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## The Executive Branch Anticanon

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## THE EXECUTIVE BRANCH ANTICANON

Deborah Pearlstein\*

*Donald Trump's presidency has given rise to a raft of concerns not just about the wisdom of particular policy decisions but also about the prospect that executive actions might have troubling longer term "precedential" effects. While critics tend to leave undefined what "precedent" in this context means, existing constitutional structures provide multiple mechanisms by which presidential practice can influence future executive branch conduct: judicial actors rely on practice as gloss on constitutional meaning, executive branch officials rely on past practice in guiding institutional norms of behavior, and elected officials outside the executive branch and the people themselves draw on past practice to help evaluate the political legitimacy of presidential conduct in the present day. Yet while the prospect of precedential impact exists, it is equally apparent that not every executive action ends up having any of these effects. Quite to the contrary, from the Franklin D. Roosevelt administration's action targeting Japanese-Americans on the basis of race during World War II, to President Richard Nixon's behavior in the Saturday Night Massacre, one might equally hypothesize the existence of an executive branch anticanon of sorts—executive actions that have produced none of the standard precedential effects, save inasmuch as they have served to establish an interpretive or normative understanding rejecting such executive behavior. Identifying how certain instances of presidential practice achieve such anticanonical status seems today an especially pressing exercise. In addition to helping refine our thinking about the interpretive impact of presidential practice on constitutional meaning, establishing how anticanonical status is achieved may help clarify the agreed-upon scope of at least some of the norms of democratic governance that have proven rich fodder in recent years for "constitutional hardball"—that is, resort to practices that are technically constitutional but that one might once have thought run afoul of normative*

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*principles of governance that could go without saying. Surfacing the existence of anticanonical practice can likewise help guard against the prospect that disfavored presidential behaviors might reset default normative expectations among government officials and the public, expectations that tend to assume because past presidents have taken some action, future presidents can defensibly take the same approach. And tracing anticanonical development can help to identify pathways for forestalling emergent presidential precedent from developing. By examining anticanonical development through several concrete examples, this Article aims to demonstrate how presidential “precedent” is established less by presidential action and more by systemic reaction to what presidents do.*

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#### INTRODUCTION

Of the many intensely partisan conflicts surrounding the Donald Trump presidency, the president’s decision in early 2019 to invoke authority under the National Emergencies Act<sup>1</sup> to secure funding for a border wall that Congress had otherwise declined to support provoked sharp, strikingly bipartisan reactions. Some members of Congress criticized the policy wisdom of the wall; others urged that the president’s action was a usurpation

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1. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended in scattered sections of the U.S.C.).

of Congress's constitutional authority.<sup>2</sup> But at least as common a concern was that the president's action would set a negative precedent. As one senator put it: "If President Trump opens the door to presidents declaring fake emergencies to fund spending they can't persuade the people's representatives in Congress to support, then a dangerous precedent has been set . . ." <sup>3</sup> The border wall is hardly the only occasion on which government officials have worried about the long-term effects of the current presidency. Indeed, concerns about the creation of presidential "precedent" have accompanied any number of presidential controversies, from the president's unilateral decision to withdraw U.S. troops from Syria,<sup>4</sup> to his decision to pardon Arizona Sheriff Joseph Arpaio,<sup>5</sup> and the decision to fire the director of the FBI while an investigation into his presidential campaign was pending.<sup>6</sup>

Describing presidential action as precedent setting should sound at least somewhat strange to lawyerly ears. What presidents do is hardly precedential in any traditional, *stare decisis* sense; neither courts nor Congress nor subsequent presidents are by any formal command bound to follow the examples of past presidents in making their own policy decisions. Yet, the expression is far from wholly rhetorical. What presidents do—what past presidents have done—can matter a great deal not only in creating legal meaning but also in guiding executive branch decision-making day-to-day. In purely doctrinal terms, the U.S. Supreme Court has long taken the view that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President" by Article II of the U.S. Constitution.<sup>7</sup> Opinions of the U.S. Department of Justice's Office of

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2. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [<https://perma.cc/CL4P-7QCQ>].

3. Press Release, U.S. Sen. Patty Murray, Senator Murray Denounces Trump's Plan to Bypass Congress and Declare Phony National Emergency, Votes to Keep Government Open and Reject President Trump's Wasteful Wall (Feb. 14, 2019), <https://www.murray.senate.gov/public/index.cfm/mobile/newsreleases?ID=47EF48DE-86A0-43AD-8CBE-43C1965A0B76> [<https://perma.cc/8URP-6QBX>]; see also Tim Haines, *GOP Sen. Lisa Murkowski: "Dangerous Precedent" to Allow President to Use National Emergency to Override Will of Congress*, REALCLEARPOLITICS (Mar. 7, 2019), [https://www.realclearpolitics.com/video/2019/03/07/gop\\_sen\\_lisa\\_murkowski\\_dangerous\\_precedent\\_to\\_allow\\_president\\_to\\_use\\_national\\_emergency\\_to\\_override\\_will\\_of\\_congress.html](https://www.realclearpolitics.com/video/2019/03/07/gop_sen_lisa_murkowski_dangerous_precedent_to_allow_president_to_use_national_emergency_to_override_will_of_congress.html) [<https://perma.cc/3QTV-ND6P>].

4. See, e.g., Catie Edmondson, *In Bipartisan Rebuke, House Majority Condemns Trump for Syria Withdrawal*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/us/politics/house-vote-trump-syria.html> [<https://perma.cc/J9M3-K2QW>].

5. T. J. Raphael, *Trump's Arpaio Pardon Draws Bipartisan Criticism*, THE WORLD (Aug. 28, 2017), <https://www.pri.org/stories/2017-08-28/trumps-arpaio-pardon-draws-bipartisan-criticism> [<https://perma.cc/5EDW-ZL4T>].

6. See, e.g., *Comey Firing: Reaction from Members of Congress on FBI Director's Dismissal*, WASH. POST (May 9, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/05/09/comey-firing-reaction-from-members-of-congress-on-fbi-directors-dismissal> [<https://perma.cc/4SH8-QCFK>].

7. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952)). State practice is at least

Legal Counsel (OLC) invoke particularly expansive versions of this idea (with or without evidence that the practice has been broken or repeated) in evaluating the legality of contemplated executive action in a range of contexts.<sup>8</sup> Apart from its role in establishing constitutional meaning, practice can also function to establish and maintain norms that guide official decision-making inside the executive branch.<sup>9</sup> And it can help establish norms that extend beyond the executive branch, setting expectations against which Congress and the public evaluate the legitimacy of presidential conduct more broadly.<sup>10</sup> Taken together, these varied potential impacts of presidential practice can produce a profound effect on present governance.

Yet those who are most concerned about the impact of the current presidency might take some comfort that not all presidential behavior becomes influential in practice-perpetuating ways. Indeed, some historical instances of executive conduct are, today, broadly recognized as mistaken, unlawful, or simply wrong. Think of the internment of Japanese-American citizens during Franklin D. Roosevelt's administration or the Saturday Night Massacre during Richard Nixon's. Legal scholars have documented an anticanon among decisions of the Supreme Court. At base, the judicial anticanon is a set of precedents that, whether or not ever formally overturned, are widely recognized among law professors, lawyers, and jurists to no longer be good law.<sup>11</sup> One might equally hypothesize something of an anticanon of executive behavior—that is, historical executive branch conduct that has come to be widely recognized as so unacceptable in character that it has not produced any of the “precedential” effects just described. The anticanon of executive behavior is executive practice that is not relied on by judicial actors as evidence of constitutional meaning; and to the extent the behavior has served to establish or maintain norms within or outside the executive branch, it does so only insofar as the behavior has come to serve as “positive authority for the propositions that [it] reject[s].”<sup>12</sup>

Determining how certain executive branch actions achieve anticanonical status seems to be of practical utility in the current climate in several respects. First, to the extent judicial attention to presidential practice is based on the theory that constitutional meaning may be discerned from mutually agreed

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equally central to the development of customary international law. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 102(2) (AM. L. INST. 1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

8. *See, e.g.*, Auth. to Use Mil. Force in Libya, 35 Op. O.L.C. 1, 7, 14 (2011).

9. *See* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189–90 (2018).

10. *See infra* Part I.A.

11. *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (identifying *Dred Scott v. Sanford*, *Plessy v. Ferguson*, *Lochner v. New York*, and *Korematsu v. United States* as constituent members of the judicial anticanon).

12. *Id.* at 384.

upon institutional performance over time,<sup>13</sup> evidence that the executive branch has itself spurned a particular practice seems at least as significant evidence of nonagreement as a formal *congressional* objection to an assertion of power or, for that matter, congressional silence. Moreover, surfacing the existence of anticanonical practices may provide a methodology for describing with more granularity current norms of democratic governance, including those that have proven rich fodder for what Mark Tushnet usefully described as “constitutional hardball”: “claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with . . . the ‘go without saying’ assumptions that underpin working systems of constitutional government.”<sup>14</sup> From across-the-board invocations of executive privilege and claims of an ability to avoid all investigation,<sup>15</sup> to reallocation of congressionally appropriated funds<sup>16</sup>—recent practice suggests that at least some of what one might have considered “go without saying” assumptions may actually need to be said. Finally, establishing how anticanonical status is achieved may help challenge an otherwise default assumption that every instance of executive behavior has inevitable precedential effects. Indeed, if presidential “precedent” is not born but made, past routes to anticanonical status might serve as a road map for how current institutions can act to guard against the prospect that disfavored presidential actions develop such precedential effects.

However useful this exercise may be, the challenges of identifying an executive branch anticanon are quite different from the exercise in the judicial realm. The concept of a judicial “canon” is reasonably well understood, having been the subject of writings in theory and practice for some time.<sup>17</sup> If a judicial canon might be defined as a set of Supreme Court cases that a particular constituency—say, law professors—agrees is essential to accomplishing a particular goal—say, the attainment of professional legal competence—then it is easy enough to determine which cases likely belong in such a canon. Very roughly, one might draw a line through those cases that most commonly appear in casebooks and scholarly commentary assembled for that same purpose.<sup>18</sup> If a judicial *anticanon* is, in one respect, made up of cases that are no longer recognized as good law, teachable only

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13. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 426 (2012) (citing EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J. G. A. Pocock ed., 1987) (1790)).

14. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 & n.2 (2004).

15. See, e.g., *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), *vacated*, 140 S. Ct. 2019 (2020); Letter from Pat A. Cipollone, Couns. to the President, to Nancy Pelosi, Speaker of the House of Representatives, Elijah C. Cummings, Chairman of the House Comm. on Oversight and Reform, Eliot L. Engel, Chairman, House Foreign Affs. Comm. & Adam B. Schiff, Chairman, House Permanent Select Comm. on Intel. (Oct. 8, 2019) (on file with author) [hereinafter Cipollone Letter].

16. See, e.g., *El Paso County v. Trump*, 408 F. Supp. 3d 840 (W.D. Tex. 2019).

17. See, e.g., J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 970 (1998).

18. See Greene, *supra* note 11, at 474.

insofar as they serve as examples of bad or rejected decisions, then one can look to scholarly work and especially subsequent judicial decisions as key evidence relevant to determining whether the cases are cited unfavorably or at all.<sup>19</sup>

In contrast, it is far from apparent that a “canon” of executive practice exists for any purpose. Executive practice may take any number of forms, from formal executive orders, to informal policy decisions or unwritten habits. Some practices address problems prone to recurrence, others address unique or at least deeply historically contingent events.<sup>20</sup> It is hardly a limited set. Likewise, given the range of ways in which executive action might manifest precedential effect, the constituencies that have some say in establishing the precedential effect (or not) of any of these executive behaviors include not only courts but also executive branch officials and those who influence their views, members of Congress, and the public alike—all of whom have multiple formal and informal methods to express their views about a particular practice but generally no compulsion to do so. Of greater concern, while the current Justices have professional, ethical obligations to consider what past Justices have held—making judicial opinions essential evidence in establishing a past decision’s present significance—presidents have no such duty. Indeed, particularly when it comes to executive practices that are generally held in *high* regard, it may well be a feature of such conduct that it most often produces little in the way of conscious, collective acknowledgement, or even agreed-upon definition.

Yet the same features that make an executive branch *canon* so difficult to identify help make the case that an *anticanon* is more susceptible to discovery. Unlike positive or uncontroversial executive practices, disfavored executive actions tend to produce substantial, and often quite detailed, records—in reactions by the courts, Congress, official and popular opinion, and more.<sup>21</sup> Because presidential precedent can have effects on a variety of institutional and private actors, one can observe the response to a particular practice among a range of constituencies to note evidence of express condemnation, which may exist in actions by Congress, the courts, or elsewhere. It is equally possible, and at times just as instructive, to observe the failure of those constituencies to rely on the practical example in circumstances in which the practice might otherwise seem to bolster their case. Where all relevant constituencies, particularly when represented in bipartisan fashion, agree in either condemnation or nonreliance, one might be more confident in assessing the practice to be “anticanonical” in nature. And because so many constituencies are involved in determining whether a presidential practice has any precedential effect, the exercise requires observing the actions and reactions of multiple institutional actors that, by the nature of constitutional governance, emerge only over time. Because norms themselves develop and change, a practice that sees sustained

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19. *See id.*

20. *See infra* Part I (discussing presidential precedent).

21. *See infra* Part II.B (noting various reactions to the Iran-Contra affair).

rejection may be recognized as more persuasively deserving of anticanonical status than one that happened to garner a single adverse (or welcoming) response at the time the president acted.

The first challenge, then, is epistemological in nature: how do we determine which instances of executive behavior the relevant constituencies agree are anticanonical? To answer that question, this Article begins by canvassing the general mechanisms by which executive practice may come to have precedential effect and then proposes a tentative set of answers for which constituencies and by what indicia of recognition a particular practice might become anticanonical in nature. Part II then tests this approach against several historical candidates for anticanonical status, both to illustrate how one might assess the views of various institutional actors over time and to refine the initial criteria for evaluating anticanonical status. In Part III, this Article examines how the analysis of these examples should inform our understanding of current questions of constitutional and normative interpretation. Beyond the prospect that such lists of executive actions in plain view may better guide courts and executive branch actors in understanding the nature of executive power in areas of ongoing conflict, the more significant impact of such findings may be in helping contemporary institutions understand the effect of their own responses to presidential behavior. While the Madisonian branches may have become accustomed to passively accepting the precedential reality of federal judicial decisions, this Article's anticanonical exercise makes clear that the precedential status of presidential behavior depends far more on what happens after the president acts.

A final note before beginning. Because judicial canons and anticanons are, at least in scholarly and pedagogical settings, recognized phenomena, it has been possible and useful to subject them as identified sets to various meta-analyses—i.e., what do cases in this canon (or anticanon) have in common? Why are they so broadly recognized as essential reading (for good or ill)? What underlying sociological or other forces have led to their construction in present form? The notion of an executive branch anticanon as hypothesized here is, comparatively speaking, a conceptual newborn. As a result, the questions this Article aims to answer are designed to define, describe and, to an extent, justify mapping an executive branch anticanon's existence. It aims to understand whether and how—even in an era of stark partisan division—an executive branch anticanon might be established and sustained. It offers only preliminary speculation about why.

#### I. PRESIDENTIAL PRECEDENT AND THE PROSPECT OF CANON

Past presidential actions—by which I mean official decisions taken by written order or otherwise with a direct effect on the conduct of the U.S. government—matter in present governance in more ways than one. In the law, the Supreme Court has relied on accounts of executive practice to inform



its understanding of constitutional meaning in any number of contexts.<sup>22</sup> Much as the practice of nation-state actors informs the content of customary international law over time,<sup>23</sup> the Court has recognized that past executive practice may lend a customary constitutional gloss on the scope of U.S. executive power today.<sup>24</sup> At the same time, as a growing number of scholars have documented, past practice can be central in the creation of sublegal norms of internal executive branch behavior—from preserving prosecutorial independence, to naming new cabinet appointees.<sup>25</sup> And past practice can help shape expectations for Congress and the public beyond the executive branch, either in ways that legitimate and reassure (as when presidents cite their predecessors' similar examples to build political support for a controversial initiative) or signal cause for alarm (as when critics assail executive conduct for actions that are not normal presidential behavior).<sup>26</sup> After sketching these mechanisms through which past practice can influence present behavior, this part considers how concepts of canon and anticanon might help make sense of which presidential conduct matters.

#### A. *Presidential Precedent*

Perhaps the most well-known, if not uncontroversial, use of past executive practice is by courts and other official arbiters of legality who look to historical practice as evidence of doctrinal meaning. This section thus begins there before turning to more norm-focused effects.

##### 1. Law Creation and Interpretation

The Supreme Court has long relied on executive branch practice to help illuminate the meaning of the largely spare provisions of the Constitution's Article II.<sup>27</sup> The leading discussion there remains Justice Felix Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>28</sup> (*Steel Seizure*).<sup>29</sup> Grappling with the question of whether President Harry S. Truman had the constitutional authority to seize and operate the nation's privately owned steel mills on the eve of a labor strike—a putative strike Truman maintained would threaten the availability of essential weapons and materiel for troops already on the front lines in Korea—Justice Frankfurter rejected the formalistic notion that the president's Article II power could be confined to inferences from the constitutional text. As he put it: “It is an inadmissibly narrow conception of American constitutional law to confine it to the words

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22. See *infra* Part I.A.

23. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 102(2) (AM. L. INST. 1987).

24. See *infra* Part I.A.

25. See, e.g., Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1433–34 (2018); Renan, *supra* note 9, at 2207–15, 2244–47.

26. See *infra* Part I.C.

27. See, e.g., Bradley & Morrison, *supra* note 13, at 417–24 (canvassing examples of cases relying on executive practice).

28. 343 U.S. 579 (1952).

