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ARTICLE

Getting Past the Imperial Presidency

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Abstract

In an age in which the “imperial presidency” seems to have reached its apex, perhaps most alarmingly surrounding the use of military force, conventional wisdom remains fixed that constitutional and international law play a negligible role in constraining executive branch decision-making in this realm. Yet as this Article explains, the factual case that supports the conventional view, based largely on highly selected incidents of presidential behavior, is meaningless in any standard empirical sense. Indeed, the canonical listing of presidential decisions to use force without prior authorization feeds a compliance-centered focus on the study of legal constraint rooted in long-since abandoned understandings of how and why legal systems function. While the reality that law does not operate as an on/off switch has long been accepted among legal scholars when it comes to ordinary law—all legal rules face “the fact of violation,” uncertainty in meaning, and a complex array of human motives and incentives for acting—these phenomena seem yet to have informed our understanding of law’s role in shaping decision-making surrounding state uses of force. This Article argues that accounting for these features of law is especially relevant to the study of constitutional and international regulations of state use of force. Applying a more contemporary understanding of how law works, the Article illustrates how shifting our methodological approach away from compliance-centered metrics of legal constraint may require reinterpreting the conventional set of examples we have long assumed we understood. At a minimum, it requires redesigning our approach to the empirical study of executive branch decision-making. And it suggests we may need to rethink what mechanisms may most effectively constrain the “imperial presidency” in the years ahead.

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Introduction

From the President's bombing of Syrian chemical weapons sites without congressional authorization, to threats of "fire and fury . . . the likes of which the world has never seen" in response to North Korean nuclear posturing,¹ the current presidency bears all the hallmarks of the "imperialism" that post-World War II scholars have long described.² Indeed, conventional wisdom, and many contemporary scholars lamenting the acute failure of Madisonian democracy,³ would suggest that law matters little in executive branch decisions about the use of military force. The scope of the President's power to use force under Article II of the Constitution is notoriously contested, as is the question which interpretive methodology (text, history, practice, or otherwise) is best applied to settle that meaning.⁴ Courts regularly rely on a range of justiciability doctrines to avoid ruling on the constitutionality of any particular use of force.⁵ Congress' occasional attempts to reassert its own authority over the use of military force—through framework statutes like the War Powers Resolution or targeted statutes authorizing the use of force for only limited purposes—have encountered executive branch interpretations rendering statutory constraints only marginally effective.⁶ Most central of all in the conventional case that ours is an "imperial presidency" is a ready set of examples in which presidents have used military force without congressional authorization.⁷ Whatever constitutional rules regarding the

¹ Peter Baker & Choe Sang-Hun, *Trump Threatens "Fire and Fury" Against North Korea if It Endangers U.S.*

Video, 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/4ZLS-QFDK>]; *see also* Helene Cooper & Ben Hubbard, *Pentagon Says Syria Strikes Hit "Heart" of Chemical Weapons Program*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/04/14/world/middleeast/syria-airstrikes-analysis.html> [<https://perma.cc/6RHQ-4TZC>].

² *See generally* ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973); *see also, e.g.*, Michael D. Shear & Thomas Gibbons-Neff, *Trump Sending 5,200 Troops to the Border in an Election-Season Response to Migrants*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html> [<https://perma.cc/N9TT-LNFH>]; *U.S. Senate Foreign Relations Committee Hearing on Authority to Order the Use of Nuclear Weapons*, 115th Cong. 439, p. 2 (2017) (Statement of Senator Cardin) <https://www.foreign.senate.gov/hearings/authority-to-order-the-use-of-nuclear-weapons-111417> [<https://perma.cc/2ZQA-9E2E>].

³ *See generally* CONSTITUTIONAL DEMOCRACY IN CRISIS? (Graber, Levinson & Tushnet, eds., 2018); BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

⁴ *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

⁵ *See, e.g.*, *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 845 (D.C. Cir. 2010); *Smith v. Obama*, 217 F. Supp. 3d 283, 297–304 (D.D.C. 2016).

⁶ *See, e.g.*, POSNER & VERMEULE, *supra* note 3, at 84–89.

⁷ *See generally* LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995) (cataloguing examples); SCHLESINGER, *supra* note 2.

President's use of force exist, they seem to have had little effect.⁸ (As detailed further below, a substantially analogous case is often made for the functioning of international—U.N. Charter-based—legal constraints on American use of force abroad.)⁹ Accordingly, the conventional story suggests, those worried about prospects for better limiting presidential power in this realm must look not simply to changes in particular rules or personalities, but to more profound changes in structural design.¹⁰

Yet even as the modern presidency appears to be reaching its imperial apex, the conventional account of the presidency as largely unbound by law in this realm has faced intriguing challenges from a growing set of empirical studies. Drawing variously on quantitative and qualitative methods, political scientists and legal historians have recently begun offering somewhat revisionist assessments of Congress' role in U.S. war making. For instance, some studies have found that Congress has significantly influenced presidential behavior both in initiating the use of force abroad and in shaping the conduct of ongoing wars.¹¹ Other scholars have shown that the courts' behavior in war-related cases is not so categorically different from their behavior in other cases,¹² and have provided qualitative illustrations of how judicial engagement on questions of domestic and international law can influence executive branch decision-making well before a court renders a final judgment on the merits.¹³ Executive branch observers have likewise leveraged contemporary examples and experiential counter-narratives to demonstrate how

⁸ See Louis Fisher, *A Dose of Law and Realism for Presidential Studies*, 32 PRESIDENTIAL STUD. Q. 672, 673 (2002) (“On matters of war, we have what the framers thought they had put behind them: a monarchy. Checks and balances? Try to find them.”); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 117-18 (1990); SCHLESINGER, *supra* note 2.

⁹ See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 197–203 (2005).

¹⁰ See, e.g., ACKERMAN, *supra* note 3, at 4–7.

¹¹ See generally DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS* (2016) (charting the history of congressional regulation of warfighting); 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); WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007) (evaluating empirically whether and to what extent congressional views influence presidential decisions to use force).

¹² See, e.g., Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 HASTINGS L.J. 1453, 1465–97 (2010) (canvassing empirical research suggesting that the Supreme Court does not rule differently on war-related cases that reach the court during wartime compared to those before the Court after the relevant war has ended); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-war Cases*, 80 N.Y.U. L. REV. 1, 4–6 (2005) (finding that the existence of war has no effect on the outcome cases related directly to the war); see also Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 793–807 (2011).

