impossible for the political branches to revise normative understandings about agency design over time. The decision costs are high as well. Courts must gather and assess information about inter- and intrabranch practice that the adjudicatory process is not designed to produce.³⁶⁹ And courts must be able to sort genuine structural norms from historical accidents lacking in normative content. Without principled means to resolve these complex questions, judges might be too apt either to freeze in place historical practice without regard to the potential benefits of norm entrepreneurship,³⁷⁰ or to legalize only those norms that their copartisans believe are being violated.

The latter course creates an additional decision cost: at a minimum, the perception of partisanship or politicization of the Court itself.³⁷¹ Is *Free Enterprise Fund* part of a partisan political effort to curb the regulatory state by undermining the legality of independent agencies? Would norm enforcement in *Noel Canning* be a partisan effort to protect President Obama's recess appointments? Beyond perception, the reality of a polarized Supreme Court, increasingly on partisan grounds, challenges the idea that the Court can operate as an effective stabilizing agent preserving a political equilibrium that the political branches are too polarized to maintain.³⁷²

³⁶⁶ *Free Enter. Fund*, 561 U.S. at 524–25 (Breyer, J., dissenting).

³⁶⁷ See *id.* at 520–23; see also Cox & Rodríguez, *supra* note 93, at 164–65 (arguing for a separation of powers approach that “produce[s] a more fluid politics of congressional-executive relations,” rather than an approach that “constitutionally entrench[es]” practice, *id.* at 165).

³⁶⁸ See, e.g., Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 71 (2013) (concluding that *Free Enterprise Fund* possibly “undermines” rather than promotes accountability because it misunderstands the norms and operation of the bureaucracy).

³⁶⁹ See, e.g., Huq & Michaels, *supra* note 87, at 417–18 (discussing limitations on judicial capacity to gather and evaluate information in separation of powers cases).

³⁷⁰ See Litman, *supra* note 338, at 1478–79; Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1619–23 (2015).

³⁷¹ See Stephen P. Nicholson & Thomas G. Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions*, 58 AM. J. POL. SCI. 620, 621 (2014) (finding that “the public responds to both legal and partisan images of the Court when making decisions about whether to accept Supreme Court decisions but that the partisan response is larger and more consistent”).

³⁷² See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (documenting that the contemporary

An analogy to the common law judge in the private law context might be revealing, as much for the limits of the analogy or the conditions that distinguish norm enforcement in that context from structural constitutionalism. Justice Cardozo famously understood the role of the common law judge to be articulating and enforcing a set of norms that constitute the “morality of the community,” recognizing, however, the difficulty of articulating those norms that can be said to order private conduct.³⁷³ Judicial enforcement of structural norms shares this difficulty, but adds others. It puts the judiciary squarely in the game of designing American politics or the acceptable interactions of the political branches. And it does so in a context where the partisan valence of the Court’s decisions may be inescapable. In addition, the iterative and incremental development of judicial common law so familiar in the private law context stands in stark contrast with the sparse and fitful interjection of a judicial perspective in structural constitutionalism, where inter- and intrabranched practice develops, sometimes for decades, sometimes for centuries, without the Court’s involvement.³⁷⁴ In the context of a perceived norm breach, then, judicial enforcement of the structural norms governing political behavior raises special concerns.

C. Indirect Enforcement

Between direct and nonenforcement is a range of intermediate judicial responses that might be grouped under the label of “indirect” enforcement. By indirect enforcement, I mean that courts recognize structural norms only as descriptive features of institutional behavior — features that have relevance to an independent question of legality. The source of legal wrong is not the norm itself but an independent constitutional or statutory right. This section analyzes two variants.³⁷⁵

Supreme Court “is different from past Courts in the linkage between party and ideology,” *id.* at 303, and that “[b]efore 2010, the Court never had clear ideological blocs that coincided with party lines,” *id.* at 301; see also Donald Michael Gooch, *Ideological Polarization on the Supreme Court: Trends in the Court’s Institutional Environment and Across Regimes, 1937–2008*, 43 AM. POL. RES. 999, 1002–06 (2015) (finding that the Supreme Court is polarized and that this polarization is concomitant with polarization in the political branches); Brandon L. Bartels, *The Sources and Consequences of Polarization in the U.S. Supreme Court* (unpublished manuscript), <https://home.gwu.edu/~bartels/Bartels%20Chapter%20-%20Polarization%20Volume%20FINAL.pdf> [<https://perma.cc/8P4U-MEKV>] (documenting “how the ideological center on the Court has gradually shrunk over time,” *id.* intro.).

³⁷³ BENJAMIN NATHAN CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 251, 274 (Margaret E. Hall ed., 1947); see also John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1327 (1990) (“[Under] Cardozo’s theory[,] . . . the common law ought to articulate and enforce in legal rules the limited set of norms that citizens . . . hold in common.”).

³⁷⁴ On the iterative and incremental process of judicial common law in Justice Cardozo’s theory, see Goldberg, *supra* note 373, at 1344.

³⁷⁵ These are not the only potential forms of indirect enforcement by courts. For example, when courts find standing for congressional offices to defend the constitutionality of a statute, the defense

1. *Recognizing Norms.* — At its more modest, indirect enforcement might mean recognizing norm *compliance* as institutional context relevant to an independent legal claim.³⁷⁶

Such norm recognition provided institutional context in *Sherley v. Sebelius*,³⁷⁷ a recent decision from the D.C. Circuit. The case concerned an APA challenge to National Institutes of Health (NIH) Guidelines implementing a presidential executive order to expand stem cell research.³⁷⁸ One issue in the case was whether NIH had violated the APA by declining to respond to submitted comments that categorically objected to stem cell research funding.³⁷⁹ In rejecting the APA claim, the court recognized the norm of presidential administration as supplying a relevant descriptive feature: NIH could not “simply disregard” the President’s directive, the court reasoned, because the agency “must implement the President’s policy directives to the extent permitted by law.”³⁸⁰ Having recognized this norm, the court concluded that it was not arbitrary and capricious for NIH to disregard comments disputing the policy choice that the President had made to fund stem cell research.³⁸¹

Judicial recognition of norm-based practice, then, can provide important institutional context against which to evaluate an independent legal claim. But what happens when a structural norm is *breached* by one or both of the political branches?

2. *Adjusting Institutional Choice.* — Underlying a range of doctrines of judicial deference is an antecedent question of institutional choice: which is the more competent institutional actor to decide the legal question at issue, the courts or the President?³⁸² The answer to that question is predicated (sometimes implicitly, sometimes explicitly) on a set of assumptions about how these institutions actually work.

of which the President has abandoned, such judicial responses may also have an indirect effect of enforcing a norm like the duty to defend.

³⁷⁶ See Vermeule, *supra* note 306, at 2; see also MARSHALL, *supra* note 37, at 12–17 (elaborating ways in which courts, in the Commonwealth context, “recognize” conventions).

³⁷⁷ 689 F.3d 776 (D.C. Cir. 2012).

³⁷⁸ See *id.* at 779–80.

³⁷⁹ See *id.* at 784.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 785; cf. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“The agency’s changed view of the standard seems to be related to the election of a new President of a different political party. . . . As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.” (footnote omitted)).

³⁸² See HART & SACKS, *supra* note 22, at 168–74, 1009–10; KOMESAR, *supra* note 22, at 3–6 (highlighting the importance of institutional choice and proposing a framework for making institutional selections).

Compliance with these types of presidential norms — in particular, insulation and discretion-structuring norms — is part of what underwrites a court’s judgment that the presidency is the better institution to decide the legal question at issue. The norm supplies descriptive features of institutional behavior upon which judicial practice is premised.³⁸³ Breach of the norm (at least as perceived by the court) changes that underlying judicial choice.³⁸⁴ Collapse of the presidential norm becomes a reason for the court to adjust a judicial norm — that is, to ratchet down deference.³⁸⁵

The rationale that courts should defer, for example, to the President’s national security judgment has not been an argument entirely about democratic accountability. It has been grounded as well in the idea that the presidency, *as an institution*, is better equipped to exercise sound national security judgment.³⁸⁶ This is in part because of informational asymmetries that limit judicial capacity to evaluate policy and national security strategy.³⁸⁷ The argument, however, is not simply about the capacity of the presidency for empirical judgment. Rather, the Supreme Court has implicitly suggested that the presidency is the institution more capable of assessing how pragmatic, constitutional, and statutory values

³⁸³ An analogous argument has long been made with respect to legislative decisionmaking: that the Court defers to the legislature because of its democratic pedigree. When the political process malfunctions, the predicate for judicial deference is weakened. *See, e.g.,* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). *But see* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1064 (1980) (“[I]t is not difficult to show that the constitutional theme of perfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete.”). Similarly, courts generally perceive the executive branch as competent to structure internal decisionmaking processes and worry that judicial involvement could compromise such systems. *See* VERMEULE, *supra* note 23, at 113–15 (describing the advantages agencies enjoy over “generalist, case-specific, and episodic” courts, *id.* at 115, in structuring administrative process); Jerry L. Mashaw, *Bureaucracy, Democracy, and Judicial Review*, in *THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY* 569, 585–86 (Robert F. Durant ed., 2010) (discussing how judicial review can undermine bureaucratic structures).

³⁸⁴ The “pay me now or pay me later” idea familiar in administrative law deference doctrines offers an analogy. An agency, by choosing its policymaking form, decides whether to “pay now” through the arguably more considered process of administrative rulemaking, or to “pay later” by having to defend its decision under a less deferential judicial framework. *See, e.g.,* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 *DUKE L.J.* 1490, 1491–92 (1992); Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 225–26 (2006); *see also* *United States v. Mead Corp.*, 533 U.S. 218 (2001).

³⁸⁵ Ratcheting down deference incentivizes norm compliance, albeit indirectly. It makes it more costly for the political decisionmaker to deviate from the norm at issue. *See generally* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 *YALE L.J.* 2 (2008).

³⁸⁶ *See supra* notes 189–226 and accompanying text.