29. *Id.* at 610 (Frankfurter, J., concurring).

of the Constitution and to disregard the gloss which life has written upon them.”<sup>30</sup> Rather, Justice Frankfurter maintained that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”<sup>31</sup> As the historical “record is barren of instances comparable to the one before us,”<sup>32</sup> Justice Frankfurter concluded, there was no basis for sustaining Truman’s action.

The *Steel Seizure* case was hardly the first to note the relevance of historical practice to constitutional interpretation. Quite to the contrary, the historical practices of the political branches featured prominently among the methodologies Chief Justice John Marshall embraced in *McCulloch v. Maryland*.<sup>33</sup> In Chief Justice Marshall’s conception, the actual practice of government “ought to receive a considerable impression,” at least when answering “a doubtful question” involving not the “great principles of liberty” but rather “the respective powers of those who are equally the representatives of the people.”<sup>34</sup> Indeed, by the time Justice Frankfurter wrote in 1952, the Court had repeatedly relied on practice-based reasoning to inform its understanding of executive power on issues ranging from the president’s power to subject legislation passed by Congress to the so-called pocket veto,<sup>35</sup> to the scope of the pardon power,<sup>36</sup> to the disposition of public lands.<sup>37</sup>

But it is Justice Frankfurter’s “practice-plus-acquiescence” formula—underscoring the interpretive significance not just of a government practice

30. *Id.*

31. *Id.* at 610–11; *see also id.* at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”).

32. *Id.* at 612 (Frankfurter, J., concurring).

33. 17 U.S. (4 Wheat.) 316 (1819).

34. *Id.* at 401; *see also* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (“As James Madison wrote, it ‘was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.’” (alteration in original) (quoting Letter to Spencer Roane (Sept. 2, 1819), in 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed., 1908))).

35. *See* *The Pocket Veto Case*, 279 U.S. 655, 688–89 (1929) (“The views which we have expressed as to the construction and effect of the constitutional provision . . . are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”).

36. *See Ex parte Grossman*, 267 U.S. 87, 118–19 (1925) (holding that the president’s pardon power extended to a contempt of court conviction and noting that “long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on”).

37. *See* *United States v. Midwest Oil Co.*, 236 U.S. 459, 472–73 (1915) (“[G]overnment is a practical affair, intended for practical men . . . . [O]fficers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself . . . .”).

as such but of *interbranch concordance* about a practice—that has survived most prominently in modern court decisions, including those recognizing, for example, that Article II supports the president’s power to resolve claims under settlement agreements with foreign countries without congressional engagement<sup>38</sup> and that the president’s exclusive power to recognize foreign governments foreclosed congressional regulation of passport designations.<sup>39</sup> It is certainly true that the Court and scholars have, over the years, offered various reasons why concordance matters—sometimes treating interbranch agreement as essential to sustain a departmental judgment of constitutionality, or at least functional practicality; on other occasions treating congressional inaction as signaling a waiver of institutional prerogative; or as giving rise to institutional and public reliance interests deserving of the Court’s respect.<sup>40</sup> But the existence or absence of a *shared* understanding of effective power has remained the relevant touchstone, even when the results of such an inquiry have been, as on more than one occasion, to defeat the president’s assertion of power.<sup>41</sup>

Such reliance on practice-plus-acquiescence to establish legal meaning is equally apparent in the opinions of OLC, perhaps most in OLC opinions regarding the president’s power to use force abroad. As OLC explained, for instance, in its 2011 opinion citing examples of past conduct supporting the president’s power to launch operations in Libya, absent new congressional authorization, “historical practice is an important indication of constitutional meaning, because it reflects the two political branches’ practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense.”<sup>42</sup> With respect to the “limited” presidential use of force abroad, the “pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidences the existence of

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38. See *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (recognizing the president’s Article II power to enter into an executive agreement suspending certain claims held by American companies against the government of Iran as part of a settlement resolving the 1979 hostage crisis); *id.* (“Past practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .’” (quoting *Midwest Oil Co.*, 236 U.S. at 474)).

39. See generally *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (relying on practice and acquiescence to establish the president’s exclusive power to decide whether to recognize the territory of a foreign country on a U.S. passport).

40. For a discussion of the varied theories supporting interpretive use of practice-plus-acquiescence, see Bradley & Morrison, *supra* note 13, at 433.

41. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014) (holding the president’s challenged recess appointments invalid); *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (“The President’s Memorandum [ordering state courts to give effect to a federal treaty obligation] is not supported by a ‘particularly longstanding practice’ of congressional acquiescence, but rather is what the United States itself has described as ‘unprecedented action.’” (citation omitted) (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 29–30, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Nos. 05-51 & 04-10566))).

42. See *Auth. to Use Mil. Force in Libya*, 35 Op. O.L.C. 1, 7 (2011).

broad constitutional power.”<sup>43</sup> While scholars continue to debate whether OLC’s engagement on this topic has functioned as relatively more constraining or enabling of executive action,<sup>44</sup> there is no dispute that both Republican- and Democratic-produced OLC opinions have relied heavily on past practice as evidence of constitutional meaning.

Because OLC’s view is often the most authoritative available legal guidance on presidential power in a variety of contexts, it is worth noting that OLC’s reliance on practice has, in many contexts, gone beyond the habitual practice-and-acquiescence formula, drawing at times on executive practice without reference to congressional acquiescence or, indeed, even in the face of congressional nonacquiescence. OLC has thus repeatedly advanced constitutional objections to, for example, attempts by Congress to shape diplomatic negotiations or to obtain certain executive branch documents or testimony.<sup>45</sup> Whether such claims ultimately prove persuasive in court is another matter;<sup>46</sup> as the D.C. federal district court recently held in rejecting the Trump administration’s claim that administration officials enjoyed absolute immunity from congressional subpoenas for testimony, “longevity” of this view in OLC opinions “alone does not transform an unsupported notion into law.”<sup>47</sup> At a minimum, OLC’s habit underscores the prospect that even isolated instances of conduct can have some significant effect on future use.

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43. *Id.* (quoting *Deployment of U.S. Armed Forces into Haiti*, 18 Op. O.L.C. 173, 178 (1994)) (referencing historical examples of presidential uses of force absent congressional authorization in Panama, Bosnia, Haiti, and Yugoslavia).

44. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1132–35 (2013) (engaging the debate about OLC’s role).

45. *See, e.g.*, Bradley & Morrison, *supra* note 13, at 457–58, 458 n.200 (“[T]his Office has ‘repeatedly objected on constitutional grounds to Congressional attempts to mandate the time, manner and content of diplomatic negotiations,’ including in the context of potential engagement with international fora.” (alteration in original) (citation omitted) (quoting Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. 1, 8 (2009))); *id.* at 8–9 (discussing similar executive branch precedents from the Jimmy Carter, Ronald Reagan, George H. W. Bush, and Clinton administrations); *see also* *Assertion of Exec. Privilege over Documents Generated in Response to Cong. Investigation into Operation Fast and Furious*, 36 Op. O.L.C. 1, 2–5 (2012) (analyzing the applicability of executive privilege to certain Justice Department documents sought by the House Committee on Oversight and Government Reform as part of its investigation into a law enforcement operation known as “Fast and Furious”).

46. *But see Medellin*, 552 U.S. at 532 (observing that “the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts” requiring them to give effect to the judgment of the treaty-based International Court of Justice).

47. *Comm. on Judiciary v. McGahn*, 415 F. Supp. 3d 148, 204 (D.D.C. 2019) (noting that the first OLC memorandum to assert that aides enjoyed absolute immunity in this context, a 1971 opinion authored by William Rehnquist, “does not cite to a single case that stands for the asserted proposition, and the ten-plus subsequent publicly available statements by OLC that DOJ points to in support of this immunity simply reference back to the 1971 Memorandum”).

## 2. Internal Norm-Generating Effect

Apart from the direct role of practice in guiding the formal legal interpretation of the president's constitutional authority, practice has also proven central to the establishment and maintenance of often powerful norms of conduct inside the executive branch. Growing concern in recent years about the abandonment of constitutional norms by both the executive and legislative branches has helped nourish blossoming literature on the topic<sup>48</sup> and has highlighted several illustrative examples of executive branch norms: respect for judicial supremacy on constitutional questions,<sup>49</sup> pursuit of a deliberative decision-making process on questions of domestic and foreign policy,<sup>50</sup> recognition of basic legislative oversight powers,<sup>51</sup> and access for a pool of journalists to White House briefings.<sup>52</sup> The list of manifestly consequential examples likely extends quite a bit longer than this. While scholars use varied terms to capture the phenomenon—norms, customs, conventions—the core idea is that there exists a body of common understandings, typically lacking formal status as law, that nonetheless has the effect of “regulat[ing] the public behavior of actors who wield high-level governmental authority, thereby guiding and constraining how these actors ‘exercise political discretion.’”<sup>53</sup>

Here, some further definition is necessary, for the relationship between “practice” and “norms” in this context is not always straightforward. The questions, for example, of where norms come from and how they emerge can be vexed by the chicken-and-egg problem: did a particular habit or practice give rise to the establishment of a “norm” or did the norm emerge, rather, from a shared moral or political belief about the appropriate exercise of power that itself gave rise to a repeated pattern of behavior? This dilemma is reflected to an extent in existing definitional variation in the literature of norms. In some conceptions, the existence of practical examples of a particular behavior is effectively synonymous with the term “norm,” which

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48. The literature has grown substantially in recent years. For a small sample, see, for example, Chafetz & Pozen, *supra* note 25, at 1433–34; David E. Pozen, *Self-Help and the Separation of Powers*, 124 *YALE L.J.* 2 (2014); Renan, *supra* note 9; Adrian Vermeule, *Conventions of Agency Independence*, 113 *COLUM. L. REV.* 1163, 1182 (2013); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 *U. ILL. L. REV.* 1847.

49. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *United States v. Nixon*, 418 U.S. 683 (1974).

50. Renan, *supra* note 9, at 2221–30 (origin of habit).

51. *See, e.g.*, Memorandum from Lloyd N. Cutler, Special Couns. to the President, for All Executive Department and Agency General Counsels on Congressional Requests to Departments and Agencies Protected by Executive Privilege (Sept. 28, 1994), reprinted in *CONG. RSCH. SERV.*, RL30240, *CONGRESSIONAL OVERSIGHT MANUAL* app. b at 97–98 (2020) (“In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations . . .”).

52. Plaintiffs’ Motion for a Preliminary Injunction at 9–10, *CNN v. Trump*, No 18-cv-02610 (D.D.C. Nov. 13, 2018).

53. Chafetz & Pozen, *supra* note 25, at 1433–34 (quoting Whittington, *supra* note 48, at 1860).

is defined as little more than “expected behavioral patterns or regularities,” full stop.<sup>54</sup> In other accounts, lived practice is but one of several methods by which a relevant norm might form; as British Commonwealth constitutional scholar A. V. Dicey understood it, normative influence can be achieved through “conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power . . . are not in reality laws at all.”<sup>55</sup>

Nevertheless, whether past practice accounts for some or all of the reasons why a particular norm comes to exist, there seems to be widespread agreement on at least some definitional points of special relevance here. First, practice is part and parcel of what makes a norm—either because practice contributed to the norm’s development and/or because practice can be important evidence that a norm now exists.<sup>56</sup> Second, a norm, once in existence, becomes an independent justification for continuing to adhere to it, all apart from the reasons for its origin in the first place,<sup>57</sup> or whether it may be formally codified in law in the second. Explanations for why norms have this effect vary. By one account, “[h]istorical practice is important in part because of its potential to reflect collective wisdom generated by the judgments of numerous actors over time.”<sup>58</sup> Another view holds that bureaucracies have a tendency to generate structures that reinforce practical inertia.<sup>59</sup> But whether because of a shared belief in the value of collective wisdom or because of some behavioral characteristic of bureaucracies, a norm’s mere existence can provide (in the present context) executive branch actors an independent reason to observe it. Finally, a key part of what distinguishes a “norm” from any other form of government behavior is that its violation is met with some form of practical (i.e., social, political, professional, or bureaucratic) disapproval.<sup>60</sup> Even in the absence of formal legal sanction, the violation of a norm brings about some negative consequences.<sup>61</sup> It is in no small measure for this reason that norms can play a significant role in shaping executive branch conduct day-to-day.

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54. Renan, *supra* note 9, at 2197 (citing Richard Fallon, What Are “Norms” and “Conventions?” (2018) (unpublished manuscript)); *see also* Chafetz & Pozen, *supra* note 25, at 1433 (adopting Phillip Pettit’s understanding of norms as “‘regularities of behavior in a society’ that do not have the status of law but that, ‘as a matter of shared awareness, most members conform to . . . and most are reinforced in this pattern of behavior by that expectation’” (quoting PHILIP PETTIT, ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 128 (2012))).

55. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION cxli (8th ed. 1915).

56. *See* Renan, *supra* note 9, at 2197.

57. Pozen, *supra* note 48, at 31 (“Like laws, conventions . . . are typically thought to provide content-independent reasons for compliance.” (citing Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935–40 (2008))).

58. Bradley & Morrison, *supra* note 13, at 426 (citing EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J. G. A. Pocock ed., 1987) (1790)).

59. *See* Renan, *supra* note 9, at 2276 (observing that bureaucratic structures grow up around the norm and have the effect of reinforcing it).

60. *Id.* at 2198.

61. *See, e.g.,* Chafetz & Pozen, *supra* note 25, at 1439 (citing Vermeule, *supra* note 48, at 1182).

A final point (for now) about the role of practice in shaping internal executive branch norms: politically appointed executive branch officials commonly come to office with existing, even entrenched, expectations about the nature and scope of at least some aspects of executive power. Especially in circumstances where the formal law of executive power is obscure or unsettled, decision makers' instincts about what may be done may play an outsized role in establishing the scope of reasonable policy debate. Although internal administrative structures, from executive branch legal counsel to, ultimately, presidents themselves, can influence and even alter these understandings in the context of particular policy decisions,<sup>62</sup> it would be unsurprising for a policy official who knows that "presidents have done this in the past" to assume equally that "presidents can do this," unless and until given credible reasons to think otherwise. Executive branch officials are, in this respect, as susceptible as others to the impact of normative views about the presidency that exist outside the executive branch—views that past practice has also helped to shape. This phenomenon is discussed next.

### 3. External Norm-Generating Effect

A third way in which past practice can help shape the exercise of executive power is in its ability to influence external expectations—the views of elected officials, the media, voters, and others—about what kind of behavior is accepted as normal, legitimate, or even "presidential" when pursued by the executive branch. There can be little doubt that presidents need, and typically care deeply about, the views of institutional and political actors outside the executive branch. In purely instrumental terms, congressional support can be essential in securing for any president the outcome she seeks. As Richard Neustadt famously put it: "[The president] may try to lead the system: he is bound to be its clerk."<sup>63</sup> Winning public opinion more broadly has indeed become a central goal of the modern presidency, as "[p]residents regularly 'go over the heads' of Congress to the people at large in support of legislation and other initiatives."<sup>64</sup> Perhaps most foundationally, support for executive action over time helps sustain the legitimacy of the constitutional system.<sup>65</sup> While it is beyond the scope of this Article to delve fully into complex

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62. See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

63. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 184 (1990). Even, perhaps especially, when it comes to presidential war-making initiatives, presidents understand that congressional buy-in (whether or not in the form of formal legislation) is essential. As Howell and Pevehouse found, congressional views turn out to influence presidential decisions to use force significantly. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007); see also DOUGLAS L. KRINER, *AFTER THE RUBICON: CONGRESS, PRESIDENTS, AND THE POLITICS OF WAGING WAR* (2010) (examining the effect of legislative mechanisms for influencing the conduct of war).

64. JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (2017).

65. 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.").

questions of political legitimacy in its varied forms,<sup>66</sup> it should seem uncontroversial to suggest that conduct by a democratic institution perceived as illegitimate by a popular majority faces an uncertain future at best. At a minimum, this literature helps illustrate why a political actor interested in securing popular support might be interested in assuring the public that actions are not only justified but “appropriate” assertions of power.<sup>67</sup>

Given such imperatives, it should be unsurprising to find that presidents have regularly invoked past executive practice in helping to advance initiatives these constituencies might perceive as abnormal. In much the same way that judges traditionally rely on past case authority as an independent justification for a decision, independent of whether they actually agreed with the outcome in the original case,<sup>68</sup> presidents commonly invoke prior executive practice to provide public reassurance and secure support for present action—not only among members of Congress and the public but also among elite thinkers and writers who tend to shape reputational assessments. Defending his resort to emergency authority to support the construction of his border wall, President Trump thus, uncharacteristically, invoked President Barack Obama’s use of the same statutory authority (albeit for different purposes) in support of his controversial assertion of power at the border.<sup>69</sup> Likewise, President Obama publicly defended his decision to defer adverse immigration action against individuals brought to the United States as children, in part, on similar grounds: “The actions I’m taking are not only lawful, they’re the kinds of actions taken by every single Republican President and every single Democratic President for the past half century.”<sup>70</sup>

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66. For a useful conceptual map distinguishing sociological, moral, and legal forms of legitimacy, see RICHARD H. FALLON JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 20–41 (2018).

67. See Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) (“[D]efining legitimacy by reference to ‘a conception of obligation to obey any commands an authority issues so long as that authority is acting within appropriate limits.’” (quoting TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 26 (1990))).