¹³ See, e.g., Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decision-making*, 38 YALE J. INT'L L. 359, 378–90 (2013); Ashley Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 841–53 (2013).

executive agencies and offices, the media, and civil society have all functioned on important occasions to forestall or reset an otherwise preferred course of executive action toward one or another domestic or international law rule.¹⁴ These accounts suggest that existing structural constraints have, in at least some circumstances, served to change executive branch behavior.

Why, then, does the largely unreconstructed view persist that “the ‘imperial presidency’ still seems to be alive and well”?¹⁵ This Article suggests it is because of the apparent persuasiveness of the empirical claim at the heart of the conventional case for the imperial presidency: presidents using military force “have regularly breached constitutional principles.”¹⁶ Whether part of a broad narrative of the expansion of presidential power in U.S. history generally,¹⁷ or an empirical listing of all those instances in which presidents have used force without prior authorization,¹⁸ the picture is one of a presidency pulled “into a continuing pattern of evasion” of legal constraint.¹⁹ While scholars have varied views on the implications of this historical practice for the interpretation of constitutional and international law,²⁰ the basic contours of this empirical account are clear: consistent non-compliance makes it apparent that law matters little in decisions to use force.²¹

As influential as this account has been in shaping contemporary understandings of presidential power, this Article aims to make clear why such singular catalogs of presidential behavior are meaningless in any standard empirical sense. It also suggests that canonical invocation of such lists feeds a compliance-centered focus on the study of law’s influence on decision-making rooted in a long abandoned jurisprudential understanding of how and why legal systems function. Indeed, it is far from apparent how one might divine law’s role in decision-making from a study of behavioral outcomes without more. Asking whether an actor complied with “x” rule tends to assume “x” is a fixed or singular value, when it is often not clear, or open to reasonable dispute, what “x” requires.²² Even where “x”

¹⁴ See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* ix–xvi (2012); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1707–31 (2011); Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1256 (2006).

¹⁵ See, e.g., 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>].

¹⁶ FISHER, *supra* note 7, at xi.

¹⁷ See generally SCHLESINGER, *supra* note 2.

¹⁸ See, e.g., KOH, *supra* note 8, at 67–100; Fisher, *supra* note 8, at 672–73.

¹⁹ KOH, *supra* note 8, at 122.

²⁰ See, e.g., Bradley & Morrison, *supra* note 4, at 424–29.

²¹ See Fisher, *supra* note 8, at 673 (“On matters of war, we have what the framers thought they had put behind them: a monarchy. Checks and balances? Try to find them.”); KOH, *supra* note 8, at 117–149; SCHLESINGER, *supra* note 2, at viii–ix. On the international law side, see, e.g., GOLDSMITH & POSNER, *supra* note 9, at 200–03.

²² H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958) (“A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? . . .

is certain, it may not be possible to isolate any singular factor as a but-for cause of individual decision-making, when such complex decisions more likely turn on multiple, often causally intertwined considerations negotiated among a group of (themselves individually conflicted) decision makers.²³ Moreover, no law, domestic or international, enjoys uniform compliance (with or without formal institutional enforcement).²⁴ Knowing solely how often a particular actor complies with a rule gives us no insight into whether such a compliance rate is high or low, good or bad; only some independent normative standard for evaluating how much compliance is to be expected can do that. Yet compliance studies rarely offer any guide for how to make such a normative evaluation. And then there is the problem of extraordinary circumstances, moments in which even highly developed rule-of-law systems may celebrate legal non-compliance—from practices of civil disobedience in a domestic law setting, to the creation of changed customary law internationally. Such instances may be less indicative of the irrelevance of legal constraints, as they are of a rational balancing of the anticipated consequences of different actions, including the knowing violation of law.

While such phenomena have been well recognized features of law since H.L.A. Hart's *Concept of Law*,²⁵ they seem to have little influenced the otherwise blossoming empirical study of executive branch war-making decisions.²⁶ However, the implications of Hartian jurisprudence for the empirical study of law's role are significant. For where the limit of "law" is sanction-backed command,²⁷ it may be entirely reasonable to gauge the existence of legal "constraint" by the demonstration of uniform (or near-uniform) compliance with the command. But in the Hartian universe, where the measure of law is the sense of an obligation, and the maturity of a legal system is found in its capacity (for example) to achieve interpretive settlement, behavioral outcome in any given case speaks indeterminately (or worse, circularly) to the presence of either of those features. In this world, more meaningful understanding of law's role may be found less in the examination of singular outcomes (compliant or otherwise), than in, for example, evidence that officials possess a strong, shared sense of a particular obligation, or evidence that decision makers engage in commonly recognized secondary processes in reaching a decision. Such evidence matters not because—as one strand

[T]here must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out").

²³ For a particularly rich account of decision-making process, see generally ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE RULE OF LAW* (1974).

²⁴ See Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 445, 452 n.16 (2006) (noting enforcement rates of domestic murder laws).

²⁵ H.L.A. HART, *THE CONCEPT OF LAWS* 92–93 (1961).

²⁶ A sample of this work by U.S. foreign relations law scholars and political scientists is cited *infra*, Part I. For a summary of the growing empirical literature on the international law side, see, e.g., Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 91 (2012); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012); Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010) (summarizing compliance literature).

²⁷ JOHN AUSTIN, 1 *THE PROVINCE OF JURISPRUDENCE DETERMINED* 123 (2nd ed. 1863).

of compliance theory has long and rightly argued—the existence of such beliefs and processes can help explain *why* officials comply.²⁸ It matters because evidence of such beliefs and acceptance of such processes themselves demonstrate that legal constraint exists.

Our persistent (and, as I argue, misguided) assumptions about the significance of presidential non-compliance in this realm are of no small import. Given judicial attention to official practice as evidence of legal meaning,²⁹ a mischaracterization or misapprehension of the nature or continuity of that practice can skew judicial and non-judicial understandings of both constitutional and international law. Perhaps of greater importance, popular perceptions about the scope of presidential power have the potential to influence the views not only of average voters, but also official decision makers engaged in evaluating the legality of presidential action.³⁰ Particularly if instincts about presidential power inform official judgment about the availability of force as an option, the *belief* that the President has the power, whether or not the empirical record supports this belief, may make the exercise of that power a self-fulfilling prophesy. If the historic perception is “presidents always do this,” it would be unsurprising to find the default expectation among officials is that “presidents can do this.”