³⁸⁷ *See Renan, supra* note 83, at 1108 (“Whether to initiate, and whether to continue, a surveillance program is a determination that implicates systemic tradeoffs and requires a holistic understanding of the structural, procedural, and technological safeguards in place.”); *see also id.* at 1108–11 (describing courts’ reluctance to review the efficacy of surveillance at a programmatic level).

resolve themselves into legal boundaries in particular policy domains. Courts ordinarily trust that the President is using that superior institutional posture, and using it in the ways required by those same value sets. Courts defer to the institutional presidency in making such assessments, not because these assessments are irrelevant to a system of legality but because courts perceive the presidency to be the institution more competent to make them.

A President who discards norms that structure discretion by promoting accuracy or limiting the influence of naked politics might be institutionally less competent to exercise that judgment. The breach raises concerns about the presupposition underwriting the court's deference: that the President is exercising superior institutional resources, and doing so in a manner at least minimally responsive to rule-of-law values. If that antecedent is missing, the framework for deference is built on a faulty assumption. This theory of indirect enforcement puts a range of judicial decisions in their best light. It is not, however, without problems. I discuss a few recent examples to sharpen the assessment that follows.³⁸⁸

Indirect enforcement is reflected in judicial responses to a denial of the "Plan B" new drug application under President Obama. Pursuant to a longstanding insulation norm, the Food and Drug Administration's (FDA) scientific assessments of drug safety are made independently of the Secretary of Health and Human Services (HHS), even though FDA is formally a part of HHS under the Secretary's supervision.³⁸⁹ In an unprecedented move, Secretary Sebelius overruled FDA's decision, which had approved "the marketing of Plan B One-Step nonprescription for all females of child-bearing potential," and she ordered the FDA Commissioner to deny the Plan B One-Step drug application.³⁹⁰ The district court relied on this breach as a reason, in effect, to ratchet down

³⁸⁸ The Supreme Court's Guantanamo Bay detainee cases, decided between 2004 and 2006, provide an additional set of examples. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); see also GOLDSMITH, *supra* note 27, at 165–81 (arguing that, while many factors led to the Court's rulings, perceptions of an "untrustworthy, out of control [presidency] . . . defying the rule of law and military traditions" appear to have played a part, *id.* at 177).

³⁸⁹ See 21 U.S.C. § 393 (2012) (establishing FDA within HHS); see also Gardiner Harris, *White House and the F.D.A. Often at Odds*, N.Y. TIMES (Apr. 2, 2012), <https://nyti.ms/1vIhMd8> [<https://perma.cc/L7YU-DRA6>] (describing FDA as "jealously guard[ing] its independence").

³⁹⁰ *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 167 (E.D.N.Y. 2013) (quoting Press Release, FDA, Statement from FDA Commissioner Margaret Hamburg, M.D. on Plan B One-Step (Dec. 7, 2011), <http://web.archive.org/web/20120501204724/http://www.fda.gov/NewsEvents/Newsroom/ucm282805.htm> [<https://perma.cc/XX73-LVVY>]); see also *id.* at 170 ("It was the first time a cabinet member had ever publicly countermanded a determination by the FDA . . .") (quoting Harris, *supra* note 389)).

deference in reviewing an APA challenge to the denial of the drug application.³⁹¹ The court probed each component of the Secretary's purportedly scientific basis for the decision under an unusually searching variant of "hard look" review.³⁹² The Secretary's overruling of the careful technical assessment by the scientists at FDA removed a precondition of the court's ordinary deference to the agency's science-based determination of medical safety.

The Fifth Circuit's decision in *Texas v. United States*, affirmed by an equally divided Supreme Court,³⁹³ might also be understood as a form of indirect enforcement, responding to what a majority of the panel perceived to be norm breaches by President Obama. As discussed above, a question at the crux of DAPA is whether such an exercise of prosecutorial discretion violates norms of presidential behavior. Challengers framed the norm being violated at two levels of generality — with respect to enforcement discretion generally and, more specifically, with respect to the types of deferred action programs that Congress had previously tolerated.³⁹⁴ The Fifth Circuit declined to resolve this question under a direct-enforcement theory (leaving open the Article II question presented).³⁹⁵ But its understanding of prosecutorial discretion norms, at both levels of generality, supplied institutional context for deciding the statutory questions presented: whether the policy was required to go through notice-and-comment rulemaking under the APA;³⁹⁶ and whether the nature of the deferred action program at issue violated the substantive constraints of the Immigration and Nationality Act.³⁹⁷

The majority looked behind the formal assertions of case-by-case discretion on the face of the DAPA memorandum from the Secretary of the Department of Homeland Security to conclude that this language was "pretextual";³⁹⁸ instead, the majority concluded that the DAPA pro-

³⁹¹ See *id.* at 170 ("[A]s judges, we 'cannot shut our eyes to matters of public notoriety and general cognizance.'" (quoting *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879))); see also *id.* ("[T]here comes a point where this Court should not be ignorant as judges of what we know as men [and women].") (alterations in original) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (plurality opinion))).

³⁹² See *id.* at 171–74 (proceeding "to deconstruct [the Secretary's] explanation sentence by sentence" and concluding that it "fail[s] to offer a coherent justification for denying the over-the-counter sale of levonorgestrel-based emergency contraceptives to the overwhelming majority of women of all ages who may have need for those drugs and who are capable of understanding their correct use," *id.* at 171).

³⁹³ *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

³⁹⁴ See *Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271.

³⁹⁵ See *supra* note 345.

³⁹⁶ See *Texas*, 809 F.3d at 170–78.

³⁹⁷ See *id.* at 178–86.

³⁹⁸ *Id.* at 173.

gram was designed to be binding on the agency, and that DAPA therefore required notice-and-comment proceedings under the APA.³⁹⁹ The majority also concluded that DAPA departed from more specific norms governing deferred-action programs — in particular, that such programs had previously been quite limited in scope and generally used as a time-limited bridge to a statutory path to legal status.⁴⁰⁰ While it nominally applied *Chevron* deference,⁴⁰¹ the court in operation conducted a more searching form of substantive review under a complex, at times inconsistent, and quite sprawling statutory framework that might otherwise have cautioned for deference.⁴⁰²

Indirect enforcement resonates as well with how lower courts have responded to norm breaching by President Trump. The Fourth and Ninth Circuit decisions on President Trump’s “entry ban” each focused, in different ways, on the absence of a fact-based and considered presidential judgment.⁴⁰³ The deliberative-presidency norm played a significant role in the Ninth Circuit’s conclusion that the President did not “make a sufficient finding that the entry of these classes of people would be ‘detrimental to the interests of the United States.’”⁴⁰⁴ The court emphasized the President’s abdication of institutional processes that ordinarily promote interagency input and reliable data.⁴⁰⁵ While the

³⁹⁹ See *id.* at 171–77.

⁴⁰⁰ See *id.* at 184.

⁴⁰¹ See *id.* at 178, 182.

⁴⁰² See Cox & Rodríguez, *supra* note 93, at 142–73 (analyzing the forms of executive discretion implicit in the INA). *But see* Bellia, *supra* note 341, at 1796–99 (contrasting DAPA to prior deferred-action programs deemed permissible under the INA).

⁴⁰³ The President’s initial executive orders, since superseded, suspended entry, based on nationality, of individuals from seven countries — a policy decision defended by the President on national security grounds. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). The President revised the first executive order following several court challenges. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (revoking and replacing Executive Order 13,769). After the Supreme Court granted certiorari in the Fourth and Ninth Circuit cases, see *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2083 (2017) (per curiam), and as the second executive order was set to expire, the President revised the policy a third time, making indefinite the travel restrictions for five of the countries, and adding indefinite restrictions for three more. See *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,163 (Sept. 24, 2017). The Supreme Court subsequently dismissed the appeals and vacated the panel decisions in both the Fourth and Ninth Circuit cases. See *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (mem.); *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.). The Supreme Court granted certiorari to review the order’s third iteration. See *Hawai’i v. Trump*, 878 F.3d 662 (9th Cir. 2017) (per curiam), *cert. granted*, 138 S. Ct. 923 (2018).

⁴⁰⁴ *Hawai’i v. Trump*, 859 F.3d 741, 755–56 (9th Cir. 2017) (per curiam), *cert. granted sub nom. Int’l Refugee Assistance Project*, 137 S. Ct. 2080.

⁴⁰⁵ *Id.* at 770–76 (immigration visas); *id.* at 780–82 (decisions related to refugees); *id.* at 782 (noting that the President’s actions “must be scrutinized with caution” because they were “incompatible” with the processes and mandates set out by Congress in statutes (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring))).

President has broad powers and extensive discretion in the areas of immigration and national security, he “is not a one-person show.”⁴⁰⁶ The Fourth Circuit decided the case on Establishment Clause grounds, but implicit in some of the court’s reasoning appears to be a similar concern: that the breach of the deliberative-presidency norm undermines the institutional case for deference.⁴⁰⁷

The courts interpreted the President’s rush to judgment, seemingly uninterested in the available data and policy views of the agencies, as a red flag suggesting that judicial norms of deference should not apply. Deference to the institutional presidency, the courts in effect reasoned, is distinct from deference to the person of the President. The litigation has evolved, in part as a result of these judicial responses in the earlier cases. In its briefing to the Supreme Court on the third iteration of the presidential order, the Solicitor General argued that the deliberative process that the new order had gone through changed the institutional context in which this third order arose.⁴⁰⁸

The President’s prohibition on military service by transgender persons,⁴⁰⁹ currently being challenged on equal protection grounds, provides another illustration. Courts ordinarily afford broad deference to the President with respect to military affairs. Yet judicial precedent has identified, more explicitly than in some other contexts, the superior institutional features of the political branches in justifying this type of deference when an equal protection claim is brought. Deciding an equal protection challenge to Congress’s imposition of a male-only draft registration, the Court in *Rostker v. Goldberg*⁴¹⁰ emphasized that, while judicial deference is “at its apogee” in this context, the Court must still consider *how* the political branches have made the policy choice at issue.⁴¹¹

⁴⁰⁶ *Id.* at 755.