68. See generally Schauer, *supra* note 57.

69. See, e.g., Aaron Blake, *Trump’s National Emergency Press Conference, Annotated*, WASH. POST (Feb. 15, 2019), <https://www.washingtonpost.com/politics/2019/02/15/trumps-bewildering-national-emergency-press-conference-annotated> [<https://perma.cc/9FHH-CE5N>] (“[W]e’re going to be signing, today—and registering—national emergency. And it’s a great thing to do, because we have an invasion of drugs, invasion of gangs, invasion of people and it’s unacceptable. And by signing the national emergency, something signed many times by other presidents, many, many times—President Obama, in fact, we may be using one of the national emergencies that he signed having to do with cartels, criminal cartels. It’s a very good emergency that he signed . . .”); see also Gregory Korte, *Trump Defends Arpaio Pardon; Lists Other Infamous Uses of the Power*, USA TODAY (Aug. 28, 2017, 10:12 PM), <https://www.usatoday.com/story/news/politics/2017/08/28/trump-defends-arpaio-pardon-lists-other-infamous-uses-power/609317001> [<https://perma.cc/PF7L-F9K2>]; *Remarks by President Trump and President Niinistö of Finland in Joint Press Conference*, THE WHITE HOUSE (Aug. 28, 2017, 4:20 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-niinisto-finland-joint-press-conference> [<https://perma.cc/2SCJ-9N8N>].

70. *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/3U6L-78XX>].



Without conducting a full survey of modern presidential oratory, even cursory searches reveal that reliance on past practice as a tool of presidential rhetorical persuasion abounds.<sup>71</sup>

The converse effect is likewise much in evidence, as critics of particular executive actions regularly invoke, among its worst qualities, the action's "unprecedented" nature. Using the term "unprecedented" with reference to one or more aspects of the Trump administration's conduct is pervasive, from references to the president's firing of Director of the FBI James Comey and the administration's categorical refusal to comply with congressional subpoenas, to the president's business-related conflicts of interest and use of Twitter as a method of communication.<sup>72</sup> Yet the "unprecedented" critique is in fact a perennial chestnut of presidential criticism, as opponents of executive branch action have strived to weaken public support for particular actions.<sup>73</sup> Just as norms, once established, become independent reasons for their own continuation within a bureaucracy, the normal or abnormal nature of presidential conduct—as evinced by the presence or absence of past practice—remains a powerful, or at least common, ground for influencing

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71. Among further examples, see *February 4, 1997: State of the Union Address*, MILLER CTR. (Feb. 4, 1997), <https://millercenter.org/the-presidency/presidential-speeches/february-4-1997-state-union-address> [<https://perma.cc/L3QQ-68HA>] ("Almost exactly 50 years ago, in the first winter of the Cold War, President Truman stood before a Republican Congress and called upon our country to meet its responsibilities of leadership . . . . That Congress, led by Republicans like Senator Arthur Vandenberg, answered President Truman's call. Together, they made the commitments that strengthened our country for 50 years. Now let us do the same."); *Transcript of President's Address on Nuclear Strategy Toward Soviet Union*, N.Y. TIMES (Nov. 23, 1982), <https://www.nytimes.com/1982/11/23/world/transcript-of-president-s-address-on-nuclear-strategy-toward-soviet-union.html> [<https://perma.cc/4H2N-D6FS>] ("We must replace and modernize our forces, and that's why I've decided to proceed with the production and deployment of the new ICBM known as the MX. Three earlier Presidents worked to develop this missile.").

72. Matthew Ingram, *The 140-Character President*, COLUM. JOURNALISM REV. (Fall 2017), [https://www.cjr.org/special\\_report/trump-twitter-tweets-president.php](https://www.cjr.org/special_report/trump-twitter-tweets-president.php) [<https://perma.cc/BS5F-F2HB>] ("The president's use of a public platform like Twitter to talk directly with the American people is unprecedented for the presidency . . . ."); Kerry W. Kircher, *Trump's Unprecedented Fight to Withhold Information*, ATLANTIC (Aug. 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/house-needs-its-subpoena-power-against-trump/596857> [<https://perma.cc/S4FZ-XMVP>] ("The Trump administration—as it has in so many other dangerous ways—again has set itself apart, this time in the unprecedented degree to which it has resisted congressional oversight. In the space of just a few months, Trump has declared war on the House's investigation of the executive branch . . . ."); Richard C. Paddock et al., *Potential Conflicts Around the Globe for Trump, the Businessman President*, N.Y. TIMES (Nov. 26, 2016), <https://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html> [<https://perma.cc/6WUF-WQNB>]; *White House Announced Firing of James Comey*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/interactive/2017/05/09/us/politics/document-White-House-Fires-James-Comey.html> [<https://perma.cc/XG25-VNKX>].

73. See, e.g., DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW (2015); Andy Worthington, *George W. Bush's Torture Program Began Ten Years Ago*, ANDY WORTHINGTON (Feb. 14, 2012), <http://www.andyworthington.co.uk/2012/02/14/george-w-bushs-torture-program-began-ten-years-ago/> [<https://perma.cc/EWW5-M4PB>] ("Depriving prisoners seized in wartime of the protections of the Geneva Conventions was a huge and unprecedented step, and thoroughly alarming.").

the views of Congress and the public more broadly. The expectation that past practice can play such a significant and persuasive role in securing popular or political approval for present action means that much depends not only on the strength of the claim that a particular past action actually occurred as described but also on the conviction that current perceptions of the past action remain favorable or neutral enough to still be well received.

### B. *Practical Canons and Anticanons*

Why and how might the task of canonical collection help shed light on how presidential practice informs the conduct of government today? It may help to consider, by way of definition, a canonical context law professors know well—canons of judicial opinions, collected for various purposes.<sup>74</sup> Constitutional law casebooks, for example, feature a core set of cases year after year, the cases “law professors and casebooks recognize as minimally necessary for students to attain professional competence in constitutional law,” the “set of decisions whose correctness participants in constitutional argument must always assume.”<sup>75</sup> While there is ample disagreement around some parts of what students of constitutional law must learn, the canon can be said to comprise at least an agreed-upon core of opinions collected for that purpose. To be sure, promoting the attainment of professional competence is but one of any number of purposes around which one might identify a constitutional canon. Variant canons of judicial opinions might be thought “necessary [to ensure] cultural literacy for citizens in a democracy” or to “serve as benchmarks for testing academic theories about the law.”<sup>76</sup> For present purposes, it may suffice to note that what distinguishes a canon in this sense from any old list is not the purpose for which the materials are collected but rather that constituents relevant to the purpose of the list *agree* that the content of the list is so. One set of cases is canonical for pedagogical purposes because lawyers, judges, and professors agree that they are so. A potentially different set of cases is canonical for theoretical study because scholars agree that they are so.

Identifying canons of any kind among executive branch “precedents” presents a somewhat different problem. For better or worse, there is no professional school for presidents and accordingly no canon of presidential practice for presidency training purposes. Presidential practice unmistakably matters in other ways, but the precedential effects identified in the preceding section require for their achievement the engagement of a range of constituencies. To understand whether a particular practice has had interpretive effect on constitutional meaning, one could look in the first instance to the Supreme Court—if the Court has noted a practice as evidence of meaning, then surely it would count as one indicator in favor of finding that practice useful in that sense. To understand whether the practice has helped to form an internal executive branch norm, one can look to executive

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74. See, e.g., Balkin & Levinson, *supra* note 17, at 970; Greene, *supra* note 11, at 474.

75. Greene, *supra* note 11, at 381.

76. Balkin & Levinson, *supra* note 17, at 969.

branch memoranda, statements, and subsequent executive branch conduct for evidence of collective agreement. Finding a practice repeated over time, across both Republican and Democratic administrations, seems a strong indicator of norm-creating or norm-sustaining status. Finally, to understand whether a practice has had any common normative impact on public expectations, one might look to subsequent legislative responses, public polling data, and other indicia of popular political opinion. Practices greeted with widespread, consistent favor (or at the very least, noncontroversy) among these groups over time seem good candidates for establishing such an effect.

Yet while agreement about precedential effect (or canonical status) might be discerned from a variety of formal and informal actions that all of these institutions and actors are capable of taking—judicial opinions, legislation, public statements, and more—it must be noted that existing structures give these actors, at best, sharply limited incentives to express a judgment about *canonical* presidential behavior in any regular way. The courts' jurisdiction is limited to cases and controversies, and canonical practice seems, by its nature, unlikely to have generated much of either.<sup>77</sup> Likewise, while current justices have professional, ethical obligations to care about what past justices have held, a current president has no such duty. The absence of citation or reference to past presidential conduct in records of present decision-making might be notable in some circumstances, but given the vastness of the body of actions on which to rely, a president's decision to cite or even replicate a past president's behavior seems not especially persuasive evidence of anything other than the proposition that presidents sometimes do and sometimes do not use examples of past practice to support the achievement of their current ends. Indeed, it may well be a feature of good executive branch conduct, however regularly repeated or praiseworthy, that it most often produces little in the way of conscious, collective acknowledgement, or even agreed-upon definition, in either political branch. And even well-known presidential actions, however widely praised, may be so tied to unique circumstances as to have, at best, uncertain effect on present governance. What normative insight may current governing institutions draw from, say, President Abraham Lincoln's proclamation freeing enslaved peoples? A norm about racial equality? Or one about presidential power?

Disfavored executive actions, by contrast, tend to produce substantial, and often quite detailed, records—in reactions by the courts, Congress, official and popular opinion, and more. Instances of executive practice that have been formally condemned by all of these constituencies produce records that might give us more confidence in concluding that there exists general and shared recognition that such a practice satisfies our criteria for anticanonical status—that is, presidential conduct so unacceptable that no court would look to such an action as evidence of constitutional meaning, and no political institution or constituency would look to that practice for any norm of official

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77. U.S. CONST. art. III.

conduct other than the opposite of what the practice reflects.<sup>78</sup> Whether or not a *canonical* set of presidential practices can be identified, well-known acts that have suffered such formal institutional condemnation—in the form of, say, a negative decision on the matter by the Supreme Court and legislation codifying a contrary rule by Congress—might at least yield a list of practices reliably and broadly recognized as *anticanonical* in effect.

But however valuable formal institutional condemnation might be in identifying candidates for anticanonical practice, it is not altogether clear that such evidence should be required to establish a practice's anticanonical status. Consider, for example, the executive practice challenged in *Korematsu v. United States*,<sup>79</sup> a case that has surely earned its place among anticanonical Supreme Court decisions, at least in the “not law” sense. Whether measuring by negative references in scholarly articles, constitutional law casebooks, testimony in judicial confirmation hearings, or negative references in subsequent cases and legislation directly,<sup>80</sup> the Court's 1944 decision had settled comfortably among the “haunted houses of constitutional law,”<sup>81</sup> even before the Court formally—and finally—repudiated it in 2018.<sup>82</sup>

Just as it had become clear that *Korematsu* was a dead letter long before it was formally overturned, one might also imagine that President Franklin D. Roosevelt's executive order<sup>83</sup> authorizing the military to affect the mass exclusion of Japanese Americans from the West Coast was equally no longer good practice on which to rely—either as evidence of constitutional meaning or as contributing to some positive internal or external norm of presidential conduct. On brief inspection, the proposition seems at least plausible. Notwithstanding the President George W. Bush administration's evident interest in a wide-ranging counterterrorism detention program beginning in 2001, neither Justice Department litigators nor OLC lawyers invoked Roosevelt's practical example in support of their otherwise extraordinarily broad claims of Article II power in that era.<sup>84</sup> Even as the George W. Bush administration relied liberally on other examples of presidential practice in its OLC opinions and briefs, the example of that particular action of the Roosevelt administration was never cited.<sup>85</sup> President George W. Bush did

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78. See *infra* Part II (evaluating potential examples of such practices).

79. 323 U.S. 214 (1944).

80. Greene, *supra* note 11, at 388–402 (detailing popular, political, and formal disapproval of *Korematsu*).

81. Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 487 (2002).

82. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority . . . . *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.” (citation omitted) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

83. Exec. Order No. 9066, 3 C.F.R. 1092 (1938–1942).

84. Greene, *supra* note 11, at 400–02.

85. While President George W. Bush famously issued an executive order authorizing detention and military trials after the attacks of September 11, 2001, the order aimed at those

not invoke the example in defending his own detention practices in public speeches. And while the administration made extensive use of existing criminal and immigration statutes to detain hundreds of individuals amidst daily fears of additional domestic attacks,<sup>86</sup> even detaining a handful of American citizens as “enemy combatants,”<sup>87</sup> it stopped short of adopting the Roosevelt approach—deploying the military to affect the wholesale exclusion of a class of individuals from their homes. Why?

It is tempting to assume that no such action could have been contemplated since the law had changed in other important respects by 2001. That is, one might assume the president did not have the military conduct mass sweeps of, say, Saudi-, Afghan-, or even Muslim-American nationals from New York or other putatively threatened cities because Congress had long since passed, in express rejection of Roosevelt’s *Korematsu* order, the Non-Detention Act of 1971<sup>88</sup> (NDA), proscribing the detention of U.S. citizens except by an act of Congress. Yet the administration was certainly aware—indeed, the Supreme Court itself had agreed as much by 2004—that the statutory Authorization for Use of Military Force<sup>89</sup> (AUMF) Congress had enacted in the days after September 11, 2001, qualified as an act of Congress to satisfy the NDA’s requirement.<sup>90</sup> Thus, the statute alone does not explain neglect of the Roosevelt administration’s past practice.

It is also possible that policymakers inside the George W. Bush administration concluded that such a practice would simply not be helpful in advancing their counterterrorism policy goals. There are indeed plenty of security policy reasons to conclude that the exclusion and internment of Japanese-Americans on the West Coast was a time-wasting diversion of military resources and personnel that could have been far more effectively used elsewhere. Yet in addition to the “enemy combatant” detentions of a handful of American citizens in the United States, the administration had pursued significant (if on a smaller scale than *Korematsu*) counterterrorism detention operations against noncitizens during that time period, operations aimed overwhelmingly at men from predominantly Muslim countries.<sup>91</sup> It thus seems hard to argue that the administration thought large, class-based

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who were part of Al Qaeda or had worked to prepare or commit terrorist attacks, rather than at a general population or place. Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002), reprinted as amended in 3 U.S.C. § 801.

86. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009) (describing some of these practices).

87. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004); Plea Agreement ¶ 1, *United States v. Lindh*, No. 02-37 (E.D. Va. July 15, 2002), <http://www.usdoj.gov/ag/pleaagreement.htm> [<https://perma.cc/NFL8-S42M>].

88. 18 U.S.C. § 4001(a).

89. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

90. See *Hamdi*, 542 U.S. at 517.

91. See, e.g., *Iqbal*, 556 U.S. at 667 (describing some of these practices); see also OFF. OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 16–22 (April 2003), <https://fas.org/irp/agency/doj/oig/detainees.pdf> [<https://perma.cc/UDN8-GDLJ>] (helpful statistics regarding the topic).

detention operations would be categorically unlikely to help their counterterrorism initiatives.

An alternative possibility is thus at least worth considering—namely, that the administration believed that invocation or repetition of President Roosevelt’s practical example would neither advance their claims legally, nor aid their cause politically. The mass exclusion and detention of a race- or religion-based class of U.S. citizens could not persuasively be invoked as a gloss on the meaning of the president’s power under Article II; and it set no favorable marker likely to enhance public perceptions of the wisdom, legitimacy, or even presidentialness of any executive action going forward. Notwithstanding the Supreme Court’s formal judicial *validation* of Roosevelt’s exclusion order in *Korematsu*, neither relying on nor replicating Roosevelt’s practice would be likely to secure the president any advantage. Put differently, it is possible members of the Bush administration, for these or other reasons, viewed the Japanese-American internment example as anticanonical in nature—that is, an example of past practice so generally recognized as mistaken that it has come to set a standard for what the executive branch should not do.

As straightforward as it might seem, selecting the Japanese-American exclusion example as Exhibit A in a hypothetical catalog of anticanonical practices also underscores the complexity of defining such a practice set. Among other things, real-time condemnation of the particular practice as such may be too much—and the wrong thing—to ask. After all, the putatively anticanonical practice of Japanese-American exclusion was initially welcomed with broad popular support,<sup>92</sup> congressional inaction, and (in critical part) formal judicial *validation*.<sup>93</sup> The following decades did eventually produce general legislation aimed at preventing the future detention of Americans without an act of Congress<sup>94</sup> and, forty years later, a writ of *coram nobis* for Fred Korematsu in particular.<sup>95</sup> But might it not have been possible that the practice had achieved anticanonical status—such that no court would affirmatively rely on it and no executive would embrace it—even before the courts formally acknowledged error? Indeed, it seems plausible to imagine anticanonical status quite commonly emerging iteratively over time or at least over a longer period of time than allowed by the window in which formal institutional invalidation (because of mootness or analogous constraints) was possible to achieve.

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92. Carl M. Cannon, *Trump, Unlearning the Lessons of Internment*, REALCLEARPOLITICS (Dec. 13, 2015), [https://www.realeclearpolitics.com/articles/2015/12/13/trump\\_unlearning\\_the\\_lessons\\_of\\_internment\\_129011.html](https://www.realeclearpolitics.com/articles/2015/12/13/trump_unlearning_the_lessons_of_internment_129011.html) [<https://perma.cc/HBQ6-GWPM>]; Art Swift, *Gallup Vault: WWII-Era Support for Japanese Internment*, GALLUP (Aug. 31, 2016), <https://news.gallup.com/vault/195257/gallup-vault-wwii-era-support-japanese-internment.aspx> [<https://perma.cc/AEP6-GQQN>]; Paul Thornton, Opinion, *In 1942, We Favored Japanese Internment. Shame on Us*, L.A. TIMES (Feb. 25, 2017), <https://www.latimes.com/la-ol-opinion-newsletter-japanese-internment-20170225-htm1story.html> [<https://perma.cc/HT6D-3ALH>].

93. See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

94. See 18 U.S.C. § 4001(a).

95. See *Korematsu v. United States*, 584 F. Supp. 1406, 1416–18 (N.D. Cal. 1984).

Given the Court's regular reliance on presidential practice (and legislative acquiescence) in assessing the constitutionality of executive action, it is certainly sensible to begin by consulting what, if anything, courts have said about a particular practice and what, if anything, Congress has done in response. But at least as an initial position, our evaluation of candidates for inclusion in an executive branch anticanon should consider not only actions that one or the other branches of government has rejected through traditional, formal means (i.e., enacted laws and decided cases) but also actions that have been treated negatively by the courts, the political branches, and the public as evidenced in other ways. Examples may include congressional hearings, opinions of executive branch legal counsel, the statements of executive branch policymakers and their elite contemporaries in practice and academe, subsequent patterns of use, and iterative exchanges among all of these actors not just in reliance on the example but in nonreliance where institutional conventions might otherwise expect to produce it.