In all events, understanding more accurately whether and when the executive branch engages law in this realm has critical implications for reformers interested in tightening constraints on power. If the conventional case is right, and presidential behavior is most importantly explained by entrenched congressional and judicial passivity, then significant structural adjustments may be required. If, on the other hand, presidential behavior is at least partly explained by, for example, officials’ failure to internalize particular primary obligations or secondary processes, a wider set of channels to useful reform might be open.

This Article thus aims to make three distinct contributions to the literature on law’s role in influencing executive branch decision-making about the use of force. First, it offers a sustained methodological critique of the conventional reliance on presidential-use-of-force outcomes to demonstrate the ineffectiveness or irrelevance of law in decision-making. Second, it shows how Hartian jurisprudence suggests alternative criteria for assessing law’s operation, and how, contrary to scholarly concerns (including Hart’s own) about his utility in certain

²⁸ See, e.g., Harold Hongju Koh, *Why Nations Obey International Law*, 106 YALE L. J. 2599, 2646–58 (1997).

²⁹ In constitutional law, the Supreme Court has opined 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.” *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). State practice is at least equally central to the development of customary international law. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

³⁰ See Scott R. Anderson & Megan Reiss, *Law and Public Intuition on the Use of Force, Part 1: An Introduction*, LAWFARE (May 4, 2018), <https://www.lawfareblog.com/law-and-public-intuition-use-force-part-1-introduction> [<https://perma.cc/4UVM-N6AZ>].

public law settings, Hart's model is especially useful in the study of constitutional and international law regulating state use of force. Finally, it charts an alternative approach to empirical research in this realm, one that moves away from compliance-centered metrics, and toward metrics more capable of capturing the role of law in the bureaucratic, sociological reality of executive branch decision-making. Applying this model, the Article illustrates how shifting our methodological approach may require reinterpreting the conventional set of examples we have long assumed we understood. In this respect, it also opens a pathway for rethinking what may be the most useful mechanisms for constraining the "imperial presidency" in the years ahead.

A final note before proceeding. Consistent with the practice shared by a handful of the qualitative studies noted here (perhaps best described as falling in the realm of U.S. foreign relations law),³¹ this Article considers these topics in the context of both constitutional and international law. This dual focus in part reflects the extent to which these bodies of law share multiple features in common: in substantive content and, as noted further below, in mechanisms for resolving common problems of legal indeterminacy and law violation.³² Most relevant to the issue of empirical design, it is not uncommon (at least within the U.S. executive branch) that decisions about constitutional and international legality of a particular use of force are addressed as part of the same executive branch legal analysis,³³ and may be discussed and evaluated by the same group of decision makers in the same room at the same time.³⁴ While that phenomenon may pose challenges for certain empirical studies, it also holds out the practical possibility of demonstrating one way or another how different parts of these bodies of law really are.

I. Taking Empirical Ignorance Seriously

As influential as the conventional listing of unilateral presidential uses of force has been in shaping contemporary understandings of the President's regular non-compliance with law, it can hardly be considered dispositive of the question whether law effectively operates in this realm in any standard empirical sense. For one, the conventional account of the imperial presidency tends to assume as its legal baseline a constitutional rule requiring congressional authorization for the

³¹ See e.g., Ingber, *supra* note 13; Deeks, *supra* note 13.

³² For a useful discussion of this idea, see generally Christopher A. Whytock, *Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT'L L. 155 (2004).

³³ See, e.g., Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Att'y Gen. Eric Holder, Authority to Use Military Force in Libya (Apr. 1, 2011), <https://fas.org/irp/agency/doj/olc/libya.pdf> [<https://perma.cc/854G-6GF2>] [hereinafter Krass OLC Memorandum] (regarding the President's constitutional authority to use force in Libya without congressional authorization).

³⁴ See, e.g., CHARLIE SAVAGE, POWER WARS 63–67 (2015) (discussing the role of the interagency national security lawyers group in use of force decision-making in the Obama Administration).

executive to use force in all instances.³⁵ Of course, not even the original constitutional scheme was so straightforward. There is no dispute, for instance, that even the Constitution's framers thought the "executive power" set forth in Article II contained, at a minimum, sufficient authority for the President to use force in self-defense without waiting for Congress to act,³⁶ a view the Supreme Court itself embraced within the country's first century of existence.³⁷ The constitutional baseline against which compliance is regularly measured could use at least this much—and likely more—refinement.

Indeed, notwithstanding the well understood indeterminacy in baseline constitutional and international rules,³⁸ empiricists studying various state uses of force have deployed a remarkable array of approaches to ignore it. Legal scholars, who have tended to favor more qualitative approaches to evaluating questions of executive branch compliance and constraint have tended to skirt the problem of identifying a baseline rule by careful selection of examples, a habit most problematic when cherry-picking instances of behavior that tend to accord with theoretical expectations.³⁹ Thus, for example, it is equally possible to find accounts describing the post-9/11 period as one of government non-compliance with law and failed legal constraints,⁴⁰ as it is to find assessments of the same period identifying rich examples of legal constraint in action over time.⁴¹ Many political scientists assessing compliance tend to favor large data sets that surely avoid the cherry-

³⁵ See, e.g., HOWELL & PEVEHOUSE, *supra* note 11, at 1–6 & 264–65 n.13 (assuming as its legal baseline an original constitutional rule requiring congressional authorization for the executive to use force in all instances).

³⁶ THE RECORDS OF THE FEDERAL CONVENTION OF 1787 VOL. 2, at 318 (Max Farrand ed., rev. ed. 1966).

³⁷ The Prize Cases, 67 U.S. 635, 668–70 (1863).

³⁸ See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 10–13 (1995); Bradley & Morrison, *supra* note 4, at 1115–16 (noting substantive disputes over the content of constitutional law regulating presidential use of force).

³⁹ See, e.g., Richard H. Pildes, *The Executive Unbound: After the Madisonian Republic*, by Eric A. Posner and Adrian Vermeule, 125 HARV. L. REV. 1381, 1410 (2012) (reviewing and critiquing Posner and Vermeule on these grounds); Oona Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1423–25 (2006) (critique of Goldsmith and Posner); GOLDSMITH & POSNER, *supra* note 9, at 104–06 (critique of Koh).