⁴⁰⁷ See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591–92 (4th Cir. 2017) (en banc) (noting, as evidence of “bad faith,” *id.* at 591, “the exclusion of national security agencies from the decisionmaking process, the post hoc nature of the national security rationale, and evidence from DHS that EO-2 would not operate to diminish the threat of potential terrorist activity,” *id.* at 592), *cert. granted*, 137 S. Ct. 2080.

⁴⁰⁸ See Application for Stay Pending Appeal to the United States Court of Appeals for the Fourth Circuit and Pending Further Proceedings in this Court at 2–4, 28–35, *Trump v. Int’l Refugee Assistance Project*, No. 17A560 (U.S. Nov. 21, 2017); see also Application for Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in this Court at 2–4, 24–30, *Trump v. Hawaii*, No. 17A550 (U.S. Nov. 20, 2017). The Supreme Court lifted stays granted with respect to the third iteration of the order. See *Hawaii*, 138 S. Ct. 923.

⁴⁰⁹ Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41,319 (Aug. 25, 2017).

⁴¹⁰ 453 U.S. 57 (1981).

⁴¹¹ *Id.* at 70. The *Rostker* majority emphasized the extensive process that Congress undertook in enacting a male-only registration for the draft. See *id.* at 68–70. For a critique of that process, and an argument that the restriction was more grounded in “a traditional way of thinking about females” than the *Rostker* majority was willing to admit, see Jill Elaine Hasday, *Fighting Women*:

Lower courts, applying *Rostker*, approached review of the military's "Don't Ask Don't Tell" policy in similar fashion.⁴¹² Sitting en banc, the Fourth Circuit emphasized the months-long, "exhaustive examination" in the political branches of the policy that was ultimately adopted.⁴¹³ Within the executive branch, the court observed that a military working group and a commissioned Rand Corporation study had informed the decision, as had "regular consultations with the Joint Chiefs of Staff and leaders of each service, . . . [close study of] the history of the military's response to social change, and consult[ation] [with] legal experts."⁴¹⁴ These "exhaustive efforts of the democratically accountable branches of American government," the court of appeals stressed, are "precisely [why] they deserve judicial respect."⁴¹⁵ The absence of the deliberative-presidency norm in the presidential conduct that gave rise to the transgender service members' prohibition removes those institutional features; it eliminates conditions on which judicial deference is premised.⁴¹⁶

The mechanisms through which indirect judicial enforcement operates on presidential norms vary and include soft forms of judicial power

The Military, Sex, and Extrajudicial Constitutional Change, 93 MINN. L. REV. 96, 115 (2008) (quoting *Rostker*, 453 U.S. at 74).

⁴¹² See Michel Paradis, *Why Transgender Service Members Will Win in Court*, LAWFARE (July 18, 2017, 12:06 PM), <https://www.lawfareblog.com/why-transgender-service-members-will-win-court> [<https://perma.cc/3Q5S-3XQE>] ("Every Circuit Court of Appeals upheld [the Don't Ask Don't Tell] law as constitutional . . . for the simple reason that Congress and the President had done their due diligence.")

⁴¹³ *Thomasson v. Perry*, 80 F.3d 915, 922 (4th Cir. 1996) (en banc).

⁴¹⁴ *Id.* General Colin Powell described the process: "We have challenged our assumptions. We have argued with each other. We have consulted with commanders at all levels." *Id.* (quoting *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Subcomm. on Military Forces & Pers. of the H. Comm. on Armed Servs.*, 103d Cong., 1st Sess. 31 (1993) (statement of General Colin Powell)).

⁴¹⁵ *Id.* at 923.

⁴¹⁶ As in the entry-ban litigation, the initial judicial decisions appear to have encouraged, if not prompted a changed institutional context. On March 23, 2018, President Trump issued another Presidential Memorandum, which his Administration argues is the result of a deliberative process. See Memorandum from President Donald J. Trump to the Sec'y of Def. and the Sec'y of Homeland Sec. (Mar. 23, 2018), <https://www.politico.com/f/?id=00000162-5590-df2f-a7e2-d7d2ebe0001> [<https://perma.cc/6GGW-CYL7>] (regarding "Military Service by Transgender Individuals"). The implications for judicial deference are currently being litigated in the district courts. See, e.g., Order Granting in Part and Denying in Part Plaintiffs' and Washington's Motions for Summary Judgment and Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment at 24-26, *Karnoski v. Trump*, No. 2:17-cv-01297 (W.D. Wash. Apr. 13, 2018), ECF No. 233 (explaining that "[this] Court previously found that the Ban . . . was not owed deference, as it was not supported by 'any evidence of considered reason or deliberation.' . . . Now that the specifics of the Ban have been further defined in the 2018 [Presidential] Memorandum and Implementation Plan," the question of deference is "more complicated" and implicates unresolved questions of fact (quoting Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Order Granting Plaintiffs' Motion for Preliminary Injunction at 18, *Karnoski*, No. 2:17-cv-01297 (W.D. Wash. Dec. 11, 2017), ECF No. 103)).

such as dictum or the atmospherics of how a judicial decision is written.⁴¹⁷ These dimensions of judicial practice might, in turn, affect how legal and other elites (including participants in the institutional presidency itself) come to understand the significance of the norm for a sufficiently rule-of-law presidency, or for their own reputational and professional interests. In contrast to direct enforcement, this indirect judicial role does not require courts to precisely specify the President's unwritten duty. The Fourth and Ninth Circuits in the travel ban litigation observed what they perceived to be a breach of the deliberative-presidency norm without converting any specific procedure into a legal requirement. Similarly, the Fifth Circuit recognized what it perceived to be an abnormal exercise of prosecutorial discretion, without converting any limits on prosecutorial discretion into a component of the Take Care Clause.

Even if it does not convert an unwritten norm into a legal obligation, however, indirect enforcement still depends on the capacity of courts to identify certain norms of the presidency as descriptive features of institutional context relevant to the legal question at issue. The difficulty of this endeavor is reflected in *Kent v. Dulles*.⁴¹⁸ The case, decided in 1958, considered a refusal by the Secretary of State (exercised through the passport office) to issue a passport to two individuals suspected of being Communists.⁴¹⁹ The underlying federal statute provided that the Secretary "[may] issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States."⁴²⁰ The question before the Court was just how sweeping was this legislative grant of discretion to the President.⁴²¹ The question was especially important to the Court because of the potential First and Fifth Amendment concerns that this particular exercise of discretion would raise.⁴²²

The majority understood the legal question to arise in the context of a presidential norm: that the President's discretion to restrict passports, at the time that the passport statute was enacted, extended only to those applications where citizenship was in doubt or where there was reason to believe that the applicant had engaged in illegal conduct.⁴²³ The

⁴¹⁷ See Mariano-Florentino Cuéllar, *From Doctrine to Safeguards in American Constitutional Democracy*, UCLA L. REV. (forthcoming 2018) (manuscript at 8-11) (on file with author) (arguing that "[c]arefully-reasoned legal judgments offered by trusted institutions" can safeguard constitutional values and promote lasting civic commitments by facilitating coordination among elites and between elites and the public); see also Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

⁴¹⁸ 357 U.S. 116 (1958).

⁴¹⁹ *Id.* at 117-18.

⁴²⁰ Act of July 3, 1926, Pub. L. No. 69-493, 44 Stat. 887 (current version codified at 22 U.S.C. § 211A (2012)).

⁴²¹ *Kent*, 357 U.S. at 127-29.

⁴²² *Id.* at 125-27.

⁴²³ See *id.* at 127.

Secretary's denial of passports to the plaintiffs violated this norm.⁴²⁴ Absent a clear statement that Congress had meant to delegate so broadly to the President, the Court interpreted the grant of statutory authority as limited to the President's prior norm-based practice.⁴²⁵

The dissenters in *Kent* did not disagree that practice was relevant to the statutory interpretation question. Yet they interpreted the unwritten rules differently, pointing to sources, including a presidential veto statement, legislative history, State Department office instructions, and legal advice from the Legal Adviser at State, all of which the dissenters read to support a different understanding of the practice-based restraints on the presidency against which Congress had legislated.⁴²⁶ *Kent* thus highlights the challenge for judges in discerning the norms of the presidency and the reality that such norms may be more or less stable, more or less consistently interpreted even among participants.

When courts respond to presidential norm breaching, even indirectly, they may shape the presidential norm. They may stake out and, in turn, entrench a position that remains contested (at least among some groups) as to the scope and nature of the presidential duty. When the presidential norm pertains to the judicial practice at issue, however, judicial "neutrality" is not really an option. Ignoring the presidential breach decides the case on false premises; it alters the substance of the judicial norm of deference.

The types of presidential norms that would remove a basis for judicial deference *might* be the types of obligations that judges are more capable of interpreting without an overridingly partisan lens. Judges inescapably interpret norms through the lenses of the multiple interpretive communities that they inhabit, including not only political party, but also social and professional networks. When norm breaching threatens core rule-of-law assumptions, judges across party lines might be more willing to recognize the breach. That said, votes along partisan lines in both the travel ban litigation and the DAPA challenge provide at least some data points challenging this hypothesis.⁴²⁷

⁴²⁴ Norms of bounded delegation by Congress, only twice directly enforced as violations of a nondelegation doctrine, also provided relevant institutional context. For this reason, *Kent* is sometimes taught as an early instance of a "nondelegation canon." See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 517–21 (3d ed. 2017). See generally Sunstein, *supra* note 353.

⁴²⁵ *Kent*, 357 U.S. at 129.

⁴²⁶ See *id.* at 131–43 (Clark, J., dissenting).