That decision, too, carries complex consequences. For it is almost inconceivable that, looking across such a wide range of sources over such an extended period of time, one would not encounter some indication that at least someone in these circles, perhaps depending on partisan affiliation, still views the practice as acceptable or at least not so unacceptable as to be beyond contemplation—or even so attractive as to be worth repeating in some form. Indeed, during Donald Trump's campaign for the presidency, he famously called for “a total and complete shutdown of Muslims entering the United States,” later defending his proposal in a televised interview by noting that President Roosevelt “did the same thing,” referencing the internment of Japanese-Americans.<sup>96</sup> Does the favorable mention of the putatively anticanonical incident—followed by an attempt to implement a version of the policy the incident was invoked to defend—suffice to take the *Korematsu* practice out of the running for anticanonical status? Or, might the anticanonical status of a presidential practice survive its occasional invocation? Might formal action by a handful of official institutions or a majority of scholars suffice to establish anticanonical status, or should evidence of bipartisan condemnation be required? How much and what kind of rejection of the practice one might conclude suffices to preserve a practice as anticanonical in such circumstances may need to await consideration of specific examples. For if the age of constitutional hardball<sup>97</sup> has demonstrated anything, it is that assumptions about which norms are beyond contestation is perhaps narrower than one might have imagined.

Finally, for present purposes, one might narrow the range of possible candidates further by focusing on executive actions that have any chance of producing any of the precedential effects described: actions that might shape constitutional meaning, create norms of conduct inside the executive branch,

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96. *Trump v. Hawaii*, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting) (describing President Trump's televised remarks).

97. See generally Tushnet, *supra* note 14.

or help define the terms of legitimate presidential conduct outside it.<sup>98</sup> One might likewise select examples only from executive actions well or widely enough known to have produced not only a documented internal response (such that might evince an internal executive branch norm) but also have served as a normative touchstone one way or another in the public mind. And given the prospect that anticanonical status may develop over time, the inquiry can also limit the focus to actions that happened long enough ago to see how various institutions have responded. In this respect, inquiring minds might prefer actions based on decisions that were bound to recur and indeed, that have recurred in more than one administration—the kind of actions for which it might be possible for a pattern of behavior over time to emerge.

## II. EVALUATING CANDIDATES FOR AN EXECUTIVE BRANCH ANTICANON

Unlike judicial canons and anticanons, the absence of a singular collection of presidential actions assembled for the purpose of, for example, professional training, means the inquiry necessarily starts from a blanker slate; this inquiry cannot be exhaustive but merely illustrative. The idea here is to test the criteria just sketched by offering a set of incidents for consideration—some that seem near certain candidates for inclusion in an executive branch anticanon, some less certain—in the hope that one might better define not just where to look but how to identify anticanonical practice. In accordance with the foregoing analysis, the examples that follow are taken from incidents that are both broadly ill regarded today and in broad contours historically well-known; they involve the *kinds* of decisions that could have constitutional implications bound to recur and indeed, that have recurred in more than one presidency; and they are limited to modern actions (to maximize the likelihood of contemporary relevance) but that are at least twenty-five-years old so that subsequent use over time can be observed. The illustrative actions assessed here—involving the handling of investigations into the president, the sharing of information with Congress, and the decision to use force—meet each of these criteria. They also help define our inquiry further before we turn to consider what anticanonical practice might tell us about the current contingencies of executive power.

### A. *Terminating an Investigation into the President*

Among potential candidates for anticanonical practice, President Richard Nixon's decision in October 1973 to fire Watergate special prosecutor Archibald Cox seems reasonably low-hanging fruit. After promising the House Judiciary Committee in confirmation hearings that he would appoint a special prosecutor to investigate the Watergate matter, newly appointed Attorney General Elliot Richardson selected Cox for the post in May 1973. With Nixon's former attorney general, John Mitchell, and others, already facing charges of perjury and obstruction of justice in federal court in

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<sup>98</sup> It is surely only a small subset of everything presidents have done that has even arguable constitutional significance.



Washington, D.C., Cox filed and won a motion in the trial court for a subpoena compelling the president to turn over newly discovered White House audio tapes thought relevant to the ongoing proceedings. After Cox refused White House attempts to offer compromise transcripts of the tapes instead, the president ordered Richardson to fire Cox. When both Richardson and his Deputy Attorney General William Ruckelshaus, refused the president's order and resigned, it fell to Solicitor General Robert Bork to carry out the president's command.<sup>99</sup>

While questions surrounding the scope of the president's removal power, and the constitutionality of independent counsel, have arisen in the courts repeatedly in the decades since, there is no evidence that Nixon's actions in this episode have influenced constitutional meaning in this realm, except arguably to support measures to restrict executive authority. The direct constitutionality of the president's actions that night was never seriously contested. Among the few public officials who spoke immediately in defense of Nixon's conduct, several emphasized that the president surely had authority to fire his subordinates at the Justice Department.<sup>100</sup> While subsequently adopted regulations imposed important limits on the president's ability to remove Cox's successor special counsel,<sup>101</sup> the Supreme Court had no occasion to address the converse question—whether Congress could constitutionally limit the president's authority to remove an independent counsel engaged in investigating the president—until 1988, when the post-Watergate independent counsel statute, passed as part of the Ethics in Government Act of 1978,<sup>102</sup> came before it in *Morrison v. Olson*.<sup>103</sup> Enacted a decade earlier, the statute provided that an independent counsel could only be removed from office by impeachment or by “the personal action of the Attorney General,” and then “only for good cause, physical or mental disability,” “or any other condition that substantially impairs” the independent counsel's performance.<sup>104</sup> The *Morrison* Court upheld the statute as not unduly interfering with the separation of powers or the president's power under Article II.<sup>105</sup>

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99. For detailed historical accounts, see, for example, FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON (1994); BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS: THE CLASSIC, BEHIND-THE-SCENES ACCOUNT OF RICHARD NIXON'S DRAMATIC LAST DAYS IN THE WHITE HOUSE (1976).

100. See, e.g., Jules Witcover, *Pressure for Impeachment Mounting*, WASH. POST (Oct. 21, 1973), [https://www.washingtonpost.com/politics/pressure-for-impeachment-mounting/2012/06/04/gJQAd9f6IV\\_story.html?utm\\_term=.91a1320cb755](https://www.washingtonpost.com/politics/pressure-for-impeachment-mounting/2012/06/04/gJQAd9f6IV_story.html?utm_term=.91a1320cb755) [https://perma.cc/KL97-6ZUE] (quoting, among others, Kansas Republican Senator Bob Dole, as saying, “I don't know what other choice the President had . . . [i]t's a question of who's the President—Nixon or Cox”).

101. *United States v. Nixon*, 418 U.S. 683, 694–95 (1974) (citing 38 Fed. Reg. 30,739 (Nov. 7, 1973), amended by 38 Fed. Reg. 32,805 (Nov. 19, 1973)).

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

103. 487 U.S. 654 (1988).

104. 28 U.S.C. § 596(a)(1).

105. *Morrison*, 487 U.S. at 696–97.

Yet while the Court's conclusion met with vigorous dissent at the time<sup>106</sup> and scholarly criticism since,<sup>107</sup> perhaps most striking about the *Morrison* opinions is what they do not do. Neither the majority nor the dissent even attempt to leverage past presidential practice to illuminate the much-contested constitutional meaning (here, the putatively exclusive nature of the executive's control over prosecutors, even special counsel, in the Justice Department). Notwithstanding the majority's direct reference to *Steel Seizure*,<sup>108</sup> not even the dissent noted that, as a matter of historical practice, presidents have acted to remove even "independent" counsels more than once.<sup>109</sup> At least one of those occasions—Nixon's, just fifteen years earlier—involved a presidential removal seemingly contrary to the requirements of then applicable Justice Department regulations, enacted pursuant to statute.<sup>110</sup> To the extent the event played any role in the Justices' thinking, it at most supported the opposite result.<sup>111</sup>

It is hard to imagine that the Court's inattention to presidential practice in this realm was merely an oversight. From the moment it became public, President Nixon's decision to order Cox's dismissal was radically unpopular.<sup>112</sup> Gallup conducted a public poll on the question of whether the president should be impeached and tracked a notable uptick in support for impeachment after the events of the Saturday Night Massacre.<sup>113</sup> *The Washington Post* reported the following day that demands for impeachment among members of both parties in Congress were mounting swiftly, with even Republican leaders describing the president's action as having "precipitated a constitutional crisis."<sup>114</sup> Within days of the Saturday events,

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106. *Id.* at 697–734 (Scalia, J., dissenting).

107. *See, e.g.*, Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133 (1998).

108. *Morrison*, 487 U.S. at 694 ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

109. *See* ANDREW COAN, PROSECUTING THE PRESIDENT: HOW SPECIAL PROSECUTORS HOLD PRESIDENTS ACCOUNTABLE AND PROTECT THE RULE OF LAW 24–29 (2019) (recounting, for example, President Ulysses S. Grant's action removing his previously appointed special counsel).

110. Establishing the Office of Watergate Special Prosecution Force, 38 Fed. Reg. 14,688, 14,688 (June 4, 1973) (to be codified at 28 C.F.R. § 0.37), formally established the Watergate Special Prosecution Force. On the question of removal, the regulation provided: "The Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part." *Id.*

111. *See Morrison*, 487 U.S. at 677 ("Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers.").

112. *See, e.g.*, KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 361–62 (1997) (describing a "firestorm" of public opinion in response to what was soon called the "Saturday Night Massacre").

113. Lydia Saad, *Gallup Vault: More Said 'Fire Nixon' After Nixon Fired Cox*, GALLUP (Jan. 26, 2018), <https://news.gallup.com/vault/226370/gallup-vault-fire-nixon-nixon-fired-cox.aspx> [<https://perma.cc/3T56-5FMM>].

114. Witcover, *supra* note 100 (quoting Illinois Republican John B. Anderson, Chair of the House Republican Conference).

multiple members of Congress introduced resolutions calling, variously, for impeachment, investigation, and the appointment of a new Watergate special prosecutor.<sup>115</sup> Just over a week later, the House Judiciary Committee voted to begin issuing subpoenas, a first step toward impeachment.<sup>116</sup> Two of the three articles of impeachment eventually adopted by the House Judiciary Committee the following summer cite the president's interference with "the office of Watergate Special Prosecution Force" as among the grounds for impeachment.<sup>117</sup> At the same time, Congress opened discussions on the prospect of legislation to establish a regular independent prosecutor shortly after Cox's firing. Those discussions produced extensive hearings and ultimately, the passage of the Ethics in Government Act,<sup>118</sup> creating the office of "independent counsel" to investigate high-ranking government officials alleged to have violated federal criminal law. Under the law the Supreme Court eventually upheld in *Morrison*, the independent counsel could only be removed from office by impeachment or by "the personal action of the Attorney General," and then "only for good cause, physical or mental disability," "or any other condition that substantially impairs" the independent counsel's performance.<sup>119</sup>

But perhaps the strongest evidence in favor of recognizing Cox's firing as anticanonical practice is the subsequent behavior of the executive branch itself. Despite multiple investigations launched under the authority of the independent counsel statute and subsequent Justice Department regulations, no president since Nixon has fired an independent counsel appointed to investigate his conduct. Indeed, notwithstanding sweeping and highly controversial investigations into both President Ronald Reagan (by Lawrence Walsh operating under the Ethics in Government Act) and President Bill Clinton (by Ken Starr, operating under the same authority),<sup>120</sup> neither Walsh nor Starr gave any indication in their lengthy final reports of any executive branch attempt to terminate their investigations.<sup>121</sup> The recently concluded investigation of President Trump and the Trump campaign by Special Counsel Robert Mueller is in this respect dramatically different.<sup>122</sup> The

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115. 119 CONG. REC. 34,871–73 (1973).

116. James M. Naughton, *House Panel Starts Inquiry on Impeachment Question*, N.Y. TIMES (Oct. 31, 1973), <https://www.nytimes.com/1973/10/31/archives/house-panel-starts-inquiry-on-impeachment-question-approves-wide.html> [<https://perma.cc/WWY6-FGAQ>].

117. H.R. REP. NO. 93-1305, at 2 (1974).

118. Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867–71 (codified at 28 U.S.C. §§ 591–594). For a more detailed chronology of this legislative history, see Constance O'Keefe & Peter Safirstein, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 BROOK. L. REV. 113, 118 nn.27–29 (1983).

119. 28 U.S.C. § 596(a)(1).

120. See COAN, *supra* note 109, at 64–86.

121. See KENNETH W. STARR, THE STARR REPORT: THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR (1998); LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (1993).

122. 1 SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

Mueller report details multiple attempts by the president, calling on more than a half dozen different individuals both in and out of government, to terminate the Mueller investigation.<sup>123</sup> Yet in recounting the response to the president's demands of multiple executive branch officials, including the president's handpicked attorney general and White House counsel, the Mueller report usefully illuminates prevailing executive branch understandings of the Nixon example. Beyond officials' consistent refusals to comply with the president's demands,<sup>124</sup> it seems clear the Nixon events served as an influential, negative example. As former White House Counsel Donald McGahn later told investigators, he did not want to be like "Saturday Night Massacre Bork."<sup>125</sup>

Such statements, coupled with Trump administration officials' uniform and repeated refusal to comply with the president's demands, make for particularly compelling evidence that Nixon's conduct has come to serve as "positive authority for the propositions [it] reject[s]."<sup>126</sup> All lines of evidence available to us support this conclusion. Despite opportunities, no court has ever cited Nixon's example (or that of, say, President Ulysses S. Grant) as evidence that Congress's ability to regulate independent counsel is constitutionally limited. Public and official indicia suggest Nixon's actions have been widely and consistently rejected by both Congress and the public. And executive branch officials themselves have either viewed it as counterproductive, impossible, or out of the question for any subsequent president to follow Nixon's course. That is, Nixon's action has come to stand for a norm supporting the opposite of the practice he pursued: the president should not be able to terminate an investigation into his own potentially illegal activity by unilaterally removing investigative counsel.

If this example is persuasive, one might take some reassurance about the accuracy of the preliminary assumptions above. That is, negative, even profoundly negative, conduct by the president need not be formally rejected by a court to be broadly recognized as such, but judicial or other official nonreliance on the practice in the face of opportunities to do so can be important evidence of anticanonical status. Negative presidential practice can indeed be expected to produce a substantial record of consistent, bipartisan condemnation in some form over time, though subsequent examples below may help to illuminate how consistent this condemnation need be. Finally, the nonrepetition of the practice across bipartisan administrations and, perhaps more significant, the anticipation of adverse

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123. 2 *id.* at 90–105.

124. *Id.* at 85.

125. *Id.* at 85–86; see also *Questionnaire for Non-judicial Nominees*, U.S. SENATE COMM. ON THE JUDICIARY (June 29, 2017), <https://www.judiciary.senate.gov/imo/media/doc/Wray%20SJQ.pdf> [<https://perma.cc/C42C-ZUHQ>] (showing responses of Christopher Wray committing to protect the Mueller investigation during its pendency). The special counsel had taken the position that this conduct is among evidence that the president committed obstruction of justice, for which he may be criminally prosecuted upon leaving office. See 2 MUELLER III, *supra* note 122, at 92–95.

126. See *supra* note 12 and accompanying text.

professional or reputational consequences in the event of repetition (as evinced in the McGahn testimony), seems to satisfy common definitions of how norms function.<sup>127</sup> Notwithstanding countervailing pressures (including even presidential direction), norms can certainly exert an independent pull on current governing decisions—and anticanonical norms can be expected to exert an especially strong one.

*B. Concealing Use-of-Force Operations from Congress*

If the Saturday Night Massacre might serve for present purposes as a paradigmatic example of anticanonical practice, many other examples of presidential practice come with records that are more complex, even within the same presidency. Consider another example from the Nixon administration. Beginning in March 1969, President Nixon ordered a major air bombing campaign in Cambodia, a significant expansion of the ongoing conflict in Vietnam into the territory of a new, previously neutral, country.<sup>128</sup> While the scope of presidential war powers in many respects remains hotly contested (and thus, at least in principle, unlikely to produce clear anticanonical examples), the practice of potential anticanonical interest here is not the introduction of forces but rather the decision to undertake these operations without any notification (before or after commencement) to Congress. At the president's insistence, none of the relevant congressional committees were notified that the president had decided to extend the use of military force into a third country whose neutrality the United States otherwise publicly recognized.<sup>129</sup> Indeed, in response to the president's insistence upon secrecy, the Pentagon developed an elaborate "dual reporting" system, making it possible for pilots and navigators involved in the missions to file reports of fuel and ordinance use but ensuring that even the Pentagon's already secret records would falsely show no indication of any bombing runs into Cambodia.<sup>130</sup> After one military flight supervisor expressed concern about the falsification of records and asked who they were meant to keep the information from, he was reportedly told, "the Foreign Relations Committee."<sup>131</sup> Apart from quiet, informal conversations with two sympathetic senators and three representatives in the summer of 1969,<sup>132</sup> Congress did not find out about the monthslong bombing campaign until July 1973, when a whistleblower reported it.<sup>133</sup>

Unlike constitutional questions surrounding restrictions on presidential removal power and the legality of independent counsel schemes, the courts have had scant opportunity to opine directly on any putative presidential

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127. See *supra* Part I.A.2 (defining "norms").

128. WILLIAM SHAWCROSS, SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA 19–24 (1979).

129. *Id.* at 28–30.

130. *Id.* at 30.