⁴⁰ See, e.g., POSNER & VERMEULE, *supra* note 3, at 48–49 BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 95–108 (2010) (inadequate constraints on executive branch behavior in violation of Geneva Conventions); Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45, 56 (2009) (noting the U.S. implementation of detention and interrogation policies, as well as the 2003 Iraq invasion—all broadly thought inconsistent with international law).

⁴¹ See, e.g., GOLDSMITH, *supra* note 14, at 51–201 (describing multiple, highly effective constraints on executive); Morrison, *supra* note 14, at 1707–31 (challenging Ackerman's account of a lawless Executive and defending the role of OLC as a check on the President including as to the Geneva Conventions).

picking problem, but too much of this research is at the expense of identifying any particular rule against which to measure compliance at all.⁴²

Even assuming we could identify within some degree of error a set of instances in which presidents have not complied with an identified (and more interpretively compelling) legal rule, it is far from apparent what we should conclude from the mere listing of non-compliant behavior about how much of a problem non-compliance really is. Without knowing, for example, how many instances there are in which presidents have complied with a constitutional rule restricting the unilateral use of force, we can say nothing about compliance *rate*—a figure requiring both a numerator and a denominator to assess. The list of instances of presidential uses of force without congressional authorization is nothing more than a selection on the dependent variable, as if one were to stand on a New York City street corner and count instances of jaywalking as one's sole metric of law's ability to constrain the behavior of New Yorkers. Any actual assessment of compliance requires a catalog of those instances in which the presidents used force *without* seeking congressional authorization, and those instances in which presidents used force *with* congressional authorization. It also requires listing those instances in which presidents contemplated but decided against the use of force at all. Given the challenge of assembling such a list, it is perhaps no surprise empiricists have largely avoided undertaking it.⁴³

Moreover, even if an enterprising scholar produced a more meaningful catalog of examples to assess, we would need yet some additional independent basis to evaluate the significance of the information such a compliance rate provides. Does the U.S. President's compliance rate with use of force rules compare more or less favorably to presidential compliance rates with other legal rules? Does it compare more or less favorably to other law enforcement officials' compliance rates with other use of force rules? What comparative metric is most meaningful here, and why? While some quantitative international law scholars have indeed labored to develop data sets that might allow them to examine compliance *rates* (at least, for instance, in the context of treaty-based military pacts),⁴⁴ analysts are left

⁴² See, e.g., HOWELL & PEVEHOUSE, *supra* note 11, at 9–10 ; James D. Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559, 559–72 (2007) (testing compliance against “issue areas” rather than actual rules, noting that “the data are not based on a precise legal analysis of whether particular acts constitute violations of the treaty in question.”).

⁴³ On this point, the study by Howell and Pevehouse examining congressional influence on presidential decisions to use force (through legislative enactments and public appeals) deserves great credit. Howell and Pevehouse scour *New York Times* reports to generate a dataset of more than 15,000 non-uses of force during this period: “foreign events that stood a nontrivial chance of provoking a U.S. military intervention.” HOWELL & PEVEHOUSE, *supra* note 11, at 78–80. By design, however, the study is one of congressional, not legal, influence.

⁴⁴ Drawing on a sample of bilateral treaties formed between 1816 and 1989, Leeds and Savun examined rates of treaty compliance and circumstances of termination, aiming in their terms to shed light on “whether international law constrains leaders.” Brent Ashley Leeds & Burcu Savun, *Terminating Alliances: Why Do States Abrogate Agreements?*, 69 J. POL. 1118, 1118–32 (2007)

to “suppose” they might demonstrate “a fairly good rate of nonabrogation” without the benefit of any way of assessing in this context what counts as good or bad.⁴⁵

Above all, even if it were possible to identify (or at least defensibly select) a set of instances in which the President both did and did not comply with a particular constitutional or international law rule regarding the use of force, it is yet another matter to identify in each of those instances whether law *qua* law was the reason why the President acted (or declined to act) as he did. For a general correlation between the existence of a legal rule and executive action is, after all, no demonstration of a causal connection between the two. Here, complications abound.

First, there is the question of whether empiricists asking if “law matters” are interested in studying the effect on decision-making of the behavior of law-related structures or institutions (like a court), or the effect of the existence of a legal rule (a discrete, normative obligation, with or without enforcement mechanism attached) standing alone. International law empirics have especially struggled with untangling its objects in this respect, often using the term “international institutions” to describe both rules contained in treaties (like the rule prohibiting targeting civilians in armed conflict) and institutions or organizations that policed compliance with those rules.⁴⁶ More recent international law scholarship in this realm has fared better, and indeed, one of the most fruitful lines of empirical inquiry has focused on the ways in which different structural mechanisms or incentives—from courts and other institutional actors and organizations,⁴⁷ to domestic politics

(finding that most treaty-based alliances during this period were honored most of the time, with approximately one-third of such agreements ending in violation by one side or another).

⁴⁵ Simmons, *supra* note 266, at 281 (“[G]iven the importance of alliances to vital national security interests, one might suppose this figure represents a fairly good rate of nonabrogation [sic]”).

⁴⁶ See Hafner-Burton et al., *supra* note 266, at 48 (“[O]ften political science scholarship has not clearly distinguished the roles of customary international law, formal legal agreements such as treaties, and organizations such as tribunals. Instead, these phenomena are treated as a loosely defined amalgam of ‘legal institutions.’”). The extent to which that semantic habit pervaded the literature remained visible as political scientists developed empirical studies of international legal constraint. See, e.g., Morrow, *supra* note 42, at 560 (“Realists give pride of place to calculations of power and interest and believe that such calculations are rarely affected by international institutions, such as international law.”).