⁴²⁷ See, for example, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *cert. granted*, 137 S. Ct. 2080 (2017) (per curiam), in which a Democratic recess appointee/Republican reappointee wrote the majority opinion, nine Democratic appointees joined that opinion or concurred in the judgment, and three Republican appointees dissented. Perhaps complicating this picture, however, two of the nine judges to join the majority opinion were first appointed to the federal bench by Republican Presidents. See also, for example, *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam), *cert. granted sub nom. Int'l Refugee Assistance Project*, 137 S. Ct. 2080,

Indirect enforcement inescapably creates a pathway for judicial discretion, and such pathways can be abused. Depending on one's normative priors, one might be more open to this form of the judicial role when a rights challenge, as opposed to a structural question about government design, is presented.⁴²⁸ In the context of potential rights infringement, judicial unwillingness to recognize the institutional features that underwrite the court's own norms of deference — and their absence in any particular application — risks a system of legality in form only.⁴²⁹

Up to this point, I have discussed diminished judicial deference when the breach of a presidential norm is tethered to the basis for judicial deference itself (for example, where the norm supplies a form of expertise that the presidency is assumed to possess). It is worth noting that, at least conceptually, indirect enforcement need not be so cabined. A court might instead ratchet down deference as a way to raise the “transaction costs” of norm breaching, whether or not the norm itself furnishes an institutional basis for deference.⁴³⁰ A court might recognize the breach of a norm preventing purely obstructionist pro forma sessions, for example, as a reason to more closely scrutinize the Senate's assertion that it was not “in recess” for purposes of Article II's recess appointments power. Indeed, dictum in *Noel Canning* suggests a potential illustration of this approach. The Court identified various institutional tactics, available to the President and his allies in Congress, that would

in which three Democratic appointees joined a per curiam opinion; and *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam), in which two Republican appointees joined the majority opinion and one Democratic appointee dissented. However, in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), two Democratic appointees and one Republican appointee joined a per curiam opinion.

⁴²⁸ *But see, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514 (1991) (“[T]he structure of the government is a vital part of . . . the protection of individual rights.”); Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1293–97 (2012) (arguing that “the rights/structure distinction is in many ways misleading,” *id.* at 1293).

⁴²⁹ It is also possible that indirect enforcement creates less interference with extralegal pathways of norm internalization, at least under certain conditions. The literature on “motivational crowding out” suggests one potential set of reasons to prefer soft or indirect enforcement, at least to the extent that hard legal requirements could crowd out professionalism- or civic duty-based grounds for norm compliance. *See, e.g.*, Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. REG. 213 (2016) (synthesizing interdisciplinary literature on motivational crowding out, teasing out its underlying mechanisms, and suggesting an “incentive architecture” to address crowding-out effects); Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 424–25 (2003); *see also* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1770 (1996) (arguing that when courts applying the Uniform Commercial Code seek to discern practice-based norms and use them to resolve cases, “they will often be using relationship-preserving norms to resolve end-game disputes”).

⁴³⁰ *Cf.* Stephenson, *supra* note 385, at 27–28.

have called the nature of the pro forma sessions into legal question.⁴³¹ The Court thus suggested, or at least left open the possibility, that it might be prepared to scrutinize the formal assertion of a Senate recess more closely under certain conditions.⁴³²

Such an approach might enable courts to extract information about the importance of the norm — or, more specifically, of the norm breach — to participants in the practice.⁴³³ This type of judicial learning could present an opportunity. Repeated use of pro forma sessions over time, for instance, could suggest that, at least sociologically, a new norm has emerged. Perhaps because it becomes a form of acceptable “self-help” by the Senate in response to changing presidential practice,⁴³⁴ the Court might come to understand pro forma sessions as no longer abnormal — that is, no longer warranting diminished deference.

Once the structural norm is untethered from the basis for judicial deference, however, it becomes much harder to sort those structural norms that a court *should* enforce indirectly from those better understood as “constitutional hardball” unreviewable by courts.⁴³⁵ So untethered, indirect enforcement transfers the concerns with direct enforcement discussed in section A, but with potentially blunted costs and benefits. Ultimately, it poses the same concerns rooted in judicial competence and the inherently partisan nature of contemporary interbranch dynamics, without the justifications suggested by a form of indirect enforcement hitched to those norms that undergird the judicial decision to defer in the first place.

D. Defending a Limited Judicial Role

This Part has suggested a spectrum of relationships between presidential and judicial practice, which can be plotted along a continuum.⁴³⁶

⁴³¹ See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2575–76 (2014); see also Metzger, *supra* note 370, at 1641–42 (arguing that “the *Noel Canning* Court implicitly recognized the need to respond to new political realities,” *id.* at 1641).

⁴³² The argument might be extended to norm-based political practice beyond the President-Congress relationship. If a discretion-structuring norm prohibits mid-decennial redistricting, for example, a court might scrutinize more closely a redistricting map drawn during this period when adjudicating an equal protection challenge. Cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 461–62, 469–73 (2006) (Stevens, J., concurring in part and dissenting in part).

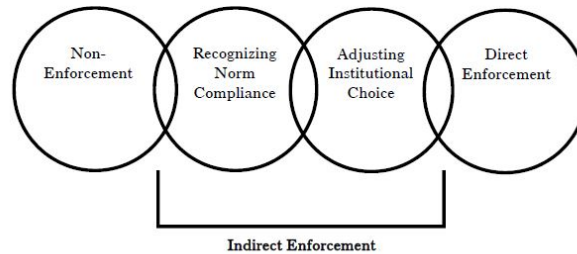
⁴³³ See Stephenson, *supra* note 385, at 6.

⁴³⁴ See Pozen, *supra* note 2, at 4–5.

⁴³⁵ For a contrary argument that self-help doctrines suggest a legal framework pursuant to which courts might productively regulate such interbranch dynamics, see *id.* On the dynamics of “constitutional hardball” more generally, see Tushnet, *supra* note 2.

⁴³⁶ This continuum concerns the directness of enforcement, not the degree of enforcement by courts. One might think, for example, that a court is more likely to enforce a particular norm through indirect means, such that the degree of judicial enforcement of that norm would be higher using the more intermediate options. That said, indirect enforcement does affect the degree to which courts have an opportunity to enforce the norm. With indirect enforcement, the norm must relate to a legal claim arising independently. By contrast, with direct enforcement, the court could use the open-ended provisions of Article II or a freestanding separation of powers principle as a legal net for a wide range of structural norms.

Figure 1.
Relationships Between Presidential Norms and Judicial Practice



As a descriptive matter, I have argued that ours is a mixed system. Cases are decided at every point along this continuum, with little attention to whether or how the divergent theories fit together. Variability in the types of norms that structure presidential behavior, the strength of those norms, and their “normative” value (which might itself be contingent on historical and institutional context) makes it difficult if not undesirable to make a one-size-fits-all prescription. My preliminary thoughts are that courts should generally be reluctant to interfere with presidential norms using structural constitutional law — either by prohibiting longstanding practice as a violation of Article II, or by legally mandating compliance with such norms as a judicially enforceable requirement of Article II. Elaboration of these thoughts awaits future work.

This section develops a more limited prescriptive claim. It defends an indirect judicial response to presidential norm breaching in a particular legal and situational context: a court reviewing presidential behavior should ratchet down deference (i) when the source of legal wrong is not the norm itself but an independent constitutional or statutory right, and (ii) when the court concludes that the situational context is sufficiently grave or the presidential norm sufficiently core to a minimal understanding of *legal legitimacy*.⁴³⁷

When presidential behavior poses a threat to basic rule-of-law understandings, it derivatively threatens the courts’ legitimate exercise of authority. For courts can exercise legitimate authority only in a sufficiently rule-of-law system. Failing to observe the absence of presidential norms basic to a rule of law, or to foundational notions of constitutional democracy, puts courts in the service of arbitrary power, rather than as

⁴³⁷ Cf. Fallon, *supra* note 3, at 1842–43 (suggesting, as an illustration of legal illegitimacy, “for the President or Congress . . . to demonstrate the kind of egregiously bad constitutional judgment that amounts to an abuse of discretion”).

a constraint on it. By deferring to a political judgment that lacks minimal characteristics of respectworthiness, the court risks a formalism dangerous to the concept of legality itself.

To my mind, the initial “entry ban” implicated such a scenario.⁴³⁸ The President’s rush to fulfill a campaign pledge to “shut down” the entry of Muslims, seemingly uninterested in the facts or considered views of his own national security agencies, threatened the legitimacy of a judicial decision to uphold it. The President’s sweeping national security powers are accepted in our legal culture because a President exercises those powers consistent with certain norms of limitation, including those norms that promote a fact-, policy-, and law-informed judgment. Judicial deference, in the context of the modern presidency, is implicitly tethered to these institutional features.

Judicial responses to the initial entry ban, combined with public outcry, prompted at a minimum the appearance of a more considered process.⁴³⁹ Now that the Administration has at least gone through the motions of complying with such a process, the third iteration of the presidential order raises different and harder questions pertaining to judicial deference, including whether the Executive’s institutional corrective was pretextual. That is, does this particular President’s expressions of anti-Muslim and anti-immigrant animus or cumulative anticonstitutional behavior raise concerns about the functioning of the institutional presidency itself?⁴⁴⁰ While unlikely to frame the Court’s doctrinal analysis, such questions inescapably will inform its application.⁴⁴¹

To take another example, consider the stylized scenario from the introduction. The President campaigns on rhetoric of locking up his political opponent. When he takes office, he directs the Justice Department to reopen a previously closed investigation into that opponent’s prior uses of a private email account for official business and to indict her if possible on the evidence.⁴⁴² The opponent brings a selective-prosecution challenge. The doctrinal framework here, again, is exceptionally deferential

⁴³⁸ See *supra* notes 403–408 and accompanying text.

⁴³⁹ Indeed, the shifting facts on the ground reflect the power of indirect enforcement itself, as the presidency has responded to those judicial rulings by adopting a more rigorous institutional process.