131. See *id.* at 32, 214.

132. See generally SEYMOUR M. HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE (1983).

133. SHAWCROSS, *supra* note 128, at 287.

authority to withhold information about military operations from Congress.<sup>134</sup> While contemporaneous lawsuits challenged the legality of Nixon's Cambodia operations on the grounds that the president lacked constitutional or statutory authorization to use force there, those lawsuits were rejected (without reaching the merits) as posing nonjusticiable political questions and, in any event, did not separately present questions about secrecy or concealment.<sup>135</sup> Congress and the executive have with some regularity fought over congressional access to executive branch information, although there remain no more than a handful of judicial decisions resolving those disputes, which have been most commonly addressed through interbranch negotiations.<sup>136</sup> What cases exist—lower court decisions involving various assertions of executive privilege—generally acknowledge that a case for executive privilege may be stronger where national security is at stake<sup>137</sup> but consistently reject the notion of any absolute privilege surrounding national security.<sup>138</sup> None of these cases—and no decision of the Supreme Court on any topic—makes reference to President Nixon's efforts to conceal information about the Cambodia campaign from Congress.<sup>139</sup>

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134. The actual falsification of official records was then, and remains today, a crime under the Uniform Code of Military Justice (UCMJ). *See* 10 U.S.C. § 907(a)(1) (providing for the criminal offense of submitting “any false record, return, regulation, order, or other official document, knowing it to be false”). The offense of lying to Congress is also a crime under the UCMJ. *See* 18 U.S.C. § 1001 (making it a crime “in any matter within the jurisdiction of the executive, legislative, or judicial branch” to “knowingly and willfully,” among other things, “make[] any materially false, fictitious, or fraudulent statement or representation”).

135. *See, e.g., Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

136. *See* TODD GARVEY, CONG. RSCH. SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 7 (2014), <https://fas.org/sgp/crs/secrery/R42670.pdf> [<https://perma.cc/3NX9-5L7T>].

137. *See* *United States v. AT&T*, 551 F.2d 384, 392 (D.C. Cir. 1976); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 24 (D.D.C. 2013); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008); *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983).

138. *See, e.g., United States v. AT&T*, 567 F.2d 121, 128 (D.C. Cir. 1977) (“The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While the Constitution assigns to the President a number of powers relating to national security, . . . it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces . . .”); Comm. on Judiciary v. McGahn, 415 F. Supp. 3d 148, 214 (D.D.C. 2019).

139. *See* GARVEY, *supra* note 136, at 21. Presidents have stated they will not use executive privilege to block congressional inquiries into allegations of fraud, corruption, or other illegal or unethical conduct in the executive branch. The Clinton administration announced that “[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.” *Id.* Similarly, the Reagan administration policy was to refuse to invoke executive privilege when faced with allegations of illegal or unethical conduct: “[T]he privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers.” *Id.* A significant application of this policy came in the Iran-Contra investigations when President Reagan did not assert

One might argue that the paucity of judicial engagement on the question necessarily makes the Cambodia situation a weak candidate for anticanonical status. Apart from what courts would think about the legality of the president's conduct if presented with the question, there is only the most modest basis on which to assess the courts' view of the constitutional relevance of the Cambodian example given only indirect opportunities to engage it. At the same time, if even judicial *affirmation* may not be enough to save a practical example from anticanonical status (as in the detention practice underlying *Korematsu*), surely judicial silence is not enough to foreclose the prospect altogether. The lack of judicial engagement may be especially unproblematic when other lines of evidence are available. In this instance, even as the courts lacked occasion to opine directly on the administration's concealment of information from Congress, Congress itself was eager to engage.

By the time the administration confirmed reports of the secret air campaign on July 16, 1973,<sup>140</sup> many members of Congress and the public were already deeply unhappy with the Nixon administration over a combination of the still emerging Watergate scandal<sup>141</sup> and the United States's massive, ongoing combat operations in Southeast Asia.<sup>142</sup> But it was news of the undisclosed campaign in Cambodia (beginning more than a year earlier than Congress and the public had been told) that triggered the first resolution calling for the president's impeachment.<sup>143</sup> Introduced just two weeks after the Cambodia revelations, the focus of the proposed article of impeachment was "not the bombing itself nor even the secrecy . . . [but] rather[] its concealment from the Congress" in violation of Article I, Section 9 of the Constitution.<sup>144</sup> The resolution would eventually result in a fourth proposed article of impeachment against President Nixon in July of the following year, alleging that the president had acted in disregard of his duty to "take care that the laws

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executive privilege and even made "relevant excerpts" of his personal diaries available to congressional investigators. *Id.*

140. See, e.g., Seymour M. Hersh, *U.S. Confirms Pre-1970 Raids on Cambodia*, N.Y. TIMES (July 16, 1973), <https://www.nytimes.com/1973/07/17/archives/us-confirms-pre1970-raids-on-cambodia-bombing-protected-gis-says.html> [<https://perma.cc/9CKG-7UF9>].

141. See, e.g., James M. Naughton, *Surprise Witness: Butterfield, Ex-aide at White House, Tells of Listening Devices*, N.Y. TIMES (July 16, 1973), <https://www.nytimes.com/1973/07/17/archives/surprise-witness-butterfield-exaide-at-white-house-tells-of.html> [<https://perma.cc/D3NW-64B4>].

142. See, e.g., ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 81 (2006) (recounting that President Nixon announced in 1970 that he had ordered 32,000 U.S. ground troops into combat across the border).

143. Marjorie Hunter, *House Gets Impeach-Nixon Resolution*, N.Y. TIMES (Aug. 1, 1973), <https://www.nytimes.com/1973/08/01/archives/house-gets-impeachnixon-resolution-littleused-provision-following.html?searchResultPosition=12> [<https://perma.cc/5F5F-DM76>]. Representative Robert F. Drinan was clear in introducing the resolution that he was moved to act "only after 'recent revelation that President Nixon conducted a totally secret air war in Cambodia for 14 months prior to April 30, 1970.'" *Id.*

144. H.R. REP. NO. 93-1305, at 308-09 (1974) (quoting U.S. CONST. art. I, § 9 requiring that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time").

be faithfully executed” by concealing from and lying to Congress about the nature of U.S. bombing operations in Cambodia.<sup>145</sup> While the House Judiciary Committee ultimately voted not to support the fourth article, the majority of those voting against it rejected it for reasons unrelated to their views of the concealment itself—including, among other things, that the War Powers Resolution<sup>146</sup> (WPR), subsequently enacted by Congress in November 1973, would now serve as a powerful deterrent against any president repeating such conduct.<sup>147</sup>

Indeed, following the Cambodia revelations, Congress moved remarkably quickly to adopt this significant new legislation regulating the president’s conduct of both military- and (later) CIA-led covert operations abroad. Having spent more than three years by that point debating whether and how to restrict the president’s ability to send U.S. troops into hostilities abroad, the House of Representatives finally passed its version of the WPR just three days after the Cambodia revelations were confirmed.<sup>148</sup> The final WPR was enacted three months later and included provisions imposing both congressional consultation and reporting requirements on the president.<sup>149</sup> While the WPR has been the subject of much criticism, Congress readily overrode the president’s initial veto to enact the bill into law, and presidents since have submitted close to 200 reports to Congress regarding the introduction of further troops into hostilities, or into circumstances where hostilities are imminent, as the WPR requires.<sup>150</sup> And public support for the kind of congressional engagement the WPR requires of the president has

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145. *The Impeachment Inquiry*, CQ ALMANAC ONLINE, [https://library.cqpress.com/cqalmanac/document.php?id=cqal74-1223105#H2\\_1](https://library.cqpress.com/cqalmanac/document.php?id=cqal74-1223105#H2_1) [<https://perma.cc/X4R7-QQ8W>] (last visited Oct. 3, 2020); *see also* H.R. REP. NO. 93-1305, at 308 (“In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, on and subsequent to March 17, 1969, authorized, ordered and ratified the concealment from the Congress of the facts and the submission to the Congress of false and misleading statements concerning the existence, scope and nature of American bombing operations in Cambodia in derogation of the power of the Congress to declare war, to make appropriations and to raise and support armies, and by such conduct warrants impeachment and trial and removal from office.”).

146. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548).

147. H.R. REP. NO. 93-1305, at 327.

148. Richard L. Madden, *House Passes Bill to Curb President’s War Power*, N.Y. TIMES (July 19, 1973), <https://www.nytimes.com/1973/07/19/archives/house-passes-bill-to-curb-presidents-war-powers-house-passes-bill.html> [<https://perma.cc/3NKG-DLZN>].

149. Section 1542 of the WPR provides that the president “in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” 50 U.S.C. § 1542. In such circumstances, § 1543 requires that the president submit a written report to the House and Senate within forty-eight hours setting forth “the circumstances necessitating the introduction of” forces, the constitutional and statutory authority on which the introduction was based, and the “estimated scope and duration of the hostilities or involvement.” *Id.* § 1543.

150. ELLEN C. COLLIER & RICHARD F. GRIMMETT, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 1, 68–94 (2019).



remained remarkably consistent since. As the bipartisan National War Powers Commission summarized in its 2018 report: “Despite changes in historical context and the varying nature of external threats, the mood of the American public has remained decidedly in favor of consultation prior to committing American troops abroad.”<sup>151</sup>

Yet if such indicia might support the conclusion that the president’s concealment of information about U.S. military operations from Congress has earned anticanonical status among actors outside the executive branch—such that the secrecy surrounding early Cambodia operations today serves as practical justification for the maintenance of laws and norms to the opposite effect—the evidence for its anticanonical status for executive branch actors is more complex. Conventional wisdom among scholars and policy officials remains that the WPR “tends to be honored in the breach rather than by observance,”<sup>152</sup> in substantial measure because the executive branch has remained chronically resistant.<sup>153</sup> OLC wrote in 2002 that it has “questioned the WPR’s constitutionality on numerous occasions.”<sup>154</sup> And presidential administrations have not filed WPR reports on several occasions when they believed that the introduction of forces under the circumstances did not rise to the level of “hostilities” triggering the reporting requirement in article 4 of the WPR.<sup>155</sup> Even when WPR reports are submitted, as one account has it, they are “relegated to lower-level executive personnel” and “stripped of so much content in the interest of preserving secrecy as to make them hardly useful.”<sup>156</sup> In the meantime, because the WPR reporting and consultation requirements apply only to the U.S. Armed Forces, presidents initially found it possible to avoid its provisions by invoking separate statutory powers to pursue covert action through the CIA.<sup>157</sup>

Indeed, Nixon’s Cambodia operation was not the last occasion on which the executive branch attempted to keep information from Congress about U.S. engagements in military conflicts outside the United States. The Iran-Contra affair, which emerged publicly in 1986, concerned in part the Reagan administration’s secret efforts to sell arms to Iran in exchange for the release of American hostages and to use the proceeds of those sales to support the military insurgency of the Contra rebels against the Nicaraguan government,

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151. JAMES A. BAKER III ET AL., MILLER CTR., NATIONAL WAR POWERS COMMISSION: REPORT APPENDIX SIX 2 (2008), <http://web1.millercenter.org/commissions/warpowers/appsix.pdf> [<https://perma.cc/G2TL-CAPB>] (citing the results of recurring Gallup polling).

152. *Id.* at 3. Congress chronically reports frustration with a lack of consultation required by § 1542 of the WPR. *See, e.g.*, COLLIER & GRIMMETT, *supra* note 150, at 1.

153. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

154. Auth. of the President Under Domestic and Int’l L. to Use Mil. Force Against Iraq, 26 Op. O.L.C. 143, 160 (2002); *see also* Overview of the War Powers Resol., 8 Op. O.L.C. 271, 275 (1984).

155. *See, e.g.*, ELY, *supra* note 153, at 49 & n.171.

156. JAMES A. BAKER III ET AL., MILLER CTR., NATIONAL WAR POWERS COMMISSION: REPORT 23 (2008), <http://web1.millercenter.org/reports/warpowers/report.pdf> [<https://perma.cc/MLZ5-RVDL>].

157. *See* KOH, *supra* note 153, at 39.

in violation of federal law prohibiting U.S. government assistance to the group.<sup>158</sup> To be sure, the incident was different from Nixon's Cambodia activities in multiple respects. Among others, the U.S. Armed Forces were not themselves engaged in hostilities in Nicaragua, and what support the United States did provide largely focused on arming and training the Contra rebels and was channeled not through the military but through CIA personnel, not covered by the terms of the WPR.<sup>159</sup> Yet the dynamic was broadly familiar: the executive, conscious that planned force-related activities faced congressional opposition, this time in the form of explicit statutory restrictions,<sup>160</sup> worked actively to conceal its actions from Congress.<sup>161</sup>

The conventional case thus features a seemingly damning collection of executive efforts to circumvent post-Cambodia congressional notification requirements: questioning the law's constitutionality, avoiding the broad application of legislative restrictions (through narrow exercises in statutory interpretation), and on at least one highly visible set of occasions, failing to comply with parallel disclosure requirements governing the activities of the intelligence community. But far from undermining the existence of the anticanonical norm fostered by the Cambodia precedent—a norm that at its core rejects executive branch concealment of use of force operations from Congress—there is strong reason to view the positions the executive took in each of these instances as in fact having had the practical effect of strengthening it.

Take the position of OLC, which has opined on multiple occasions on the constitutionality and application of the WPR since its enactment.<sup>162</sup> Notwithstanding the common assertion that “[e]very President since Ford has questioned the constitutionality of the War Powers Resolution,”<sup>163</sup> only one administration since President Nixon's has expressly taken the position that the WPR is in any respect unconstitutional—the George W. Bush

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158. *See, e.g.*, WALSH, *supra* note 121, at xv.

159. *Id.* at xviii–xix. Not long before the Iran-Contra scandal, Congress had learned that the CIA had secretly mined Nicaraguan harbors in April 1984 without giving congressional committees the (by then) statutorily required notice (at least in classified form). *See id.* at 2.

160. *See* Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, § 791, 96 Stat. 1830, 1865. In addition to the Boland Amendment expressly prohibiting the use of federal funds to support the Contras, Congress had also adopted multiple legislative reforms following the Nixon administration designed to strengthen congressional oversight of the intelligence community, including mandating notification to Congress and congressional oversight of covert action operations. *See, e.g.*, Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804–05 (1974) (codified at 22 U.S.C. § 2422); *see also* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 593 (2012) (describing the range of legislative reforms during this era).

161. Indeed, some of the CIA personnel involved in the Iran-Contra affair had been among the personnel working in Cambodia the decade before. *See* Robert Timberg, *Alleged Iran-Contra Players No Strangers to Spy Affairs*, BALT. SUN (Dec. 21, 1986), <https://www.cia.gov/library/readingroom/docs/CIA-RDP90-00552R000606010001-9.pdf> [<https://perma.cc/Q88T-XMQK>].

162. *See supra* note 154 and accompanying text.

163. BAKER, *supra* note 156, at 24.

administration—and only then with respect to § 5(b) of the WPR (requiring the automatic termination of the use of force after sixty days in the absence of congressional authorization).<sup>164</sup> Not even President Nixon (who famously vetoed the bill in part on constitutional grounds before Congress's override) challenged the constitutionality of the WPR's consultation requirement, which he praised as “foster[ing]” the “prudent fulfillment by each branch of its constitutional responsibilities . . . by enhancing the flow of information from the executive branch to Congress.”<sup>165</sup> While OLC has engaged vigorously in detailed statutory debates about the timing of consultation and the nature of “hostilities” triggering the reporting requirement of the WPR,<sup>166</sup> it has never questioned the facial constitutionality of the consultation or reporting requirements—criticisms that surely would have arisen by now had they existed. Put differently, there has been sustained, bipartisan acceptance over a period of decades of the constitutionality of the WPR's reporting requirements.

What then of the multiple executive attempts to avoid filing a formal report pursuant to § 4 of the WPR, often based on the executive's narrow understanding of the kind of force that counts as “hostilities” under the WPR.<sup>167</sup> There is indeed a running list of incidents in which the U.S. Armed Forces have been deployed in potentially or actually hostile situations abroad (including, for example, a several days long bombing campaign in Iraq in 1998) in which presidents did not submit WPR reports to Congress.<sup>168</sup> It is far less evident that the absence of formal reports in these situations had any bearing on the (putative) norm of not concealing military operations from Congress. Under the WPR, the filing of the formal report starts the running of a sixty-day clock, after which time § 5 requires any use of military force to cease unless Congress has authorized its use.<sup>169</sup> As noted above, it is this cutoff clock provision that is the source of the controversy surrounding the WPR on constitutional grounds and otherwise.<sup>170</sup> It is, likewise, precisely for this reason that such formal reporting failures are best understood as avoiding the application of § 5's cutoff provision, not § 4's disclosure provision. Indeed, none of the operations typically cited as among those in which the executive should have but did not submit a formal report were secret, much less actively hidden by the executive branch.<sup>171</sup> All were the subject of contemporaneous press coverage and moreover, were generally affirmatively announced to the public at large through official statements

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164. Auth. of the President Under Domestic and Int'l L. to Use Mil. Force Against Iraq, 26 Op. O.L.C. 143, 159–60 (2002); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—a Constitutional History*, 121 HARV. L. REV. 941, 1072–74 (2008).

165. Veto of the War Powers Resolution, 311 PUB. PAPERS 893, 895 (Oct. 24, 1973).

166. *See supra* note 154 and accompanying text.

167. *See, e.g.,* ELY, *supra* note 153, at 49 & n.10 (describing, for example, the “tanker war” in the Persian Gulf in the summer of 1988).

168. *See* COLLIER & GRIMMETT, *supra* note 150, at 95.

169. 50 U.S.C. § 1544(b).

170. *See supra* notes 163–64 and accompanying text.