⁴⁷ See generally Scharf, *supra* note 40 (reporting findings from meetings with former State Department Legal Advisers); Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1 (2010) (reporting findings from interviews with JAG lawyers); see also KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 182–209 (2001) (attributing domestic government compliance with ECJ rulings to concerns about political legitimacy).

and sociology⁴⁸—influence state decision-making.⁴⁹ The study of structural, institutional constraints has been equally rich among legal scholars in recent years. While still shying away from core constitutional questions about the President’s power to use military force,⁵⁰ scholars have drawn on a combination of personal government experience, interviews, and an otherwise rich historical record to examine how various mechanisms (both internal forces such as those inside the executive branch or other branches of government, and external forces like the media and NGOs) shape state behavior.⁵¹

Yet while such analyses certainly shed greater light on why states act as they do, it is often difficult to untangle whether they are observing the effect of “law” as such—that is, the *existence* of a formal legal rule against, say, torture—or are instead measuring the effect of intervening organizational, political, or sociological dynamics that could or would find expression in state behavior even in the absence of a particular binding legal rule.⁵² Studies apparently aimed at

⁴⁸ See, e.g., BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 125–154 (2009) (examining the role of domestic political constituencies in promoting compliance with international human rights law); RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 9–16 (2013) (positing a sociology of state influence on other states).

⁴⁹ Beth Simmons’s study of state behavior in the face of international human rights treaties, for example, demonstrates several ways in which participation in such treaties can ultimately influence state behavior: by putting issues on the domestic legislative agenda that would not have arisen as a result of national processes alone; by providing authoritative legal support in domestic litigation or by supporting domestic implementing legislation that itself is useful in domestic litigation; and by encouraging local groups to mobilize politically to demand action on human rights issues domestically. SIMMONS, *supra* note 48, at 125–54.

⁵⁰ Indeed, to the extent constitutional resort-to-force questions are addressed, it is largely to embrace the conventional account of executive war power as an exception to the otherwise-legally-constrained rule. See, e.g., GOLDSMITH, *supra* note 4, at 182 (“[A]s President Obama’s 2011 military intervention in Libya without congressional approval makes plain, legal checks on unilateral uses of military force are weak at best, especially with regard to low-level uses of force that do not involve ground troops.”). It is perhaps ironic that Goldsmith separately assesses Obama’s intervention in Libya to be in accordance with constitutional law. See Jack Goldsmith, *War Power: The Campaign Against Libya Is Constitutional*, SLATE (March 21, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/03/war_power.html [<https://perma.cc/SBJ2-M3BD>].

⁵¹ See, e.g., GOLDSMITH, *supra* note 144, at 51–201; Ingber, *supra* note 133, at 360–66; Deeks, *supra* note 133, at 829–33 (assembling a set of recent examples in which the executive has changed or amended national security policies, changes motivated by the prospect (without more) that judicial engagement might call the policy’s legality into question); Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1470–92 (2010) [hereinafter Morrison, *Stare Decisis*] (examining written, publicly available OLC opinions issued between the beginning of the Carter Administration and the end of the first year of the Obama Administration, and finding close to a quarter of the opinions rejected or limited a discernable White House position); Pearlstein, *supra* note 12, at 1256.

⁵² Compare, e.g., GOLDSMITH, *supra* note 14, at 51–201 (describing the role of the media, NGOs, military lawyers and others in influencing executive policy decisions), with, e.g., GOLDSMITH & POSNER, *supra* note 9, at 8–9 (suggesting such accounts may not observe the effect of law as such, but rather

shedding light on the impact of a legal rule as such on behavior⁵³ have rightly been criticized for failing to account for selection effects, *i.e.*, the possibility that states only ratify those treaties whose terms they would honor even in the absence of a treaty.⁵⁴ Many equally struggle to defend claims that a correlation between legal rule and subsequent behavior actually shows that the legal rule alone is why the behavior unfolded as it did. For instance, Oona Hathaway and Scott Shapiro's recent study examined 254 cases of territorial exchange between states that took place during a militarized conflict involving conquest from 1816 to 2014,⁵⁵ and concluded that interstate wars resulting in *enduring* territorial conquest became dramatically less significant after the adoption of the 1928 Kellogg-Briand Pact (purporting to outlaw wars of aggression).⁵⁶ Yet this study did not attempt to explain whether the adoption of the pact itself, or rather other contemporary phenomena, like the advent of nuclear weapons may have had a greater or even dispositive causal effect on decision-making.⁵⁷ Such compliance studies offer insight into *what* happened after 1928, but often speak far less persuasively about *why*.

Indeed, even if one could correct for such problems of data and survey design, there is more than one reason to imagine that fully disentangling the relative importance of law from other decision-maker concerns in this sense—whether law or politics, normative commitment or self-interest—is simply not susceptible to empirical discovery through behavioral outcomes.⁵⁸ What empirical insights we have into the reality of decision-making within the executive branch regarding the use of force show consistently that state-organizational decision-making involves groups of actors, each of whom has multiple motives and interests, debated among

organizational or sociological effects, economic or other interests that would find expression in state behavior even in the absence of binding law).

⁵³ See, e.g., OONA A. HATHAWAY & SCOTT I. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 312–13 (2017) (examining the issue in the context of international law).

⁵⁴ See, e.g., Simmons, *supra* note 26, at 280–93 (describing studies and selection effects critique); Hafner-Burton et al., *supra* note 266, at 91 (“What looks like effectiveness or compliance might be caused by something else. The job of the analyst who is measuring the effect of an agreement is to separate its impact from the noise of those many other forces.”); cf. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1112–24 (2013) [hereinafter Bradley & Morrison, *Presidential Power*] (analyzing formal and informal legal constraints on the presidency).

⁵⁵ HATHAWAY & SHAPIRO, *supra* note 53, at 312–13.

⁵⁶ HATHAWAY & SHAPIRO, *supra* note 53, at 313–35 (either because most territory taken in war after 1928 was later returned to its pre-1928 owners, or if not, was far smaller in area than the vast land conquests of the old world order in which aggressive war was unquestionably lawful).

⁵⁷ HATHAWAY & SHAPIRO, *supra* note 53, at 331–33.