⁴⁴⁰ Cf. Vicki Jackson & Judith Resnik, *Against Deference: Considering the Trump Travel Ban*, TAKE CARE (Dec. 8, 2017), <https://takecareblog.com/blog/against-deference-considering-the-trump-travel-ban> [<https://perma.cc/D226-FAC2>] (arguing that this President’s cumulative “contempt and disregard for . . . constitutional and legal traditions” counsel against judicial deference).

⁴⁴¹ The case is likely to play out, at least in part, as a question of presidential authority under the Immigration and Nationality Act. As in the *Texas* litigation and also in *Kent*, more specific norms governing the exercise of presidential discretion under the immigration laws might more explicitly inform the Court’s doctrinal analysis. See *supra* notes 393–426 and accompanying text.

⁴⁴² To date, this scenario has not come to pass — seemingly because the structural norms have had some constraining effect on the President. See Peter Baker, “Very Frustrated” Trump Becomes Top Critic of Law Enforcement, N.Y. TIMES (Nov. 3, 2017), <https://nyti.ms/2lMXBN8> [<https://perma.cc/3WEN-HB8J>].

to the Executive. As the Supreme Court has explained, “[a] selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive.”⁴⁴³ Judicial deference is rooted in part in a constitutional conception of the prosecutor as a “delegate[.]” of the President “discharg[ing] his constitutional responsibility.”⁴⁴⁴ It is based as well, however, “on an assessment of the relative competence of prosecutors and courts” in deciding whether a particular prosecution is appropriate.⁴⁴⁵ Implicitly, such deference is conditioned on the expectation that the executive branch exercises law enforcement judgment in the public interest — that the President does not use criminal law enforcement as a cover for naked politics or self-dealing.⁴⁴⁶

Deference in this scenario would alter, rather than preserve, judicial practice. And it would put a judicial imprimatur on a form of presidential power deeply threatening to constitutional democracy. The investigatory-independence norm protects democratic values that developed after the Founding but are no less part of our constitutional fabric today. While the Alien and Sedition Acts of 1798 can be understood as efforts to criminalize political opposition (efforts reviled by many even in their own times), the legitimacy of a political opposition has since become widely recognized as a core component of a working constitutional government. Similarly, while President John Adams personally directed prosecutions under the Sedition Act (conduct expressly urged by the Senate at that time),⁴⁴⁷ contemporary norms instruct the President to refrain from such direction. A static conception of either judicial deference or presidential control fails to appreciate those dynamics and their relevance to the rights-based question at issue.

As these examples suggest, the severity of the institutional collapse that should cause a court to adjust its own structural norms of deference is an important question. I do not think that a neat formula exists to answer it. Judges will disagree on whether such a situational context is

⁴⁴³ See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 465.

⁴⁴⁶ In *Wayte v. United States*, 470 U.S. 598 (1985), the Court rejected a selective-prosecution challenge to the federal government’s “passive enforcement” policy, by which the only draft non-registrants who were prosecuted were those who vocally opposed draft registration. See *id.* at 605–06, 614. In so ruling, the Court reversed a district court decision, which had found that the defendant in the case had made out a prima facie case of selective prosecution. See *id.* at 604–07. Interestingly, the unusual role of “the White House, through Edwin Meese III, . . . a member of the Presidential Military Manpower Task Force,” in the prosecution of nonregistrants was part of what established, for the district court, the prima facie case. *United States v. Wayte*, 549 F. Supp. 1376, 1382 (C.D. Cal. 1982), *rev’d*, 710 F.2d 1385 (9th Cir. 1983), *aff’d*, 470 U.S. 598. The district court thus shifted the burden to the executive branch “to prove that its policy was not based on impermissible selective prosecution.” *Id.*

⁴⁴⁷ See *Prakash*, *supra* note 98, at 558–60.

present, and they may be inescapably influenced by their own ideological or political leanings. Not asking this question, however, is itself an answer. And one that could prove more corrosive to our constitutional order than judicial discretion. Courts should not flyspeck every presidential decision for any conceivable norm breach. There comes a point, however, when presidential norm breaching derivatively challenges the legitimacy of the judicial function itself.

An analogous legal development, beginning in the 1920s and 1930s in the criminal context, helps to flesh out the stakes. Noncompliance by Southern courts, prosecutors, and investigators with structural norms that promote accuracy and basic fairness in the criminal process when the defendants were black prompted the Supreme Court to ratchet down deference across doctrinal categories, creating the conditions for modern constitutional criminal procedure.⁴⁴⁸ The Court observed the breach of these norms as red flags cautioning heightened scrutiny of state officials' assertions of culpability and fair criminal process.⁴⁴⁹ The underlying institutional choice — whether the federal courts or the state courts were more competent to decide the legal questions implicated by the criminal process — changed because, absent the norms on which deference was predicated, the cases posed an entirely different institutional judgment for the Supreme Court to make.

Recognizing that this prescriptive claim accepts a degree of judicial discretion that others might oppose, the remainder of the section responds to three additional objections rooted in originalism, democratic legitimacy, and Thayerism.⁴⁵⁰

⁴⁴⁸ See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50–77 (2000); see also Vicki C. Jackson, Essay, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2389 (2017) (“[I]n a series of cases stretching over the . . . thirty-plus years [since *Norris v. Alabama*, 294 U.S. 587 (1935)], the Court repeatedly refused to accept state court findings of fact in race discrimination cases.”).

⁴⁴⁹ See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936); *Norris*, 294 U.S. at 590 (“[I]t is our province to inquire not merely whether [a federal right] was denied in express terms but also whether it was denied in substance and effect.”); *Moore v. Dempsey*, 261 U.S. 86, 87 (1923) (“[T]he proceedings in the State Court, although a trial in form, were only a form, and . . . the appellants were hurried to conviction under the pressure of a mob without any regard for their rights . . .”); see also Klarman, *supra* note 448, at 77 (“For the Court effectively to intervene in these cases, it had to do something that the Justices understandably would have been reluctant to do: accuse state courts or state officials of lying.”).

Professor Michael Klarman has argued that the doctrinal shift might be attributed to two factors: “appealing cases in which the injustice to black defendants and the dishonesty of [state officials] were manifest, and an incipient transformation of the extralegal context which rendered the Justices more sensitive to and less tolerant of the egregious mistreatment of blacks by the southern criminal justice system.” *Id.*

⁴⁵⁰ The foregoing has suggested ways to cabin that discretion: by tethering the change in judicial practice to breaches of those presidential norms that supply the institutional basis for judicial deference itself; by suggesting that the claim of illegality should arise independently of the norm; and by emphasizing that such a judicial response is warranted only when the breach is sufficiently grave to derivatively challenge the legal legitimacy of a judgment upholding it.

An originalist might object that presidential norms are not part of our constitutional design — at least to the extent that the norm lacks a temporal connection to constitutional meaning at the Founding — and that judicial enforcement, in any form, would create a less stable set of constitutional understandings. The norm-based order that I have described is inconsistent with a core principle common to a range of originalism theories: that constitutional meaning “is fixed at the time each provision is framed and ratified.”⁴⁵¹ Structural norms, however, should not be understood in contrast to a fixed constitutional order. Rather, they reveal a provisional aspect of constitutional design itself.⁴⁵²

Neither the original public meaning of Article II, nor practice at the time of the Founding, supplies the understandings that give presidential power, in our time, institutional integrity. Structural norms have shifted expectations of the presidency away from Founding-era understandings. They have done so through a complex interplay of mechanisms that cannot neatly be sorted into legal and nonlegal categories.⁴⁵³ And they neither require nor privilege practice with a temporal connection to the Founding.⁴⁵⁴ Rather, presidential norms of limitation have developed alongside the growing practical and legal capacity of the presidency. A conception of the presidency that would reject these norm-based fea-

⁴⁵¹ Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 7 (2015). Professor Lawrence Solum identifies two principles core to originalist constitutional theories: a “Fixation Thesis,” claiming that “the original meaning . . . of the constitutional text is fixed at the time each provision is framed and ratified,” *id.* at 6–7, and a “Constraint Principle claim[ing] that constitutional actors . . . ought to be constrained by the original meaning when they engage in constitutional practice,” *id.* at 7. For foundational accounts of the “new originalism,” see generally Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); and Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

⁴⁵² An analogy might be drawn to Professor David Strauss’s work, which has revealed a common law Constitution with striking departures from the constitutional text. See Strauss, *supra* note 12, at 28–52.

⁴⁵³ Cf. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 844–45 (2015) (arguing that “originalism as a theory of legal change,” *id.* at 844, requires that “[w]hen a given set of laws is in force, those laws are supposed to change only . . . with a legal justification for each new step,” *id.* at 844–45).

⁴⁵⁴ Cf. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring in the judgment) (arguing, contra the majority, that “where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision”); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 534–35 (2003) (“Although Madison conceded that the words used in the Constitution might well fall out of favor or acquire new shades of meaning in later usage, he was suggesting that their meaning *in the Constitution* would not change; once that meaning was ‘fixed,’ it should endure.” *Id.* at 535.). But see Bradley & Siegel, *supra* note 333, at 25–29 (observing that “[t]here are . . . certain variants of originalism that are potentially compatible with the consideration of historical practice for reasons other than as evidence of original meaning,” but arguing that such approaches “close[] the gap between originalist and nonoriginalist approaches, which may be why certain originalists resist [them],” *id.* at 28).

tures thus obscures what a sufficiently rule-of-law presidency means today, and whether the breakdown of certain presidential norms should warrant adjustments in judicial practice.