171. *See* COLLIER & GRIMMETT, *supra* note 150, at 95.

issued by the Department of Defense.<sup>172</sup> The executive's behavior in these instances fairly reflected avoidance of the application of the § 5 cutoff. But its behavior equally reflected the rejection of executive branch concealment of military force—that is, the executive practice supports an understanding of Nixon's active concealment in Cambodia as anticanonical in nature.

The same surely cannot be said of the Reagan administration's behavior in connection with the Iran-Contra affair. While the executive's conduct did not implicate the WPR, even then Attorney General Edwin Meese acknowledged that the arms sales to Iran should have but did not comply with parallel notification laws (also enacted following the Cambodia conflict) applicable to the intelligence community.<sup>173</sup> But in understanding how this series of events bears on the anticanonical status of Nixon's Cambodia behavior—and the accompanying norm against concealment—it is essential to recall how norms themselves are defined. Norms can regulate the behavior of public officials, “guiding and constraining how these actors ‘exercise political discretion.’”<sup>174</sup> But there is no sense in which norms—or for that matter, laws—cease to exist in the face of a singular violation.<sup>175</sup> Rather, a key part of what distinguishes a “norm” from any other form of government behavior is that its violation is met with some form of practical (i.e., social, political, professional, or bureaucratic) disapproval.<sup>176</sup>

In the Iran-Contra affair, the evidence of practical disapproval was overwhelming—and especially compelling in light of Reagan's strong popularity otherwise.<sup>177</sup> The scandal produced three separate, sweeping investigations: a commission created by the president himself to review what

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172. For an example of contemporaneous press coverage of one such incident, see, for example, George C. Wilson, *Secretly Acquired MiGs Aided Navy Pilots in Libya Combat*, WASH. POST (Jan. 13, 1989), <https://www.washingtonpost.com/archive/politics/1989/01/13/secretly-acquired-migs-aided-navy-pilots-in-libya-combat/f6850bce-097d-4264-bfc4-03729e30e118> [<https://perma.cc/JTA7-7UMC>]. For an example of an official Department of Defense statement about one of these instances (reported in the press), see, for example, Philip Shenon, *U.S. Reports Mixed Results on 89 Targets in Iraq*, N.Y. TIMES (Dec. 19, 1998), <https://archive.nytimes.com/www.nytimes.com/library/world/mideast/121998iraq-rdp.html> [<https://perma.cc/4ACP-STUX>].

173. Letter from Edwin Meese III, Att'y Gen., to Sen. John Tower, President's Special Rev. Bd. (Feb. 18, 1997), reprinted in REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD app. H at H-1 to H-2 (1987).

174. Chafetz & Pozen, *supra* note 25, at 1433–34 (quoting Whittington, *supra* note 48, at 1860).

175. In H. L. A. Hart's classic account, because all laws by their nature carry certain defects—most evidently, uncertainty in meaning and “the fact of violation”—mature legal systems also have secondary rules: power-conferring rules by which primary rules could be authoritatively identified, applied, and changed. H. L. A. HART, *THE CONCEPT OF LAW* 81, 92–94 (1961) (describing the need for rules of recognition, change, and adjudication that determine what the primary legal rules are and when they have been violated).

176. See, e.g., Chafetz & Pozen, *supra* note 25, at 1439 (citing Vermeule, *supra* note 48, at 1182); Renan, *supra* note 9, at 2198.

177. Frank Newport et al., *Ronald Reagan from the People's Perspective: A Gallup Poll Review*, GALLUP (June 7, 2004), <https://news.gallup.com/poll/11887/ronald-reagan-from-peoples-perspective-gallup-poll-review.aspx> [<https://perma.cc/35RC-726W>] (“Reagan continued to soar in 1985, routinely receiving ratings in the 60% range. In May 1986, Reagan received a 68% job approval rating, tied for the highest of his administration.”).

happened,<sup>178</sup> an independent counsel investigation to assess criminal liability,<sup>179</sup> and an investigation by select committees of Congress convened to evaluate the course of events and the need for legislative reform.<sup>180</sup> The independent counsel investigation yielded fourteen criminal indictments, all but three resulting in convictions and all involving the underlying conduct and subsequent efforts to conceal it.<sup>181</sup> The scandal likewise sparked renewed legislative efforts to clarify and tighten covert action requirements, producing a multiyear set of debates capped by significant revisions to the law governing covert action.<sup>182</sup> As for the public's reaction, Gallup tracked a staggering 16 percent drop in President Reagan's job approval rating in the weeks following his attorney general's first public acknowledgment that the administration had been secretly using profits from the Iranian arms sales to help fund the Contra rebels in Nicaragua.<sup>183</sup> Gallup described the shift at the time as "the sharpest one-month drop ever recorded by a public opinion poll in measuring approval of Presidential job performance."<sup>184</sup> Indeed, the monthly poll following the attorney general's announcement found 79 percent of Americans disapproving of the Reagan administration's conduct in the matter.<sup>185</sup> In the end, the president turned to television, addressing the nation directly from the Oval Office about the scandal.<sup>186</sup> Far from seeking to defend his actions (with reference to past presidential behavior or otherwise), President Reagan embraced the critical findings of the Tower Commission report, accepted its recommendations, and regretfully took full responsibility for the administration's conduct.<sup>187</sup>

In addition to reinforcing the previous conclusion about the effect of judicial silence not foreclosing the prospect of anticanonical status, this example suggests several amendments to the criteria established so far for

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178. See REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, *supra* note 173, at 1–2.

179. See WALSH, *supra* note 121, at xiii.

180. See REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100-216, H. R. REP. NO. 100-433 (1987), at xv–xvi.

181. WALSH, *supra* note 121, at xiv.

182. See Pub. L. No. 102-88, § 503(e), 105 Stat. 429, 443–44 (codified at 50 U.S.C. § 3093(e)). For an extensive history of the evolution of the statute following the scandal, see Chesney, *supra* note 160, at 592–601.

183. Surrounding the attorney general's announcement on November 25, 1986, Gallup recorded a drop in the president's job approval rating from 63 percent in late October 1986 to 47 percent in early December. Lydia Saad, *Gallup Vault: Reaction to Iran-Contra 30 Years Ago*, GALLUP (Nov. 25, 2016), <https://news.gallup.com/vault/198164/gallup-vault-reaction-iran-contra-years-ago.aspx> [<https://perma.cc/KJ43-JL48>].

184. Richard J. Meislin, *President Invites Inquiry Counsel; Poll Rating Dives; 46% Approve Reagan's Work, down 21 Points*, N.Y. TIMES (Dec. 2, 1986), <https://www.nytimes.com/1986/12/02/world/president-invites-inquiry-counsel-poll-rating-dives-46-approve-reagan-s-work.html> [<https://perma.cc/8KQ4-9QX9>].

185. JANE MAYER & DOYLE MCMANUS, LANDSLIDE: THE UNMAKING OF THE PRESIDENT, 1984–1988, at 316 (1988).

186. *The Reagan White House; Transcript of Reagan's Speech: 'I Take Full Responsibility for My Actions,'* N.Y. TIMES (Mar. 5, 1987), <https://www.nytimes.com/1987/03/05/us/reagan-white-house-transcript-reagan-s-speech-take-full-responsibility-for-my.html> [<https://perma.cc/K8KT-BYG5>].

187. *Id.*

evaluating anticanonical status. Most notably, anticanonical status may exist even if the executive has repeated the anticanonical practice. While one would expect anticanonical norms to have some constraining effect on subsequent executive branch practice, one would no more suspect legal norms of securing perfect compliance than one would expect as much from norm-based laws (like murder).<sup>188</sup> As the definition of norms embraced above suggests,<sup>189</sup> what matters in both instances is whether any apparent variance from the norm produces or can be anticipated to produce negative practical consequences of some kind for future presidents. Here, the executive was at pains to explain even technical variances in terms of the (nonconcealment) norm (as in its detailed explanations for not filing reports under article 4 of the WPR) and suffered significant negative consequences when it was violated without explanation (as in efforts to mask Iran-Contra from Congress). Indeed, repetition coupled with a negative reaction—most especially against an otherwise popular president—may, in this sense, prove to be stronger evidence of anticanonical status than nonrepetition from which disfavor can only be inferred.

Which brings us back to the *Korematsu* internment practice introduced at the outset, a seemingly anticanonical incident that President Trump invoked favorably during his campaign.<sup>190</sup> Not only did candidate Trump campaign and win the election on a platform advocating the mass exclusion of a suspect class of individuals from the United States on ostensible national security grounds,<sup>191</sup> he issued a series of orders as president aimed at carrying such an exclusion into effect—the third version of which was ultimately upheld by the Supreme Court.<sup>192</sup> True, the Trump travel ban orders were aimed not at U.S. citizens but at noncitizens, discriminated not on the basis of race but of religion, and significantly involved not detention but denial of admission.<sup>193</sup> But it was President Trump himself who thought the parallel sufficient. Have these actions now compromised the anticanonical status of the presidential practice—or, put differently, weakened the especially compelling character of the norm? While the fate of travel ban policies, and the Trump presidency more broadly, is yet to unfold, there are reasons to look at the systemic response to the initial travel ban order as importantly norm reinforcing. In the face of massive public protests and aggressive litigation, the travel ban in its original form was struck down quickly and repeatedly by the lower courts, and the executive moved to revise it in important ways (among others, by clarifying that those with long-standing residence in the

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188. See HART, *supra* note 175, at 93 (noting the “fact of violation” among all legal systems).

189. See *supra* Parts I.A.2–3.

190. See *supra* Part I.B.

191. See Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States.’* WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states> [https://perma.cc/W34B-R52E].

192. *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–04, 2423 (2018).

193. See *id.* at 2423 (distinguishing from *Korematsu*).

United States would not be affected) before producing a version of the order finally upheld by the Court.<sup>194</sup> Indeed, the Court took the occasion of affirming a revised version of the policy to conclude that the *Korematsu* decision that candidate Trump had invoked was itself no longer good law. The systemic response to these actions is still unfolding. But it would be a mistake to ignore those indications that already exist that President Trump's use has had, at least in part, a norm-reinforcing effect.

*C. Conducting Sustained Military Ground Operations Without Congressional Authorization*

The discussion of the Cambodia example began by hypothesizing that ongoing contestation surrounding the president's authority to use force absent congressional authorization made presidential use-of-force practices an unlikely area in which to find even plausible candidates for anticonstitutional status. Much constitutional law on the topic remains unsettled. Indeed, "few areas of American constitutional law engender more fierce debate."<sup>195</sup> At the same time, the Korean War was and remains an unprecedented, and unrepeated, assertion of presidential authority to go to war without congressional authorization. Nearly 1.8 million American troops were deployed to the Korean theater between 1950 and 1953 in a conflict involving air, sea, and ground combat that left more than 36,000 American soldiers dead and more than one hundred thousand wounded.<sup>196</sup> In the seventy years since, in every U.S. war of comparable scope (in the introduction of ground troops, duration, or loss of life), presidents have sought and received some form of express congressional authorization.<sup>197</sup> Since the Korean War, OLC has repeatedly taken the position that the president's constitutional authority to use force without prior authorization excludes operations "sufficiently extensive in 'nature, scope, and duration'" that they rise to the level of "war in a constitutional sense."<sup>198</sup> Notwithstanding conventional wisdom, which

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194. *See id.* at 2403–04.

195. *See* BAKER, *supra* note 156, at 3.

196. NESE F. DEBRUYNE, CONG. RSCH. SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 8 (2019).

197. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498 (codified at 50 U.S.C. § 1541 note); Authorization for Use of Military Force Against September 11 Terrorists, Pub. L. No. 107–40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note); Gulf of Tonkin Resolution, Pub. L. No. 88–408, 78 Stat. 384 (1964) (repealed 1971).

198. Auth. to Use Mil. Force in Libya, 35 Op. O.L.C. 1, 8–10, 13 (2011) (quoting Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 179 (1994)) ("This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period. Again, Congress's own key enactment on the subject reflects this understanding. By allowing United States involvement in hostilities to continue for 60 or 90 days, Congress signaled in the WPR that it considers congressional authorization most critical for 'major, prolonged conflicts such as the wars in Vietnam and Korea,' not more limited engagements." (quoting Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 (1994))); *see also, e.g.*, Apr. 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, 42 Op. O.L.C. 1 (2018); Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994).

treats President Truman's decision to commit combat forces to Korea as but one example in a lengthy catalog of practice in which executives have used force without prior authorization,<sup>199</sup> could it be that Truman's example—an example of no small significance in ongoing debates about executive power—now has anticanonical status? The question turns out to be remarkably close.

The judicial record here is perhaps more instructive, and more condemnatory, than elsewhere. There is no reported case opining directly on the constitutionality of President Truman's commitment of troops in Korea. Indeed, unlike in Vietnam and later conflicts, there appears to be no reported case even involving a constitutional challenge to the president's use of force in Korea on this point. At the same time, the Supreme Court came closer here to signaling its disapproval of the president's action than it did on the matter of the Cambodian nondisclosure. In *Steel Seizure*, the government had offered as evidence of the capaciousness of the president's war powers the practical example of the massive deployment of troops to Korea, "sent to the field by an exercise of the President's constitutional powers" alone.<sup>200</sup> Justice Robert Jackson did not "find it necessary or appropriate to consider the legal status of the Korean enterprise to discountenance,"<sup>201</sup> as he did, the government's argument that the president's commander-in-chief authority included the power to seize and operate steel mills domestically.<sup>202</sup> But Justice Jackson's decision to focus on the president's lack of domestic powers came only after his cautionary assessment: "Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress."<sup>203</sup> Indeed, the *Steel Seizure* majority's rejection of the notion that Truman's practice in Korea might now inform the meaning of Article II is made particularly plain in context; the sole instance in which a reported judicial opinion cites President Truman's practice in support of presidential power is in the *Steel Seizure* dissent.<sup>204</sup>

President Truman's action to repel North Korean forces following their surprise invasion of the South was met at first with overwhelming popular support both in Congress and in the general public.<sup>205</sup> But opinion on the

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199. See generally ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

200. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

201. *Id.* at 643.

202. *Id.* at 642–43.

203. *Id.* at 642.

204. See *id.* at 700 (Vinson, C.J., dissenting) ("President Truman acted to repel aggression by employing our armed forces in Korea . . . Congress responded by providing for increased manpower and weapons for our own armed forces, by increasing military aid under the Mutual Security Program and by enacting economic stabilization measures, as previously described. This is but a cursory summary of executive leadership. But it amply demonstrates that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution.").

205. Notably, among President Truman's first moves in response to the surprise invasion—and news of its rapidly crushing effects—was to call a sizeable group of congressional leaders to the White House to inform them of the situation and of Truman's inclination to act. After receiving the president's assurance that they would be kept "currently informed of



action quickly soured among both over time as the war effort struggled.<sup>206</sup> While it is difficult, perhaps impossible, to untangle fully the varied reasons why the Korean War became so unpopular, at least part of the opposition in Congress plainly centered on doubts about the president's constitutional authority. Prominent Republican Senator Robert Taft was among the first to call into question the adequacy of the president's authority to proceed in Korea, a concern that took root as it became clear combat would continue beyond America's emergency action to repel the invasion from the North.<sup>207</sup> As even OLC would later recognize, President Truman's action in Korea—with the authorization of the United Nations (UN) Security Council but “without prior approval of, or subsequent ratification by, Congress”—centrally informed the so-called “Great Debate” of 1951 over whether the United States should commit troops to Europe pursuant to the newly formed North Atlantic Treaty Organization (NATO).<sup>208</sup> In the end, the Senate voted to support the NATO deployment but only after voting overwhelmingly for an amendment emphasizing that no further ground forces would be sent to Europe in implementation of the treaty without “further congressional approval.”<sup>209</sup> Over time, Senator Taft's doubts about the adequacy of the president's legal authority gained traction.<sup>210</sup> The 1952 Republican Party

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developments,” congressional leaders promised the president their undivided support. DEAN ACHESON, *PRESENT AT THE CREATION* 409 (1969); *see also* DAVID MCCULLOUGH, *TRUMAN* 780–81 (1992).

206. For public opinion polling, see Steve Crabtree, *The Gallup Brain: Americans and the Korean War*, GALLUP (Feb. 4, 2003), <https://news.gallup.com/poll/7741/gallup-brain-americans-korean-war.aspx> [<https://perma.cc/3UF2-NWDX>].

207. *See, e.g.*, ACHESON, *supra* note 205, at 410, 414–15. While Acheson, President Truman's secretary of state, chalked Senator Robert Taft's opposition up to partisan politics, President Truman's own secretary of commerce (and roving ambassador), Averell Harriman, equally pressed President Truman to seek a war resolution from Congress. MCCULLOUGH, *supra* note 205, at 789.

208. Presidential Auth. to Permit Incursion into Communist Sanctuaries in the Cambodia-Viet. Border Area, 1 Supp. Op. O.L.C. 313, 316–17 (1970) (“The authority of the President to commit troops in limited conflict is not, of course, unquestioned. There are Presidents who have doubted such authority and Congress has challenged it more than once. President Truman's commitment of troops in Korea in response to a United Nations (‘U.N.’) resolution without prior approval of, or subsequent ratification by, Congress led to the Great Debate of 1951.” (citations omitted)).

209. 13 DOCUMENTS ON AMERICAN FOREIGN RELATIONS 225–28 (Raymond Dennett et al. eds., 1951) (reprinting S. Res. 99, 82d Cong. (1951)); *see also, e.g., id.* at 15 (“[T]he President incorrectly assumed that the United Nations was an operating organization, with power to call on us for troops which we could supply. As a matter of fact, he had no authority whatever to commit American troops to Korea without . . . congressional approval.” (quoting statement of Senator Robert Taft)).