⁵⁸ See Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 825–36 (2012) (reviewing POSNER & VERMEULE, *supra* note 3). The suggestion that legal constraint can only be demonstrated by establishing the possibility that law may be a but-for cause of decision-making thus seems especially problematic. See Bradley & Morrison, *Presidential Power*, *supra* note 54, at 1122. More, as the following Part suggests, Hartian jurisprudence does not require it.

themselves and even within the individual.⁵⁹ As sociologists have long suggested, it may be inaccurate, or even impossible, to identify any singular factor as a but-for cause of an individual's decision to act or not, when people regularly act for multiple, often causally intertwined reasons—reasons that may well vary by individual, or even within the same individual whose circumstances or focus changes with the time of day.⁶⁰ More, even if it were possible to identify particular, situational examples of decisions in which law played relatively more or less significant a role than other considerations, it is at best problematic to assume that such individual incidents are either characteristic or exhaustive of the role law plays in decision making day to day. If we are to leave empirical room for the possibility that law “matters” in ways more than just in determining an individual decisional outcome – that law, for example, shapes the language, categories, expectations and habits within which the use of force is contemplated, debated, and assessed – then the study of law's role must be based on something more than outcome-based assessment alone.⁶¹

For the overlapping fields of scholars occupied with resolving whether law can constrain executive branch behavior, the sustained focus on compliance makes strong intuitive sense. What good is a constitutional division of powers related to war—or indeed any legal rule regulating official use of force—if its existence has no independent effect on actually changing official behavior on questions of force? Yet, the moment one undertakes to measure a particular rule's impact empirically, it becomes apparent how contingent compliance is: which contested definition of a rule and what surrounding circumstances necessitate compliance? In a world where ordinary laws are violated with some regularity, how many individuals must change their behavior in order to conclude law “constrains” it? What counts as an “independent” effect of law, rather than some other, isolatable reason for behavior? To make sense of any results, and further to understand how we might reasonably expect constitutional or international law in this realm to function, we need a baseline definition and theory of law.

II. Why Hart Matters to High Power

The theoretical framework that supports contemporary empirical inquiries into the role of law in constraining power was forged at a time when prevailing jurisprudential theory offered very different answers to the question “what law is and how it works” than those embraced by scholars today. At the birth of the current legal order governing U.S. use of force abroad—marked by, among other things, the post-World War II ratification of the UN Charter prohibiting aggressive war, and President Truman's congressionally unauthorized war in Korea—international

⁵⁹ See, e.g., CHAYES, *supra* note 23, at 28–40.

⁶⁰ See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

⁶¹ For a useful discussion of this last point, see Nina Tannenwald, *Assessing the Effects and Effectiveness of the Geneva Conventions*, in *DO THE GENEVA CONVENTIONS MATTER* 1, 25–26 (Evangelista & Tannenwald, eds. 2017).

law theory was dominated by Austinian realism,⁶² and domestic legal theory was dominated by the views of John Austin's American heir, Oliver Wendell Holmes.⁶³ By the positivists' definition, law was the general command of a sovereign backed by threat of sanction for disobedience.⁶⁴ The "sovereign" power could take many forms, but it was identifiable by society's habitual obeisance of its orders, by its internal supremacy (for the sovereign itself could not be subject to law), and by its external independence from the command of any other power.⁶⁵ As Holmes saw it, the relationship of law to the consequences for its disobedience was fundamental; law was distinguishable from morality because individual compliance was motivated by identifiable material incentives—moral principles alone did not provide.⁶⁶ For realist scholars of international law, this understanding led to a simple, negative conclusion about the prospect of legal constraint. That is, while it might appear a puzzle to explain why states could often be observed complying with international rules in the absence of any overarching international enforcement authority, whatever compliant behavior might be observed was the result of other motives—an expression of existing state interests, not some independent effect of law itself.⁶⁷

⁶² See generally, e.g., Hathaway & Lavinbuk, *supra* note 39 (summarizing theoretical evolution); Richard H. Steinberg, *Wanted – Dead or Alive: Realism in International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 146 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (same). Embracing the Austinian definition of law as the sanction-backed command of a sovereign, realist scholars understood "law" as little more than a prediction of habitual compliance. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 1 (2010) ("Laws establish relationships between variables . . . [I]f the relation between a and b is invariant, the law is absolute. If the relation is highly constant, though not invariant, the law would read like this: if a, then b with probability x. A law is based not simply on a relation that has been found, but on one that has been found repeatedly.").

⁶³ See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* (1992).

⁶⁴ See generally JOHN AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* (1863).

⁶⁵ *Id.*

⁶⁶ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

⁶⁷ While acknowledging that international law had "in most instances been scrupulously observed" in the preceding 400 years, Morgenthau found international law "primitive" as compared to the domestic law model—a model in which law is "imposed by the [state] that holds the monopoly of organized force." HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 285 (1948). In contrast to that vertical model of law, in the decentralized international system in the relatively rare instances when law is violated, the availability of sanctions depended solely on the "vicissitudes of the distribution of power between the violator of the law and the victim of the violation." *Id.*, at 298. Scharf, *supra* note 40, at 52 (summarizing intellectual history).

While more than one generation of theoretical,⁶⁸ and more recently empirical,⁶⁹ critiques has by now substantially revised this elementary realist view, the literature remains focused on solving the same puzzle the realists put forward: how to explain observed compliance with public law rules in the absence of formal legal enforcement?⁷⁰ Today, one thus finds both theorists and empiricists who maintain that states only comply when it is in their interest,⁷¹ and those who argue that state compliance is a result of various influence mechanisms that law independently channels or calls into play.⁷²

In constitutional law, the conventional case—which treats the presidency as fundamentally unconcerned with constitutional limits on the authority to use force—likewise has deep roots in nineteenth and twentieth century thought.⁷³ While Schlesinger’s *Imperial Presidency* was hardly the first to conceive of the notion that constitutional law did not much constrain presidential war power,⁷⁴ it crystallized the terms of the conventional case, which makes the passivity of the legislative and judicial branches central to the reason why non-compliance is seen and expected. As foreign affairs law specialists regularly explained, that state of

⁶⁸ See generally OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (2006) (compiling readings on constructivism, institutionalism and others as among critiques of realist theory).

⁶⁹ For useful reviews of the field of empirical study in international law, see generally Hafner-Burton et al., *supra* note 26; Shaffer & Ginsburg, *supra* note 26; Simmons, *supra* note 26.

⁷⁰ See, e.g., Jana von Stein, *The Engines of Compliance*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, *supra* note 62, at 478 (“If no higher authority exists [to enforce international law,] why should we ever observe compliance?”); SIMMONS, *supra* note 48, at 114 (identifying the ongoing puzzle of international law compliance literature similarly: with “no ‘law enforcement’ corps to enforce the rules . . . , what (if anything) drives compliance . . . ?”); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1796 (2009) (describing the puzzle of “how public law regimes can effectively constrain the behavior of states in the absence of any superstate enforcement authority”); Koh, *supra* note 28, at 2603–04; CHAYES & CHAYES, *supra* note 38, at 3–9.