Norm-based change to the constitutional order raises another potential concern, however. Because norms emerge and evolve in a diffuse and decentralized fashion, we might worry that these unwritten rules undermine or even contradict core notions of constitutional democracy. Professor Adrian Vermeule has argued that constitutional conventions (that is, norms) should not be judicially enforced because they “have systematically suspect democratic credentials and no systematic virtues to recommend them.”⁴⁵⁵ The “decentralization of constitutional norm-generation,” Vermeule argues, “is what makes constitutional conventions democratically suspect.”⁴⁵⁶ They “bubble[] up out of a whirlpool of political and social interactions” that foreclose democratic change.⁴⁵⁷

This argument overlooks the ways in which structural norms also facilitate and preserve constitutional democracy.⁴⁵⁸ Structural norms do not achieve any ideal sense of constitutional balance, nor any optimal pace of change. But any thick conception of constitutional democracy depends on them.⁴⁵⁹ From a developmental perspective, moreover, these unwritten rules *are* a form of democratic responsiveness to changing normative expectations of governmental legitimacy.⁴⁶⁰ Indeed, norm-based change “drives . . . constitutional development,” perhaps to a surprising degree.⁴⁶¹ For it is a source of both democratic and constitutional legitimacy.⁴⁶²

Finally, an indirect judicial role might be in tension with a principle, usually associated with Professor James Thayer, that a court should not

⁴⁵⁵ Vermeule, *supra* note 306, at 26. However, Vermeule does support judicial recognition in the context of norm compliance. *See id.* at 16–20; *see also supra* note 376 and accompanying text.

⁴⁵⁶ Vermeule, *supra* note 306, at 25.

⁴⁵⁷ *Id.* at 29.

⁴⁵⁸ *Cf.* ROBERT E. GOODIN, *INNOVATING DEMOCRACY* (2008); GUTMANN & THOMPSON, *supra* note 12, at 3–4.

⁴⁵⁹ For classic defenses of a thicker conception of democracy, see, for example, ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 220–24 (1989); and Guillermo O’Donnell, *Illusions About Consolidation*, *J. DEMOCRACY*, Apr. 1996, at 34–36. *See generally* Huq & Ginsburg, *supra* note 296, at 86 (noting that while some political science literature “focuses on a simple concept of democracy identified closely with the fact of elections,” that literature “also recognizes that the concept is a multifaceted one that can be described with various levels of thickness”).

⁴⁶⁰ *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 929 (1996) (“[C]ommon law constitutionalism is democratic in an important sense: the principles developed through the common law method are not likely to stay out of line for long with views that are widely and durably held in the society.”); *see also* Strauss, *supra* note 333, at 360–61 (drawing an analytic connection between judicial precedent and the “precedent” of the political branches); *cf.* MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111–46 (2008) (discussing nonjudicial precedent).

⁴⁶¹ Richard Primus, *Constitutional Expectations*, 109 *MICH. L. REV.* 91, 100 (2010).

⁴⁶² *See id.* at 107–08.

strike down a law unless its unconstitutionality is “so clear that it is not open to rational question.”⁴⁶³ While Thayer has prompted valuable assessment of our constitutional law, that law cannot be said to be Thayeran.⁴⁶⁴ In any event, indirect enforcement, in the legal and situational context in which I have defended it, is perhaps more responsive to a core concern of Thayer’s than first appears: that judicial enforcement not crowd out considerations of “justice and right”⁴⁶⁵ that operate on a different register from legality.⁴⁶⁶ Structural norms construct the rules of justice and right — the normative order — that the President inhabits. Courts *should* be wary of regulating that infrastructure using legal doctrine. When an independent legal claim is presented, however, a court that ignores the governing norms decides that legal question on false premises; in so doing, it accepts — and paints over — distortions in the policy process itself.⁴⁶⁷

This type of indirect enforcement is consonant with the political realities of judicial review. As scholars have emphasized, “[j]udges are part of contemporary culture, and they rarely hold views that deviate far from dominant public opinion.”⁴⁶⁸ That said, to the extent that polarization corrodes those shared normative understandings, its effects will be felt on the Court as well.⁴⁶⁹

Thayer’s account does underscore, however, that the circumstances that warrant a ratcheting down of judicial deference to the presidency should be extreme. Crowding out is not the only concern that judicial intervention poses. Judicial enforcement also risks “occasion[ing] so

⁴⁶³ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

⁴⁶⁴ See, e.g., Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 245–46 (1995).

⁴⁶⁵ Thayer, *supra* note 463, at 155.

⁴⁶⁶ *Id.* at 155–56; see also Dorf, *supra* note 71, at 86–88 (arguing that this crowding-out concern extends not only to questions of judicial enforcement but also to the “writeness” of the Constitution itself).

⁴⁶⁷ See Tushnet, *supra* note 464, at 247.

⁴⁶⁸ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 6 (2004); see Dahl, *supra* note 321, at 285; see also, e.g., Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010) (synthesizing the existing literature, *id.* at 264–71, and finding that “an association exists between the public’s mood and the Court’s decisions,” *id.* at 280, but arguing that the Justices might simply “respond to the same events or forces that affect the opinion . . . of the public,” *id.* at 264); *id.* at 264 n.3 (collecting the literature debating this causal question); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1033 (2004) (finding that the Justices are responsive to the public mood).

⁴⁶⁹ See Devins & Baum, *supra* note 372, at 346 (“[T]oday’s Justices are members of increasingly polarized elite social networks that help to create and reinforce their ideological commitments.”).

great a jealousy of [the judicial] power” as to undermine judicial independence itself.⁴⁷⁰ This points to a final cautionary note. The authority of the Court depends on an Article II norm of compliance with judicial orders.⁴⁷¹ That norm might itself be weakened if the President concludes that the Court, in effect, has found him to be noncredible. In dire political times, there is an inescapable tension between perceiving the legal question as it really exists and promoting a culture of legal compliance by the Executive. While presidential legitimacy and judicial legitimacy often reinforce each other,⁴⁷² a President who rejects the unwritten rules of his time puts tremendous strain on that connection.

As a result, the judicial role in presidential norm enforcement should be limited. Courts cannot solve the problems of constitutional governance. Most norms do not implicate an independent and judicially enforceable legal claim, at least most of the time. And the more society depends on courts to check norm breaching by political actors, the more fragile *judicial* norms (such as norms of judicial independence) may become. The next Part thus turns to the implications of a norm-based presidency beyond the courts.

IV. PRESIDENTIAL NORMS BEYOND THE COURTS

If we take seriously the role of structural norms in constraining and empowering the presidency, the argument suggests a few avenues for further investigation. Conceptually, it raises questions about the “lawness” of these presidential norms and about their implications for constitutional theory. It also raises questions, relevant to both theory and practice, about the conditions — legal, institutional, and political — that sustain or erode norm-based practice. This Part begins to develop the argument in each of these directions and, in so doing, hopes to point to some next research steps. Section A explores the “lawness” of presidential norms and their connection to a more colloquial discourse about legality. Section B analyzes implications of a norm-based presidency for constitutional theory. It argues that structural norms supply the network of understandings that gives meaning to — and mediates tensions within — constitutional design goals such as representative government. Section C turns to the legal, institutional, and political conditions that sustain or erode norm-based practice; it begins to map out the system of norm enforcement that operates beyond the courts.

⁴⁷⁰ Thayer, *supra* note 463, at 142.

⁴⁷¹ See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1830–35 (2009); Grove, *supra* note 228, at 488–90; Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 777 (2018).

⁴⁷² See Dahl, *supra* note 321, at 294.

A. *The “Lawness” of Structural Norms*

Structural norms make it possible to realize important rule-of-law values; they are constitutive of a sociologically and normatively acceptable system of government.⁴⁷³ But what does it mean to say, as many have in our current constitutional climate, that for the President to fire the FBI Director without cause — or to formulate a national security judgment without regard to facts on the ground — is “not illegal” but *is* “contrary to the rule of law”?⁴⁷⁴ While the current political moment has heightened the salience of this question, it did not create it. Debates about the status of executive branch norms as law have deep historical roots,⁴⁷⁵ and they are reinvigorated by recent administrative law scholarship.⁴⁷⁶

One analytic move suggested by this scholarship would be to broaden the boundaries of what counts as “legal,” even as we unbundle legality from judicial enforceability.⁴⁷⁷ On this view, one might argue that it is not simply a violation of norm-based practice for the President to fire the FBI Director without cause. It is illegal for him to do so. Similarly, it is not merely abnormal for the President to make a national security decision absent a process that surfaces dissenting views and

⁴⁷³ The content of the rule of law is contested, and I do not address it here. Instead, my aim is to explore what Professor Gerald Postema calls the “conditions of its realization,” if we understand the “core idea of the rule of law [to be] a middle-level political value, capable of being defended in a number of different ways from different ideological perspectives.” Postema, *supra* note 24, at 18.

⁴⁷⁴ See, e.g., Bob Bauer, *How It Was Done: The Problem Is Not Only that Trump Fired Comey, but How He Did It*, LAWFARE (May 10, 2017, 8:10 PM), <https://lawfareblog.com/how-it-was-done-problem-not-only-trump-fired-comey-how-he-did-it> [<https://perma.cc/CW8P-8UQE>] (explaining that although President Trump had the “authority” to fire Comey, the “action itself” and the process used to get there are troubling for the rule of law); Noah Feldman, Opinion, *Comey’s Firing Is a Crisis of American Rule of Law*, BLOOMBERG VIEW (May 9, 2017, 8:35 PM), <https://bloom.bg/2qSYjKp> [<https://perma.cc/K28A-4KN7>] (noting that “[t]echnically, President Donald Trump was within his constitutional rights” but that “the firing did violate a powerful unwritten norm,” and that “it’s anomalous in a rule-of-law system for law enforcement to be too responsive to the political whims of the elected executive”).

⁴⁷⁵ At the turn of the twentieth century, scholars of administrative law developed an account of “internal” administrative law and defended it as a crucial component of our legal system. Professor Bruce Wyman offered a sustained account of what he termed “internal law of administration,” BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 22 (1903), and argued that “it is necessary to have the whole law governing administration [by which he meant both internal and external administrative law] in mind to pass upon any question that may arise in regard to the execution of the law,” *id.* at 23.

⁴⁷⁶ Professor Jerry Mashaw has resuscitated that project, locating and analyzing administration’s “internal law” during the nineteenth century and in modern times. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 1–16 (1983); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 23–25, 251–82 (2012); see also Metzger & Stack, *supra* note 183.