210. 93 CONG. REC. 21,233 (1973) (statement of Rep. Thomas Morgan) (“At that time it was believed by many in the executive branch, and in the Congress, that by becoming a member of the United Nations, the United States was obligated by U.N. commitments, including commitments to international police actions, and that it would be within the power of the President alone to see that those commitments were carried out. Although the Congress did not formally accept this position, neither did it as a whole contest the right of the Executive to respond to the call of the United Nations Security Council. Some members, however, were outspoken in their view that power of Congress had been usurped. Among them was the great Republican Senator from Ohio, Senator Robert Taft.”).

platform singled out as among the failures of the Truman administration the decision to “plung[e] us into war in Korea without the consent of our citizens through their authorized representatives in the Congress.”<sup>211</sup> By 1973, Korea, along with Vietnam, had become a poster child in Congress for advocates of the WPR. As one member put it:

As the result of our country’s experience in Korea and Vietnam, one lesson should be clear by now to everyone: Congress must play its rightful role in warmaking—not only to satisfy the demands of the Constitution—but also for the practical reason of creating the national unity and purpose which are necessary for the success of our national effort.<sup>212</sup>

The growth of misgivings over time about President Truman’s lack of congressional authorization might in part explain the consistency of executive branch practice since. While presidents have used force in various ways without congressional authorization many times since Korea, every conflict involving a significant commitment of U.S. ground troops or U.S. casualties since has had some form of express congressional authorization.<sup>213</sup> And while presidents since have spoken with varying degrees of praise of the policy wisdom of “Truman’s War” in Korea, I have not unearthed any instance in which a president since has publicly invoked President Truman’s example in defense of his own decision to use force without congressional authorization elsewhere.<sup>214</sup> Indeed, even when faced with a legal situation identical to the one that faced Truman—having won UN Security Council authorization but not the approval of Congress for the use of force in Libya in 2011—neither President Obama nor the Obama administration’s OLC invoked the Korea example in support of the proposition that the president has the power to act without congressional authorization, a proposition OLC limited to the use of force, as anticipated in Libya, less than “war in a constitutional sense.”<sup>215</sup>

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211. *Republican Party Platform of 1952*, THE AM. PRESIDENCY PROJECT, UC SANTA BARBARA (July 7, 1952), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1952> [<https://perma.cc/MS5N-NRHQ>].

212. 93 CONG. REC. 21,233 (statement of Rep. Thomas Morgan).

213. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (codified at 50 U.S.C. § 1541 note); Authorization for Use of Military Force Against September 11 Terrorists, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) (codified at 50 U.S.C. § 1541 note); Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971).

214. This finding is based on a search of a database of presidential speeches and documents collected by the University of California Santa Barbara’s American Presidency Project. *See The American Presidency Project*, UC SANTA BARBARA, <https://www.presidency.ucsb.edu/documents> [<https://perma.cc/8EKM-KCAF>] (last visited Oct. 3, 2020). I searched the speeches for any mention of the word “Korea” and reviewed each for an indication that the example was used to support the assertion of executive authority to use force without congressional authorization.

215. Auth. to Use Mil. Force in Libya, 35 Op. O.L.C. 1, 8–10, 13 (2011) (explaining that “war” within the meaning of the Constitution generally only describes “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period” and arguing that the sixty or ninety-day limit imposed by the WPR demonstrated Congress’s view that congressional authorization was

Yet it is, perhaps ironically and certainly instructively, OLC's writings that provide the most important evidence against the conclusion that the Korean War is now anticanonical practice. In one sense, that evidence is fairly thin. While OLC war powers opinions generally rely heavily on past examples of presidential practice in support of OLC's understanding of the president's constitutional power, reliance on the Korea example has been remarkably limited. Of more than a dozen publicly available OLC memoranda addressing presidential war authority since President Truman, the vast majority of mentions of Korea are for the purpose of supporting limited and largely uncontroversial propositions. OLC has occasionally noted the Korea action, for instance, in support of the proposition that protecting the credibility of the UN has been an important national interest of the United States.<sup>216</sup> A 1980 OLC opinion was the first to suggest that Korea might serve as precedent "for the commitment of United States armed forces, without prior congressional approval or declaration of war, to aid an ally in repelling an armed invasion," although that suggestion is immediately followed by the caveat that "clearly such a response cannot be sustained over time without the acquiescence, indeed the approval, of Congress."<sup>217</sup>

Although OLC's references to the Korea example may be limited, two such references do require closer examination. First, in a 2002 George W. Bush administration OLC opinion signed by Assistant Attorney General Jay Bybee, OLC for the first time cited Korea in unmodified support of the practical proposition that "[p]residents have long undertaken military actions pursuant to their constitutional authority as Chief Executive and Commander in Chief . . . [in] numerous unilateral exercises of military force."<sup>218</sup> On its face, this single-sentence reference to the conflict in support of an otherwise unremarkable, general proposition seems something less than a major shift in the conflict's precedential value in the executive branch. Indeed, the 2002 memorandum was submitted after President George W. Bush had already secured congressional authorization for the 2003 Iraq War, making the memorandum's position on the sweeping scope of presidential authority in the absence of congressional authorization (up to and including force

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most critical for "major, prolonged conflicts such as the wars in Vietnam and Korea,' not more limited engagements" (quoting *Deployment of U.S. Armed Forces into Haiti*, 18 Op. O.L.C. 173, 176 (1994)). The OLC's Libya memorandum mentions Korea in support of the notion that the U.S. government has long recognized that "[t]he continued existence of the United Nations as an effective international organization is a paramount United States interest," but it otherwise defends the constitutionality of the president's actions in Libya on the grounds that it involves a use of air power without the introduction of ground troops. *Id.* at 12 (quoting *Auth. to Use U.S. Mil. Force in Som.*, 16 Op. Att'y Gen. 6, 11 (1992)).

216. *See, e.g., id.* at 8–9.

217. *Presidential Power to Use the Armed Forces Without Statutory Authorization*, 4a Op. O.L.C. 185, 187–88 (1980).

218. *Auth. of the President Under Domestic and Int'l L. to Use Mil. Force Against Iraq*, 26 Op. O.L.C. 143, 151–52 (2002). On the Korea example, the memorandum states in full: "For example, the deployment of U.S. troops in the Korean War by President Truman was undertaken without congressional authorization." *Id.* at 152.

necessary to secure “regime change”) the equivalent of legal dicta.<sup>219</sup> Neither was the George W. Bush administration keen to publicly press its reading of presidential power in this realm; despite congressional efforts to obtain the 2002 memorandum,<sup>220</sup> it was not revealed until 2009, upon release by the Obama administration’s Justice Department.<sup>221</sup> The Obama Justice Department did not include the 2002 memorandum among the nearly dozen OLC memoranda it withdrew during that period as “not consistent with the current views of OLC,”<sup>222</sup> a highly unusual move for any OLC. However, its subsequent 2011 OLC opinion on the president’s power to use force in Libya returns to the previously articulated limitation on the president’s power: the force that the president undertakes alone must be something less than force of the duration and scope that would amount to “war in the constitutional sense.”<sup>223</sup> Likewise, while the Trump administration’s OLC memorandum on the use of force in Syria again mentions Korea in a list of historical instances in which presidents have used force without congressional authorization, it too plainly and repeatedly embraces the post-Korea standard: unilateral uses of force by the president going forward must amount to something less than “war in the constitutional sense.”<sup>224</sup> These memoranda mention Korea but do not seem to rely on it in its relevant sense; and the presidential practice that follows each is inconsistent with the practice Truman pursued.

A second type of OLC reference is more problematic. OLC has twice (under President Nixon in 1970 and under President Clinton in 2000) referenced Korea in support of some version of the proposition that congressional appropriations following a president’s decision to deploy troops into (otherwise unauthorized) hostilities might be taken as evidence of congressional acquiescence to (or even authorization of) the use of force in some circumstances.<sup>225</sup> This use is potentially problematic in two respects:

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219. *See id.* at 144 (“We conclude that the President possesses constitutional authority for ordering the use of force against Iraq to protect our national interests.”).

220. Press Release, Off. of U.S. Sen. Patrick Leahy, Leahy Postpones Return of Subpoena for OLC Documents: Justice Department Offers to Provide OLC Documents (Nov. 17, 2008), <https://www.leahy.senate.gov/press/leahy-postpones-return-of-subpoena-for-olc-documents-justice-department-offers-to-provide-olc-documents> [<https://perma.cc/54UL-QZGQ>].

221. Deborah Pearlstein, *DOJ Releases More Bush-Era Legal Opinions—UPDATED*, OPINIOJURIS (Sept. 1, 2009), <http://opiniojuris.org/2009/01/09/us-department-of-justice-releases-new-bush-era-opinions> [<https://perma.cc/JA3B-5UVD>].

222. Memorandum for the Files from Stephen G. Bradbury, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Just., on Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009).

223. Apr. 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, 42 Op. O.L.C. 1, 1 (2018).

224. *Id.*

225. *See* Authorization for Continuing Hostilities in Kos., 24 Op. O.L.C. 327, 334–35 (2000) (“It has also been argued that Congress ratified the Korean War by enacting several major pieces of war-related legislation during that conflict . . . .”); Presidential Auth. to Permit Incursion into Communist Sanctuaries in the Cambodia-Viet. Border Area, 1 Supp. Op. O.L.C. 313, 317 (1970) (“While various scholarly views were quoted on both sides of the issue and the congressional debate raged from January to April, there was no legal resolution of the

(1) it suggests that, notwithstanding the various ways in which Congress and the public expressed their disapproval of President Truman's action in Korea noted above, Congress itself subsequently ratified President Truman's actions; and (2) it suggests that the executive branch has at least on occasion relied on the Korea precedent to establish a positive executive branch norm (i.e., presidents can use even Korea-level force without prior authorization so long as Congress continues to appropriate funds for deployed troops)—a use that would seem to take Korea out of the running for anticonstitutional status.

The first inference from OLC's reliance on Korea in this respect—that Congress itself subsequently accepted the president's actions in Korea as constitutional—is more easily dismissed. Both OLC memoranda, as well the underlying scholarly sources that comprise the principal basis on which the memoranda support their proposition of congressional authorization or acquiescence, take pains to recognize that Congress's post-Korea legislation may not actually have sufficed to establish either. The sole authorities on which the 1970 OLC memorandum relies in support of its passing assertion of congressional acquiescence to Korea include no reference to legislation at all but rather two popular histories—neither one of which discusses, much less supports, the proposition that Congress acquiesced to President Truman's action.<sup>226</sup> The 2000 OLC memorandum likewise mentions Korea in a single sentence, noting that “[i]t has also been argued that Congress ratified the Korean War by enacting several major pieces of war-related legislation during that conflict, including a bill to increase taxes by \$4.7 billion to help pay for the war.”<sup>227</sup> The memorandum itself does not embrace, much less make, this argument. Instead, it cites solely to work by legal scholar John Hart Ely, who also notes the existence of the argument

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President's authority in light of the U.N. Charter or independent of it. Nevertheless it is clear that Congress acquiesced in the President's action.” (citations omitted)).

226. See Cambodia-Viet. Border Area, 1 Supp. Op. O.L.C. at 316–17 (first citing DAVID REES, KOREA: THE LIMITED WAR (1964); and then citing MERLO J. PUSEY, THE WAY WE GO TO WAR (1969)). Pusey, a Pulitzer Prize winning journalist at *The Washington Post*, pulled no punches in characterizing President Truman's action: “The appalling fact is that the President plunged the United States into the war without a shred of authority from the Constitution or the laws or treaties.” MERLO J. PUSEY, THE WAY WE GO TO WAR 89 (1969). His book offers no discussion of post-invasion legislation that could be understood as congressional approval of President Truman's action (indeed, devotes no ink to post-invasion legislation at all); cites President Dwight D. Eisenhower's subsequent election (and President Eisenhower's promise, backed by practice, to seek congressional authorization for any military action) as another rejection of Truman's conduct, *id.* at 97–98; and makes a vehement case that the *Steel Seizure* decision should be seen as a manifest rejection of any argument that Korea now stands as precedent for presidential war powers in this realm. *Id.* at 160–61. The book by David Rees, a conservative British scholar and onetime literary editor of *The Spectator*, is a lengthy political, military history of the Korean War. To the extent it engages internal U.S. political debates, it is on the political and strategic imperatives of Korean intervention. There is scant discussion of constitutional considerations at all, save to the extent Rees recognizes that President Truman's decision not to seek congressional authorization would become a vigorous point of attack by domestic opposition (which eventually hands President Truman a crushing defeat in 1952). DAVID REES, KOREA: THE LIMITED WAR 26, 400–01 (1964).

227. See Authorization for Continuing Hostilities in Kos., 24 Op. O.L.C. 327, 334–35 (2000).

without embracing it and indeed, while expressing skepticism of it.<sup>228</sup> To the extent anyone actually argued Congress had approved the war in Korea, it appears traceable to a 1974 article by two political scientists who cite several 1950 enactments, including bills: extending the draft and lifting the ceiling on the size of the armed forces, making various economic adjustments to prevent inflation in response to anticipated increased defense production, granting foreign aid to various countries in Asia, and increasing taxes.<sup>229</sup> None of the bills in any way *authorized* the use of military force in Korea (or elsewhere), and as the 2000 OLC memorandum itself made clear, no such authorization can be properly inferred unless the legislation “clearly intend[s]” to grant “specific authorization.”<sup>230</sup> As to whether the statutes can be understood as *acquiescence* to President Truman’s decision to launch a war without congressional authorization, that case is likewise difficult to sustain. For one thing, all of the legislation cited to support the theory of congressional acquiescence to the Korean War was enacted within the first three months of the military’s deployment,<sup>231</sup> reflecting, at most, Congress’s initial support for what members might have expected would be a short-term engagement.<sup>232</sup> Particularly with the subsequent enactment of the WPR, in express response to the conflicts in Korea and Vietnam, it seems hard to credit the notion that the legislation stands for congressional acquiescence to waging a sustained ground war without authorization.

The second inference from OLC’s usage—that Korea supports an affirmative executive branch norm regarding the use of force—is more problematic. Could an executive branch legal opinion suggesting that a president *could* do what Truman did in Korea—an opinion no president has ever acted on and that the Court has implicitly rejected—really save from anticanonical status a precedent that has been in all other ways practically condemned? The prospect that a practical precedent *could* be invoked by the courts seems rather a slim basis on which to save it from at least current precedential ignominy; any institutional actor could, in theory, rely on any otherwise disfavored practice at any time.<sup>233</sup> The mere prospect that even long disfavored practices might someday be resurrected seems hardly sufficient to overcome their status as currently disfavored.

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228. ELY, *supra* note 153, at 11 & nn.66–67.

229. Larry Elowitz & John Spanier, *Korea and Vietnam: Limited War and the American Political System*, 18 ORBIS 510, 517 n.11 (1974–75).

230. See Continuing Hostilities in Kos., 24 Op. O.L.C. at 346; accord 50 U.S.C. § 1547(a) (providing that war authority “shall not be inferred . . . from any provision of law . . . unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities”).

231. See, e.g., The Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C. §§ 4501–4568).

232. I say “at most” because some of the legislation, like the foreign aid bill, is equally consistent with a congressional view that supports monetary aid to South Korea to enable it to repel the North’s invasion itself.

233. Cf. Alex Thompson, *Progressive Activists Push 2020 Dems to Pack Supreme Court*, POLITICO (Feb. 25, 2019, 9:11 AM), <https://www.politico.com/story/2019/02/25/progressive-activists-pack-supreme-court-1182792> [<https://perma.cc/LRT7-24CT>].

At the same time, OLC's willingness to invoke the example suggests that one would be relying on Korea's anticanonical status at peril—that is, it would be a mistake to assume that no court would ever rely on it as evidence of constitutional meaning or that President Truman's action is so generally recognized as mistaken that it has come to set a standard for what the executive branch should not do. Many former OLC attorneys later make their ways to the federal bench; indeed, the 1970 memorandum was authored by former Chief Justice William Rehnquist, the 2002 memorandum was authored by now Ninth Circuit Judge Jay Bybee.<sup>234</sup> While courts rarely decide cases involving the president's power to use force abroad, Korea seems unlikely to be off the table entirely as practical evidence in, for example, Judge Bybee's court if they do. Moreover, OLC's use may reflect the pervasiveness of a normative understanding of presidential power that exists outside the executive branch—a conventional view of an “imperial presidency” advanced by legal scholars and political scientists in popular and scholarly settings alike, according to which Korea is just one in a long, undifferentiated list of incidents in which presidents “have regularly breached constitutional principles,” using military force whether or not Congress approves.<sup>235</sup> Such an understanding would not be so surprising. Presidentialist legal scholars and lawyers in particular have looked to presidential practice in isolation from systemic response, in service not only of normative understandings of presidentialness but also in advancing affirmative commitments to maximizing presidential power.<sup>236</sup>

The Korea example—while likely not presently part of an executive branch anticanon as this Article has defined it—thus adds to our understanding of anticanonical status in several important ways. First, even if executive branch practice does not support a norm of presidential behavior—indeed, even if executive branch practice would support the *opposite* norm of presidential behavior—it is possible that normative expectations of presidential practice from outside the executive branch may be enough to preserve a practice's precedential effect. In one sense, this might be considered a desirable effect, just the way a system of popular constitutionalism is meant to function.<sup>237</sup> In another sense, this effect tends

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234. Auth. of the President Under Domestic and Int'l L. to Use Mil. Force Against Iraq, 26 Op. O.L.C. 143 (2002); Presidential Auth. to Permit Incursion into Communist Sanctuaries in the Cambodia-Viet. Border Area, 1 Supp. Op. O.L.C. 313 (1970).

235. For a discussion of the parameters of this conventional case, see, for example, Deborah Pearlstein, *Getting Past the Imperial Presidency*, 10 HARV. NAT'L SEC. J. 368, 373 (2019) (citing ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973)); see also Kevin M. Kruse & Julian E. Zelizer, *Have We Had Enough of the Imperial Presidency Yet?*, N.Y. TIMES (Jan. 9, 2019), <https://www.nytimes.com/2019/01/09/opinion/president-trump-border-wall-weak.html> [<https://perma.cc/JJ48-3RLK>].