⁷¹ See, e.g., GOLDSMITH & POSNER, *supra* note 9, at 7–8; Benjamin Valentino et al., *Covenants Without the Sword: International Law and the Protection of Civilians in Times of War*, 58 WORLD POLITICS 339–77 (Apr. 2006).

⁷² See, e.g., Dickinson, *supra* note 47; SIMMONS, *supra* note 48; GOODMAN & JINKS, *supra* note 48.

⁷³ The most influential constitutional law treatise scholar of the Civil War era, William Whiting, embraced a limitless vision of executive power as commander-in-chief. See generally WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES (10th ed. 1864). This vision was embraced and extended by Edward Corwin in the years after World War II. See EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 227–42 (1958) (“[T]he facts of the Civil War had shown conclusively that in meeting the domestic problems that a great war inevitably throws up[,] an indefinite power must be attributed to the President to take emergency measures . . . [A] practice so deeply embedded in our governmental structure should be treated as decisive of the constitutional issue.”). By World War II, Roosevelt’s former Attorney General had famously explained (in contextualizing President Roosevelt’s support for the internment of Japanese Americans): “The Constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war.” F. BIDDLE, IN BRIEF AUTHORITY 219 (1962).

⁷⁴ See SCHLESINGER, *supra* note 2, at 498–99.

affairs created “a climate in which Presidents have regularly breached constitutional principles,”⁷⁵ facilitating the ascendancy of an executive branch pulled “into a continuing pattern of evasion” of compliance with constitutional constraint.⁷⁶ Indeed, even as much more recent empirical work has begun to call fundamental elements of the conventional case into question—suggesting Congress and the courts may be more influential than long assumed⁷⁷—the scholarship here, as in international law, sooner or later adopts the conventional metric of assessing legal constraint: whether or not the executive branch changes its behavior to comply.⁷⁸

Yet as these debates over the puzzle of compliance in the absence of enforcement unspooled in political science departments and in the legal academy through the twentieth century, Hart’s *The Concept of Law*, first published in 1961, had elsewhere dismantled the Austinian definition of law point by point. Not all laws were in the form of commands, Hart explained. Many laws rather conferred and guided the conduct of governance (public power), or created and guided legal relations (private power). These were laws whose violation did not result in any “sanction” as such, but rather, for example, in the recognition that the exercise of power had been without legal effect.⁷⁹ While some laws necessarily resulted in state-imposed sanctions for violation (like criminal statutes), those rules generally applied equally to private individuals and to the public officials who enact the laws as “sovereign” authority.⁸⁰ Indeed, it made as little sense to identify the sovereign as one “necessarily exempt from legal limitation,” as it did to identify the sovereign’s laws as “habitually obeyed,” when laws presumptively remain in effect from one legislature or governing regime to the next, well before the new regime could demonstrate any reality of habitual obeisance.⁸¹ In all events, it was unclear in Austin’s conception what should count as evidence of “obedience” when, as would often be the case, “the person ordered would certainly have done the very same thing without any order.”⁸²

In Hart’s universe, the touchstone of law was thus not the external application or prediction of sanction (for only some laws require or trigger it), but

⁷⁵ FISHER, *supra* note 7, at xi.

⁷⁶ KOH, *supra* note 8, at 122.

⁷⁷ See *supra* notes 11–13.

⁷⁸ See, e.g., Deeks, *supra* note 13, at 834–35 (joining critics of the view that the executive is unconstrained by law by “offering examples of situations in which the executive has declined to pursue its preferred course of action because it viewed that course as legally unavailable”); Pildes, *supra* note 39, at 1410.

⁷⁹ HART, *supra* note 25, at 33–38, 79.

⁸⁰ *Id.* at 79.

⁸¹ *Id.*

⁸² *Id.* at 51 (“[I]t is not easy to state, even in the case of a single order given face to face by one man to another, precisely what connection there must be between the giving of the order and the performance of the specified act in order that the latter should constitute obedience.”); see also *id.* at 114 (“[The ordinary citizen] may obey [law] for a variety of different reasons and among them may often, though not always, be the knowledge that it will be best for him to do so.”).

officials' internal sense of obligation—the sense that “the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”⁸³ Among the advantages of this view was that it better described the range of rules necessary and apparent in a functioning legal system. Primary rules of course remained, by which “human beings are required to do or abstain from certain actions, whether they wish to or not.”⁸⁴ Many such rules simply captured pre-existing (*i.e.* pre-codification) moral expectations or social habits. But because all such rules by their nature carry certain defects—most evidently, uncertainty in meaning and “the fact of violation”—mature legal systems also had secondary rules: power-conferring rules by which primary rules could be authoritatively identified, applied, and changed.⁸⁵ Legal systems addressed the problem of uncertainty in rules by providing structures and processes for settling what counts as law, “either by reference to an authoritative text or to an official whose declarations on this point are authoritative.” And they solved the “fact of violation” (a function of the “inefficiency of diffused social pressure”) by providing similarly authoritative mechanisms for defining what counts as a transgression of law.⁸⁶ In this view, just two conditions were thus “necessary and sufficient” to constitute a mature legal system. First, public officials must have internalized acceptance of primary rules—rules they may obey “from any motive whatever,” whether or not they fear sanctions. Second, public officials must equally accept a framework of secondary rules and structures within which law is made and applied—rules officials must regard as “common standards of official behavior and appraise critically their own and each other’s deviations as lapses.”⁸⁷

If Hart’s view is right, the implications for empirical studies in this realm are substantial. At a minimum, Hart’s views imply that empiricists might find much more significant evidence of legal constraint not by counting behavioral outcomes, compliant or not, but by assessing whether individual officials have a “sense of obligation” to primary rules or secondary structures.⁸⁸ But before more fully exploring Hart’s implications for empirical design—a topic to which this Article returns in detail below—it is worth pausing to understand why his more contemporary understanding of legal systems has, to date, been largely absent from the literature of legal constraint on the use of force.⁸⁹ Part of the explanation is no

⁸³ HART, *supra* note 25, at 86; see also J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 110 (1993) (“Since H.L.A. Hart, jurisprudence has been grounded on the so-called ‘internal point of view’—the perspective of a participant in the legal system who regards its laws as norms for her behavior.”).