⁴⁷⁷ See Frederick Schauer, Essay, *Law’s Boundaries*, 130 HARV. L. REV. 2434, 2435 (2017) (“[T]he boundary between law and not-law is a shifting one The shift has not been unidirectional, and the boundaries of law, even if generally wider now than at most times in the past, still seem at some times to expand and at other times to contract.”); see also Primus, *supra* note 1.

countervailing facts, it is illegal. Yet this approach does more to obfuscate than to reveal a murkier or more intermediate space that structural norms inhabit. It also may strain the idea of legal accountability and overpromise on what legal rules, or legal methods, on their own can achieve.

Another approach, then, would be to refine our conception of the rule of law so as to make space for underlying institutional commitments that are simultaneously vital to a rule-of-law ideal but also underspecified in legal rules or methods of legal accountability, and desirably so. To advance this approach, we need a richer vocabulary to understand the relationship between structural norms that do not have a strictly legal quality and a system of law or legitimate governance that depends on them. Put differently, some presidential behavior may be unconstitutional, but not illegal.

Recent scholarship has suggested a path forward. Professor Gerald Postema suggests the concept of an “ethos of law”⁴⁷⁸ and the “thick network of mutual accountability” on which it depends.⁴⁷⁹ Postema argues that a conceptual shift from principles of “legality” to principles of “fidelity” will bring this ethos into sharper focus.⁴⁸⁰

This idea of fidelity — or “faithful[] execut[ion]”⁴⁸¹ — might help to reconcile the unwritten aspects of Article II with the written text. Structural constitutionalism is more than a collection of particular legal requirements. It is a system of constitutional governance inferred — but incompletely so — from legal methods involving constitutional structure and text. Fidelity to the constitutional order occurs through norm-based practice.

B. Constructing Presidential Representation

So what does constitutional fidelity require? To begin to answer that question, this section analyzes how norms construct the constitutional goal of presidential representation. Representation is both a core feature and a contested ideal of our constitutional structure. As Professor Hanna Pitkin defined the term, representation is the “making present in some sense of something which is nevertheless not present literally or in fact.”⁴⁸² If the problems that we look to the President to resolve were as arbitrary or irrational as one’s preference between two fruits, or as technocratic as solving a mathematical equation, “representation

⁴⁷⁸ Postema, *supra* note 24, at 8 (emphasis omitted).

⁴⁷⁹ *Id.* at 25; *see also id.* at 8.

⁴⁸⁰ *See id.* at 19.

⁴⁸¹ U.S. CONST. art. II, § 3.

⁴⁸² HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 8–9 (1967) (emphases omitted).

[would] disappear[.]”⁴⁸³ Presidential decisionmaking, like much of political life, more often occurs “in the intermediate range, where the idea of representing as a substantive acting for others does apply.”⁴⁸⁴ What, then, does presidential representation mean? What does it require?

The “big-C” Constitution does not really answer this question.⁴⁸⁵ It offers some hints — or gestures at some ideas that are, in important respects, conflicting.⁴⁸⁶ Our system of separated powers structures political representation so as to be both responsive to and tempering of popular will.⁴⁸⁷ It is designed to check presidential action through differentiated institutional roles. At the same time, representation is understood by many to entail the capacity to act, not just deadlock.⁴⁸⁸

Structural norms specify the forms of representation that are accepted and expected of the presidency.⁴⁸⁹ They mediate among tradeoffs inherent in this complex ideal. And they enable adaptation, over time, to emergent understandings or expectations about governance.⁴⁹⁰ Representation, as specified by a deliberative-presidency norm, requires presidential judgment that is fact-informed and conscientious in observing policy implications and legal constraints. The institutional resources of the modern presidency have given rise to a set of expectations (among participants in the practice, political and legal elites, the media, and civil

⁴⁸³ *Id.* at 211; *see also id.* at 211–12 (“[The] scientist solving a technical problem is not represent[ing], . . . [he] is not pursuing anybody’s interest. The man choosing for others in matters of arbitrary taste is not acting for them in the substantive sense either; he can only substitute his will for theirs . . .”).

⁴⁸⁴ *Id.* at 212.

⁴⁸⁵ *See generally* Primus, *supra* note 1.

⁴⁸⁶ *See, e.g.,* Huq & Michaels, *supra* note 87, at 380–415 (describing the “plurality” of “contested” values underlying the separation of powers, *id.* at 381); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000) (explaining that the separation of powers embraces conflicting goals of balancing power and separating functions); *see also* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 679–80, 682, 688–92 (2015) (critiquing a rigid view of the separation of powers that rejects trading off its values against other values).

⁴⁸⁷ *See* Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1722 (2016) (proposing to develop a normative account of “the aspirations and responsibilities of a ‘conscientious’ or ‘pro-constitutional’ legislator in the U.S. constitutional democracy”); *cf.* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 472 (2006) (Stevens, J., concurring in part and dissenting in part) (concluding that the redistricting plan at issue “violate[d] the sovereign’s duty to govern impartially”).

⁴⁸⁸ *See* Mark E. Warren et al., *Deliberative Negotiation*, in *POLITICAL NEGOTIATION: A HANDBOOK* 141, 142–47 (Jane Mansbridge & Cathie Jo Martin eds., 2016); *see also* Jackson, *supra* note 487, at 1741–42, 1768.

⁴⁸⁹ On the multiple forms of political representation that coexist in a constitutional democracy, *see generally* Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003).

⁴⁹⁰ *Cf.* Strauss, *supra* note 12, at 53 (arguing that “the legal systems within which we operate today should be seen as an effort to accommodate three institutional interests[:]. . . sovereignty, adaptation, and settlement”).

society groups) that the President will rely on professionalized intelligence, sound scientific data, interagency assessments, and competent lawyering in the exercise of presidential judgment. Yet the deliberative-presidency norm, by consolidating power in the NSC, also has marginalized less hawkish voices such as the State Department's. And the norm likely helped stay the tide of stronger interbranch checks on a growing domain of presidential authority.

Meanwhile, the emergence of the going-public norm reflects an idea of constitutional representation in tension with, if not antithetical to, the Framers' vision, and instantiates that commitment in practice.⁴⁹¹ Compromising institutional bulwarks against demagoguery, the presidency has increasingly reflected and reinforced an expectation that the President communicate directly with the citizenry on the defining questions of public policy, including national security.⁴⁹² The rhetorical presidency has promoted energy in presidential governance and a particular form of democratic responsiveness.⁴⁹³ But it also has shifted the emphasis in policymaking away from Congress. It has made the presidency more capable of shaping public opinion, but also more beholden to public opinion. And it may incentivize a presidential discourse that capitalizes on crises and "pseudo-crises."⁴⁹⁴ Whether the going-public norm ultimately has done more to promote or undermine representation in the public interest is, again, a subject of ongoing debate. But the Framers' embrace of a norm against popular presidential leadership likely could not have met the demands of democratic accountability felt in modern American governance — at least once the presidency itself gained such outsized prominence in the policymaking process.

Studied together, going public and the deliberative presidency also reflect a substantial tension in expectations about presidential representation. The modern President is expected to make decisions through an

⁴⁹¹ See TULIS, *supra* note 232.

⁴⁹² Political scientists writing on the public presidency have focused on how presidential rhetoric has altered the nature of representation and accountability. See Jeffrey E. Cohen, *Alternative Futures: Comment on Terry Moe's "The Revolution in Presidential Studies,"* 39 PRESIDENTIAL STUD. Q. 725, 727 (2009) (synthesizing much of this literature and arguing that the concepts and research of the public and institutional presidencies should be better integrated).

⁴⁹³ See TULIS, *supra* note 232, at 175.

⁴⁹⁴ *Id.* at 181 ("Intended to ameliorate crises, the rhetorical presidency is now the creator of crises, or pseudo-crises."); see Whittington, *supra* note 240, at 199 (arguing that "[t]he Clinton administration . . . underscore[s] the perils posed by the modern rhetorical presidency, notably its manipulation of legislative policymaking, its propensity toward demagoguery, and its de-emphasis of deliberation"); see also Vanessa B. Beasley, *The Rhetorical Presidency Meets the Unitary Executive: Implications for Presidential Rhetoric on Public Policy*, 13 RHETORIC & PUB. AFF. 7, 22 (2010) (arguing that an "explicit theme" in political scientists' accounts "is that the rhetorical presidency can have negative impact on democratic processes, most notably deliberation, central to public policy creation," and that a "less explicit theme is the possibility that as presidents' use of public rhetoric increases, both incentive and opportunities for the expansion of presidential power do as well").

informed, rational, and deliberative process, but also to be closely attuned and responsive to democratic will. It is possible that the rise of the administrative state helped to curb the dangers associated with observing each of these two norms, albeit only to a point. As a core reinforcement of the deliberative-presidency norm, administrative governance offered a check on demagoguery and a mechanism to promote deliberation, even as the legitimacy of administrative governance itself became linked to the rhetorical presidency — that is, to the idea of a President directly accountable to the people. Yet linking the legitimacy of the administrative state to democratic accountability through the President, in turn, reinforced norms of presidential control over agency policymaking. And those norms over time contributed to a less stable and more ideologically polarized policymaking apparatus inside the executive branch.

Norm-based practice, then, does not achieve any optimal or perfect form of presidential representation.⁴⁹⁵ But it supplies the interplay of understandings that gives content to the respectable presidency of one's time.

C. *A System of Norm Enforcement*

If structural norms supply the web of understandings that structure the American presidency, then the conditions that support or erode norm-based practice raise important questions at the crux of public law theory and the practice of constitutional governance. This section concludes by beginning to tease out those legal, institutional, and political conditions.

Legally, written text (such as statutes) can play a significant role, indirectly, in creating the conditions that generate, sustain, or erode norm-based practice. As the conflict-of-interest norm reveals, law can make illicit conduct that was previously licit. Even when the text stops short of applying those normative expectations to the top echelons of government power, structural norms can “finish the job.” They can develop or extend those obligations to actors such as the President.⁴⁹⁶

⁴⁹⁵ Cf. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008).