236. Scholarly proponents of broad executive power commonly note President Lincoln's suspension of habeas corpus during the Civil War as evidence of broad presidential power without noting the Court's subsequent rejection of President Lincoln's assertion of power in this respect or the absence of any repetition of the practice by subsequent presidents. See generally DANIEL FARBER, *LINCOLN'S CONSTITUTION 157–59* (2003) (describing this episode).

237. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

to undermine the justification for relying on practice as a guide to interpretation—a justification based on the notion that practice reflects practical settlement among the political branches of government. The near seventy-year-old practical settlement between the political branches would make this a relatively clear anticanonical case. But in assessing the normative impact of presidential practice, apparent intrabranched settlement is not all that matters. In all events, the example points those who might be concerned about the scope of presidential war power to a clearer understanding of the stability, or not, of what normative agreement might be said to exist.

### III. UTILITY OF A PRACTICAL ANTICANON

Whether or not one believes the particular foregoing instances warrant inclusion in the pantheon of executive branch black sheep, these examples serve, at least, to illustrate how one might go about determining whether a practice has attained (or sunken to) anticanonical status. The foregoing analysis suggests at least the following conclusions. First, even if a particular executive practice was not formally rejected by Congress or the courts in real time, anticanonical practice will produce a substantial public record (in hearings, speeches, or other public actions) of disfavor by governing institutions over time, as well as sustained rejection by the public. Second, while it is certainly possible to identify anticanonical practices that have not since been repeated (like President Nixon's Saturday Night Massacre), nonrepetition of the practice as such cannot be considered dispositive.<sup>238</sup> For one thing, plenty of historically favored actions have never been repeated (the Emancipation Proclamation, for example) but for reasons that have far more to do with circumstance and opportunity than with negative perception. More importantly, no law or legal norm, no matter how deeply engrained, enjoys 100 percent compliance; one might expect eventual repetition of even bad behavior as part of the "fact of violation" associated with norm-driven behavior.<sup>239</sup> What matters far more is the institutional response to any repetition of anticanonical practice. Repetition, when coupled with renewed condemnation (as in the Iran-Contra affair), should be understood as evidence of the vitality of a practice's anticanonical status, not its demise. Finally, even if a practice has been rejected in some measure by all three branches, it may still not belong in an anticanon of executive practice if there is evidence that the practice is relied on as affirmative support for presidential action. For while the universe of presidential practice is too vast and the bandwidth of contemporary institutions too narrow to fairly expect each practice to receive some up or down vote of approval, affirmative reliance on the example undermines any assumption that it stands for a shared understanding that can reliably be expected to guide present governance.

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238. See *supra* Part II.B (discussing President Trump's allusions to *Korematsu* in support of a "travel ban").

239. HART, *supra* note 175, at 81, 92–94 (describing how legal systems handle "the fact of violation").



How, then, might these conclusions inform our understanding of presidential precedent going forward? This part suggests the exercise of sketching an executive branch anticanon may be useful in at least three ways: (1) guiding the use of practice in constitutional interpretation, (2) clarifying the scope and robustness of assumed norms, and (3) identifying institutional pathways for guarding against undesirable norm formation. To illustrate these functions, this part considers how the examples above might help to shed light on analogous current debates surrounding assertions of presidential power.

#### A. *Constitutional Interpretation*

While the Saturday Night Massacre itself was never subject to judicial scrutiny, the example provides perhaps the most direct insight among those discussed here into whether and how anticanonical practice should be used to guide constitutional interpretation. For notwithstanding the Supreme Court's decision in *Morrison* to uphold the independent counsel statute against a separation of powers challenge,<sup>240</sup> the constitutionality of that law, including its imposition of restrictions on the president's ability to remove an investigative counsel, has remained the subject of intense constitutional debate,<sup>241</sup> particularly on the import of interbranch practice on this question. Indeed, then Judge Brett Kavanaugh, among others, has argued that Congress's decision to allow the original independent counsel statute to lapse following the Starr investigation reflected the branches' recognition that the burden on the presidency of such a counsel was too great to be continued.<sup>242</sup> It is an argument that takes from institutional inaction on this singular executive restriction a lesson of collective disapproval.

Yet the anticanonical status of the presidential practice described above—based on a record that tracks bipartisan institutional and public response over time—would suggest just the opposite conclusion. That is, there is not only a shared but robust recognition among the branches and the public that

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240. See generally *Morrison v. Olson*, 487 U.S. 654 (1988) (addressing 28 U.S.C. §§ 591–599 (1994)).

241. See generally Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011 (1998) (featuring contributions by Michael R. Bromwich, George D. Brown, Arthur H. Christy, Samuel Dash, Joseph E. diGenova, Katy J. Harriger, Philip B. Heymann, Brett Kavanaugh, Norman J. Ornstein, Julie R. O'Sullivan, Jerome J. Shestack, Donald C. Smaltz, Cass R. Sunstein, and Lawrence E. Walsh).

242. See, e.g., Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1462 n.36 (2009) (“I believe that the independent counsel statute was a major mistake for reasons I have articulated previously. Congress itself came to that conclusion in 1999 when it declined to reauthorize the statute.” (citations omitted)); *Id.* (“The [independent counsel] law is dying because there appears to be a consensus that it created more problems than it solved.” (quoting 145 CONG. REC. S7766 (daily ed. June 29, 1999) (statement of Sen. Arlen Specter))). Judge Kenneth Starr himself has made this same point. See *The Future of the Independent Counsel Act: Hearings Before the S. Comm. on Governmental Affs.*, 106th Cong. 425–34 (1999) (statement of Kenneth W. Starr, Independent Counsel).

presidents should *not* be able to fire counsel investigating them.<sup>243</sup> Congress may have abandoned the particular investigative approach set forth in the independent counsel statute, but there is nothing that suggests it did so because it believes presidents should be able to fire their investigators<sup>244</sup> and significant evidence of mutual agreement among the branches to the opposite effect.<sup>245</sup>

The lessons here, then, are twofold. First, sensible reliance on practice as evidence of constitutional meaning requires accounting for the range of constituencies that help determine whether and how presidential “precedent” is made and for the reality that those constituencies’ expressions of interest may be most reliably assessed by observing the exchange of institutional responses over time. Second, and correspondingly, identifying a practice as anticonstitutional in the sense discussed here does not mean the courts should henceforth ignore its effect on constitutional meaning. Quite to the contrary, in evaluating the constitutionality of future potential mechanisms designed to limit a president’s ability to forestall investigations into his own conduct, the anticonstitutional status of the Saturday Night Massacre should be powerful evidence of a presidential behavior that has no practical or normative support—and no precedential effect. Nixon’s Saturday Night Massacre was and has remained understood as unacceptable presidential behavior.

### B. Norm Clarification

How confident can scholars and policymakers be in identifying which norms of constitutional governance go without saying and which may need codification or other formal reinforcement? While President Trump’s strike against Iranian Major General Qassem Soleimani<sup>246</sup> and his troubling threats of “fire and fury . . . the likes of which the world has never seen” in response to North Korean nuclear posturing have been among many events prompting renewed interest in the adequacy of constitutional constraints on presidential war power,<sup>247</sup> the conclusion above that Korea may not be anticonstitutional in nature suggests that scholarly confidence about the adequacy of constraints may be misplaced. At the height of recent crises, several scholars argued that the relevant constitutional law of presidential power is clear, and the answer to whether the president could start a war with Korea or Iran without

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243. Among the findings noted above, presidential practice itself since Nixon has reflected a strong norm against firing investigative counsel, and the attempt to do so has been met with significant forms of sanction.

244. See 145 CONG. REC. S7766–90 (daily ed. June 29, 1999).

245. See *supra* note 242.

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

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

Congress's authorization was negative.<sup>248</sup> OLC memoranda have consistently excepted "'war' in the constitutional sense" from the suite of unilateral presidential authorities, and given the strategic reality in Korea, any U.S. attack there could only be understood as carrying a significant risk of being a "war" in the constitutional sense.<sup>249</sup> Indeed, bipartisan majorities of both the Democratic-controlled House and Republican-controlled Senate passed legislation reiterating the necessity for the president to win congressional authorization before pursuing further hostilities with Iran.<sup>250</sup>

Yet while there is indeed significant basis for reading many OLC opinions to recognize that standard—a standard that would be consistent with the anticanonical nature of President Truman's action in Korea—the analysis above suggests the example falls short of that status. Indeed, the precedential import of the Korea example is subject to contestation in a way that may be particularly likely to influence present practice. Both because legal and policy officials may come into the executive branch with strong views and affirmative agendas about the scope of presidential power and because popular and even scholarly understandings about the import of Korea in the history of presidential practice does not align with what executive branch practice has actually been, any legal norm against presidents starting full-blown wars cannot be understood to "go without saying." Especially where the constitutional law of executive power is obscure or unsettled, decision makers' instincts about what may be done may play an outsized role in establishing the scope of reasonable policy debate. With those instincts shaped at least in the first instance by conventional accounts, it is entirely possible that knowing "presidents have done this" makes more likely the assumption that "presidents can do this" will be sustained.

In addition to teaching that those worried about executive war power would be wise to add the "no war in the constitutional sense without Congress" understanding to the list of norms needing formal reinforcement, the Korea example also illustrates how efforts to identify anticanonical practice can help correct misimpressions about the historical record. There is little doubt that the presence or absence of presidential precedent can help establish that some conduct is out of bounds.<sup>251</sup> The practical proposition that "no President has ever called the press the enemy of the people,"<sup>252</sup> for

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248. See, e.g., Marty Lederman, *No, the President Cannot Strike North Korea Without Congressional Approval*, JUST SEC. (Aug. 10, 2017), <https://www.justsecurity.org/44056/no-president-strike-north-korea-congressional-approval> [<https://perma.cc/67B7-HXFZ>].

249. See, e.g., *id.*

250. Catie Edmondson, *House Sends Trump Bill to Restrict War Powers on Iran, Setting Up Veto*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/us/politics/trump-iran-war-powers-congress.html> [<https://perma.cc/S4HL-VNfq>].

251. Chafetz & Pozen, *supra* note 25, at 1433–34 (defining norms as a body of common understandings, lacking formal status as law, that nonetheless have the effect of "regulat[ing] the public behavior of actors who wield high-level governmental authority, thereby guiding and constraining how these actors 'exercise political discretion'" (quoting Whittington, *supra* note 48, at 1860)).

252. See Emily Stewart, *Trump Calls Media the "True Enemy of the People" the Same Day a Bomb Is Sent to CNN*, VOX (Oct. 29, 2018), <https://www.vox.com/policy-and->

instance, can be used to help support the conclusion there are norms that presidents should not call the press the “enemy of the people.” Practice-based norms can likewise help establish that some conduct is acceptable. The practical proposition that “presidents regularly use force without consulting Congress” can help support the conclusion that presidents can and perhaps should use force without consulting Congress. But it is easy to imagine circumstances in which the public’s and even public officials’ perceptions about historical practice are less than wholly accurate.<sup>253</sup> Even among the most well-informed public officials, organization theory provides reason to worry that other incentives may skew perceptions about and invocations of historical practice.<sup>254</sup> Whatever the source of error, mischaracterizations of underlying practice can lead to the embrace of actions that are not aligned either with actual practice or, given norms’ self-sustaining nature, present day preferences. Like all exercises in historical analysis, investigations into anticanonical status can help drive decision makers to embrace courses of action more reflective of long-standing, shared beliefs.

### C. Norm Correction

Finally, charting past routes from presidential practice to anticanonical status may offer something of a road map for how institutions can effectively forestall emergent presidential precedent from crystallizing. Consider in this context the Trump administration’s sweeping—regularly called unprecedented—refusals to disclose information to Congress, whether in connection with impeachment proceedings or other investigations,<sup>255</sup> in reporting the status of sanctions measures or the expenditure of appropriations,<sup>256</sup> or in favoring partisan notification only for activities like the attack against ISIL leader Abu Bakr al-Baghdadi or operations in Syria.<sup>257</sup> Opponents of these practices have pursued a range of real-time

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politics/2018/10/29/18037894/donald-trump-twitter-media-enemy-pittsburgh [https://perma.cc/TJ28-NFWH].

253. As a recent national survey of Americans released by the Woodrow Wilson National Fellowship Foundation noted, more than half of respondents did not know which countries the United States fought in World War II and only 24 percent of respondents could identify why American colonists fought the British. See Patrick Riccards, *National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test*, WOODROW WILSON NAT’L FELLOWSHIP FOUND. (Oct. 3, 2018), <https://woodrow.org/news/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/> [https://perma.cc/Z569-M9KB].

254. See, e.g., IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 142–58 (2d ed. 1982) (contrasting the Cuban Missile Crisis executive decision-making process with “groupthink” dynamics in which individual decision makers conform to group norms, often compromising critical analysis); AMY B. ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11*, at 67–69 (2007) (reviewing cultural pathologies undermining necessary cooperation in pre-September 11 counterterrorism efforts).

255. See, e.g., Cipollone Letter, *supra* note 15.

256. See Eric Lipton et al., *Behind the Ukraine Aid Freeze: 84 Days of Conflict and Confusion*, N.Y. TIMES (Dec. 29, 2019), <https://www.nytimes.com/2019/12/29/us/politics/trump-ukraine-military-aid.html> [https://perma.cc/2YEK-TWZ3].

257. Peter Baker et al., *ISIS Leader al-Baghdadi is Dead, Trump Says*, N.Y. TIMES (Oct. 27, 2019), <https://www.nytimes.com/2019/10/27/us/politics/isis-leader-al-baghdadi->

approaches to overcome them, from impeachment proceedings to litigation, to political campaigns and elections. Concern about the creation of presidential precedent (in one direction or another) has been at the heart of the intense focus on the success or failure of these measures.<sup>258</sup>

Yet while Nixon's efforts to conceal information from Congress about his secret bombing campaign in Cambodia were successful in real time—the campaign was unknown to Congress or the public for nearly four years after its commencement—the practice was ultimately denied precedential effect (and achieved anticanonical status) through a range of actors' collective response, including: legislation codifying disclosure requirements to the opposite effect, renewed public and official condemnation of analogous conduct following repetition, and bipartisan internalization of the opposite norm by officials within the executive branch. Whatever the resolution of disclosure conflicts involving the current president, those concerned about correcting perceived violations of norms of cooperation and disclosure between branches would be wise to pursue a similarly multidimensional approach: enacting structural legislation to clarify and reinforce congressional prerogatives or develop novel mechanisms for prompt resolution of interbranch disputes; designing internal executive branch regulations that reinforce and leverage existing, quasi-independent actors such as inspectors general to reinforce disclosure requirements; and pursuing ways through popular, legal, educational, and policy-oriented writing to illustrate the abnormality of each disfavored example. As the *Korematsu* example illustrates, the battle for presidential precedent can take decades to unfold. But it is most effectively fought across multiple constituencies in American political life.

#### CONCLUSION

By virtue of the norms of the system in which courts operate, judicial decisions are commonly recognized as “precedent” the moment they are handed down. This Article has aimed to illustrate how the precedential status of presidential behavior is “not fixed but fluctuate[s],”<sup>259</sup> depending on the judgment over time of the full range of constituencies prepared—or not—to give it effect. The existence of an executive branch anticanon demonstrates

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dead.html [https://perma.cc/AW3D-4M9G] (“[W]hile [President Trump] tipped off a couple of Republican senators, Mr. Trump made a point of refusing to inform Nancy Pelosi or other Democratic leaders in advance of the raid, as is customary, saying they could not be trusted not to leak.”).

258. Compare 166 CONG. REC. S615 (daily ed. Jan. 27, 2020) (statement of Professor Alan Dershowitz) (“I am sorry, House managers, you . . . picked the most dangerous possible criteria to serve as a precedent for how we supervise and oversee future Presidents.”), with 166 CONG. REC. S647 (daily ed. Jan. 29, 2020) (statement of Rep. Adam Schiff) (“Counsel says to think about the precedent we would be setting if you allow the House to impeach a President and you permit them to call witnesses. I would submit: Think about the precedent you would be setting if you don’t allow witnesses in a trial. That, to me, is the much more dangerous precedent here.”).

259. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

the importance of reading presidential practice—whether for purposes of constitutional interpretation or otherwise—not as a fixed reality of constitutional life but as a barometer of the present status of constitutional meaning and norms.

As noted at the outset, the questions this Article has aimed to answer are an attempt to define, describe, and to an extent, justify mapping such an anticanon's existence—the better to understand whether and how an executive branch anticanon might come into being. It remains for future scholars to examine why the anticonstitutional status of some practices—like the Saturday Night Massacre or President Nixon's later decision to comply with the Supreme Court's order to disclose inculpatory tapes—has thus far remained relatively robust, while that of others—like the recognition of congressional entitlement to executive branch information—are more readily subject to renewed challenge. Perhaps the difference is historical happenstance. Perhaps there are thematic commonalities among more durable norms, like the relative cultural pervasiveness of the terms in which the practice is understood. Answering these questions will require considering both a broader range and developing a deeper account of historic examples. For present purposes, we must continue to guard against the temptation to mistake particular constitutional follies for permanent constitutional truth.

The end of the current presidential administration, whenever it comes, will bring with it an opportunity for significant reassessment—for reconstructing those aspects of our constitutional government that have proven most vulnerable to abuse. If the anticanon teaches us anything, it is that it would be a mistake to view the task of reconstruction as limited to questions of executive power alone. The anticanon is populated by examples of presidential behavior to which *multiple* institutions publicly objected. Congress took disciplinary action or (more commonly) enacted contrary legislation; subsequent administrations of both parties internalized contrary norms; and, just as important, the anticonstitutional practice was represented critically in public education, professional training, political discourse, and popular art—in the cultural landmarks defining civic life that all American officials encounter well before they enter public service. Judicial precedents may be born. But presidential precedents are made.