⁴⁹⁶ We see similar dynamics in the other branches, for example, where norm-based practice extends the conflict-of-interest rules to Supreme Court Justices. See, e.g., JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–5 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/5CQN-HKLR>] (explaining that the Supreme Court is not “exempt” from the Judicial Code of Conduct, *id.* at 4, even though the Code does not apply to the Court). Additionally, norms extended prohibitions on workplace discrimination to Congress even before the statutes caught up. See, e.g., 141 CONG. REC. 649–52 (1995) (statement of Sen. Grassley) (explaining the background to legislation that became the Congressional Accountability Act of 1995); *id.* at 651 (“A number of major antidiscrimination and employment laws enacted in this century did not cover one or both Houses of Congress. . . . Over the past 15 years or so, and accelerating in the 1990’s, Congress has taken considerable steps [including resolutions by each chamber] to apply these laws to itself.”).

Thus, while the statutory conflict-of-interest prohibition stops short of the President, a structural norm has developed to so extend it. So too, legal rules, such as those contained in the APA, can generate or reinforce normative understandings of acceptable executive decisionmaking in specific decisional domains. Those normative understandings, in turn, might shape expectations of government decisionmaking in contexts that the APA itself does not govern. In this way, the legal frameworks that develop, through statutes and other forms of legal regulation, are an important factor in constructing the norm-based constitutional order.

Institutionally, pluralist norm enforcers, drawing on the soft powers of Congress, the bureaucracy, civil society, and the media, appear to have made some norms of the presidency more resilient than others. Given Congress's presumed role in the constitutional structure as a check on the presidency, a polarized Congress makes presidential norms of limitation all the more significant — even as it also makes them more fragile. For presidential norms have long been enforced, and thereby reinforced, by Congress. Through oversight and confirmation hearings, discourse on proposed legislation, the creation of administrative oversight structures, and the threat of statutory constraints, Congress historically has played an important role reinforcing and shaping the normative understandings of the presidency.⁴⁹⁷

Administrative actors also have developed prophylactic procedures and their own oversight institutions, and used leaks and other informal tools to sanction norm breaching by the President.⁴⁹⁸ So too, when a range of participants in the practice can be sanctioned for norm breaching (professionally or otherwise), the structural norm may be more resilient. Both a protected civil service and other types of professional networks, such as legal, scientific, or intelligence communities, develop their own understandings of acceptable or respectable practice. When these types of actors have a role in presidential decisionmaking, their understandings of professional ethics or institutional identity operate as a normative constraint on the presidency itself.⁴⁹⁹

Civil society actors similarly police presidential norms, and those actors have become more institutionalized and more focused on the norms of the presidency in recent years. As former executive branch officials

⁴⁹⁷ Congress also has used its hard powers, in particular, impeachment, to resist norm-based change to the presidency. See Whittington, *supra* note 233, at 442 (“The impeachment of Andrew Johnson had a partisan and personal dimension, but it developed as a constitutional challenge to the presidency as it was being constructed by Johnson.”).

⁴⁹⁸ Of course, many leaks are self-interested, and some leaks are simply false. But leaks do provide an important tool for administrative actors seeking to sanction the President. See, e.g., Katie Bo Williams, *Comey Leaked Memos to Prompt Special Counsel*, THE HILL (June 8, 2017, 11:46 AM), <http://thehill.com/policy/national-security/336932-comey-leaked-memo-to-prompt-special-counsel> [https://perma.cc/EC8S-T7BM].

⁴⁹⁹ See *supra* notes 140–142 and accompanying text.

increasingly assume leadership roles in these civil society organizations, the organizations themselves draw on and work to reinforce understandings initially developed inside the presidency.⁵⁰⁰ Other legal elites, including those in the academy, have long played a role articulating and critiquing the norms of the presidency. Beyond teaching the formal structures and doctrinal rules of public law, academics, in their teaching and writing, participate in developing a legal culture that accepts or expects certain forms of presidential behavior.

Media actors as well have long played a role in enforcing presidential norms.⁵⁰¹ The increasingly polarized pathways through which Americans receive their news, however, limits the influence of these media actors as norm enforcers.⁵⁰² And the current media environment, with media personalities who are deeply and avowedly partisan speaking to increasingly polarized audiences, is a condition that appears to be undermining even norms that until recently appeared quite robust, such as the norm of investigatory independence.⁵⁰³

Indeed, contemporary American politics — shaped by partisan, affective, and ideological polarization and rising inequality — makes structural norms more fragile throughout the political process.⁵⁰⁴ It heightens the fact and nature of contestation over those norms; it whittles away at previously agreed-upon core commitments; and it fuels a discourse that undermines institutions that have long supported and reinforced the norms themselves (as recent attacks on the “deep state” or

⁵⁰⁰ For example, the chief ethics lawyers of President Obama and President George W. Bush, Norman Eisen and Richard Painter, respectively, are today the Chair and Vice Chair of a nonprofit organization, Citizens for Responsibility and Ethics in Washington, an organization that Eisen co-founded. See Press Release, Citizens for Responsibility and Ethics in Wash., Norman Eisen and Richard Painter to Lead CREW Board (Dec. 7, 2016), <https://www.citizensforethics.org/press-release/norman-eisen-richard-painter-lead-crew-board> [<https://perma.cc/DPA6-NUCC>]. And when the Director of OGE resigned, he joined the Campaign Legal Center, an organization focused on violations of campaign finance law, where he “felt like he could have a greater impact.” See *Government Ethics Watchdog Walter Shaub Resigns*, *supra* note 175.

⁵⁰¹ See, e.g., Azari & Smith, *supra* note 2.

⁵⁰² See generally ROBERT FARIS ET AL., BERKMAN KLEIN CTR., PARTISANSHIP, PROPAGANDA, & DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION 63–70 (2017), https://dash.harvard.edu/bitstream/handle/1/33759251/2017-08_electionReport_o/pdf?sequence=9 [<https://perma.cc/797Q-2DF2>]; CASS R. SUNSTEIN, REPUBLIC.COM 2.0 (2007).

⁵⁰³ See, e.g., Jonathan Easley, *Conservatives Ramp Up Attacks on Mueller*, THE HILL (Dec. 8, 2017, 6:03 AM), <http://thehill.com/homenews/administration/363856-conservative-attacks-on-mueller-investigation-grow> [<https://perma.cc/6PX3-DD4B>].

⁵⁰⁴ Levitsky and Ziblatt emphasize a deep paradox at the crux of American democracy: that democratic norms that have come to “sustain[] our political system” themselves emerged “to a considerable degree” from historical and institutional conditions that preserved racial exclusion. LEVITSKY & ZIBLATT, *supra* note 37, at 143. The challenge now, they emphasize, is to reinvigorate those norms “in an age of racial equality and unprecedented ethnic diversity.” *Id.* at 231.

“fake news” reflect). When political elites reject the significance of structural norms, “the checks and balances of American political institutions are not self-executing.”⁵⁰⁵

CONCLUSION: STRUCTURAL NORMS BEYOND ARTICLE II

As a sustained study of the presidency reveals, the structures of constitutional governance were not fixed at a Founding moment. The character and content of the presidency is the ongoing work of practice-derived norms, and it is entrenched or unsettled by legal, institutional, and political conditions.

These dynamics are not limited to Article II. Similar phenomena have been documented extensively with respect to Congress.⁵⁰⁶ Norms of congressional practice, some of which developed during periods of relatively weak political parties and relatively modest polarization, helped to facilitate coalition-building across party lines.⁵⁰⁷ Norm erosion in Congress both reflects and contributes to partisan polarization and, in turn, exacerbates the perception, if not the reality of a “broken” branch.⁵⁰⁸ Indeed, Article I norms might be relatively more vulnerable to political backsliding than some of the Article II norms discussed in this Article, to the extent that institutional supports such as an entrenched administrative process, bureaucratic structures, and a protected civil service are generally lacking. The erosion of Article I norms, in turn, makes the norms of Article II more fragile.

Article III norms are being challenged as well by heightened polarization and the “fight to the finish” mentality that it promotes, for example, in judicial appointments.⁵⁰⁹ Norms of judicial independence rest on expectations of iterative play among fundamentally legitimate political rivals⁵¹⁰ — understandings that appear increasingly fragile. Meanwhile, the failure of Congress to reinforce norms of presidential governance puts added strain on longstanding norms of judicial deference. And a growing structural dependence on courts to reinforce presidential norms might further unsettle the acceptance of an independent judiciary by political actors.

⁵⁰⁵ Lieberman et al., *supra* note 89, at 23.

⁵⁰⁶ In contrast to the presidency, much has been written about congressional norms, in particular in the political science literature beginning with the work of Professor Donald Matthews. See DONALD R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 92–117 (1960); see also MANN & ORNSTEIN, *supra* note 316; THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH* (2006); Rohde, *supra* note 2; David W. Rohde et al., *Political Change and Legislative Norms in the U.S. Senate, 1957–1974*, in *STUDIES OF CONGRESS* 147 (Glenn R. Parker ed., 1985).

⁵⁰⁷ See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 14–15, 15 n.18 (1990).

⁵⁰⁸ See MANN & ORNSTEIN, *supra* note 306; Rohde, *supra* note 2; see also Sarah Binder, *The Dysfunctional Congress*, 18 *ANN. REV. POL. SCI.* 85, 85 (2015) (finding that “Congress’s problem-solving capacity appears to have fallen to new lows in recent years”).

⁵⁰⁹ Primus, *supra* note 76; see also Grove, *supra* note 228.

⁵¹⁰ See Primus, *supra* note 76; Graber, *supra* note 57; WHITTINGTON, *supra* note 57.

These dynamics did not begin with President Trump and they will not end with his presidency. Ours is a norm-based constitutional order and a politics that has become deeply challenging to it. Constructing a constitutional system that supports structural norms, while preserving opportunities to assess and contest them, is a public law project that has and will continue to determine the nature of the presidency and of American constitutional democracy.