⁸⁴ HART, *supra* note 25, at 81.

⁸⁵ *Id.* at 81, 92–94 (describing the need for rules of recognition, change, and adjudication that determine what the primary legal rules are and when they have been violated).

⁸⁶ *Id.* at 92–93, 96.

⁸⁷ *Id.* at 116–17.

⁸⁸ See *infra* Part III.

⁸⁹ While it is certainly true that the distinction between Hartian and Holmesian understandings of law have in recent years found their way into theoretical work on the nature of legal constraint, see, e.g., Pildes, *supra* note 39, at 1410 (“Ever since H.L.A. Hart’s *The Concept of Law*, theorists have recognized that the existence of a legal system ultimately depends upon a socially shared rule of

doubt simply interdisciplinary distance: the study of state behavior in this realm in both political science and law has famously suffered from basic definitional disconnects.⁹⁰ Further, compliance has been a particularly attractive metric for contemporary empiricists, who are sensibly drawn to the methodological possibilities of large and available datasets. Most significant for present purposes, even among scholars who broadly view Hart and his jurisprudential heirs as having left Austin “jurisprudentially dead” when it came to the operation of ordinary municipal law,⁹¹ there are significant doubts as to Hart’s descriptive relevance to constitutional and international law in particular.⁹² The remainder of this Part thus takes on these concerns, taking each field in turn. For while these concerns are important, they do not overcome the ways in which Hart is deeply relevant to the study of modern legal constraints on state uses of force. Most important, it is entirely consistent with Hartian jurisprudence to imagine that settlement of legal meaning may be had not only by operation of the judgment of a singular court of compulsory jurisdiction, but also through a series of distributed mechanisms that can, and regularly do, provide adequate settlement in the individual case.

A. *Constitutional Law*

Among constitutional scholars, there remains only a small but vocal number who still embrace the Holmesian insistence that law matters only as a function of its formal sanction.⁹³ The greater number, while embracing Hart in general, harbor

recognition, at least among public officials”); Goldsmith & Levinson, *supra* note 70, at 1799–1800 (“Few contemporary jurists would join Hobbes and Austin in casting sanction-based commands or sovereignty in the central roles these concepts play in the conventional wisdom about the exceptionalism of international law”), this work does not much contemplate the implications of Hart’s framework for empirical design. Among the few scholars who have suggested Hart might have something useful to say about empirical design in this realm, they find in Hart’s utility generally limited to his recognition of the importance of norm internalization without more. *See, e.g.,* Bradley & Morrison, *Presidential Power*, *supra* note 54, at 1122–23; Manik V. Suri, *Reorienting the Principal-Agent Frame: Adopting the “Hartian” Assumption in Understanding and Shaping Legal Constraints on the Executive*, 7 HARV. L. & POL’Y REV. 443, 448 (2013). This generalized understanding avoids distinguishing between internalization of primary and secondary rules, and equally makes it possible to elide which official actors might be the most significant indication of the internalization of either kind of rule—focusing invariably on assessments of executive branch *lawyers*, rather than executive branch actors responsible for policy decisions. *See* Pildes, *supra* note 39, at 1400 (noting how accounts of legal advisors “run the risk of being self-serving or suffering various forms of self-attribution bias”). Above all, they continue to conceptualize legal constraint as requiring that law has at least the potential to be a singular, but-for cause of decision-making, a measure that sociologists would doubt exists, *see supra*, text accompanying note 61, and Hart does not require, *see supra*, text accompanying note 88.

⁹⁰ *See, e.g.,* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, *supra* note 62, at 11 (describing an array of interdisciplinary tensions).

⁹¹ Goldsmith & Levinson, *supra* note 70, at 1800.

⁹² HART, *supra* note 25, at 213–37.

⁹³ *See* POSNER & VERMEULE, *supra* note 3, at 7–11 (embracing an instrumental account of law’s operation); Pildes, *supra* note 39, at 1392–93 (“[T]he premise [of Posner and Vermeule’s work] . . . is that public officials obey the law not for normative reasons but only when the benefits of legal compliance in specific contexts outweigh the costs.”).

concerns about the implications of Hart's model for constitutional law in particular.⁹⁴ The existence of the Constitution itself can hardly count as a rule of recognition (or as containing a rule of recognition), for the text standing alone settles almost nothing at all.⁹⁵ Given the chronic debate in constitutional law over interpretive methods (and equally vigorous debates about which, if any, branch is the authoritative institutional interpreter), it is indeed arguably difficult to pinpoint a constitutional law rule of recognition—a settled understanding of how to identify what the law is.⁹⁶ Especially for those who embrace the view that more than one branch of government has (at least some) power to interpret the Constitution, or even the arguably lesser power to have its practice inform constitutional meaning, it seems difficult to conclude that there could ever be an authoritative settlement of constitutional meaning.⁹⁷

Indeed, even for those less concerned by the nature of the independent interpretive authority retained by the political branches, there is little doubt that our judicial system famously struggles, and regularly fails, to adjudicate on the merits violations of even some of our most important primary rules.⁹⁸ The Supreme Court—the only court jurisdictionally capable of imposing formal uniformity on countless constitutional decisions reached in lower federal and state courts—resolves only a tiny fraction of constitutional disputes that arise in the United States every year. Many more constitutional questions arise, and must be resolved, every day in the work of legislatures and executives at the federal and state levels as they draft, apply, and enforce legal rules under circumstances no court will ever review. Disagreements on the meaning and effect of the Constitution arise within government (between the President and Congress, or a state governor and legislature), and it is far from certain as a matter of law who prevails in all such disputes.⁹⁹ In the end, not even Supreme Court settlement guarantees that legal questions are well and forever settled, as the Court itself has had occasion to change its mind about legal meaning on matters both small and large over the years.¹⁰⁰ The

⁹⁴ See generally THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

⁹⁵ See generally, e.g., JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

⁹⁶ See, e.g., Kent Greenawalt, *The Rule of Recognition and the Constitution*, in THE RULE OF RECOGNITION, *supra* note 94, at 1, 11–23.

⁹⁷ See, e.g., Richard H. Fallon, *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1083 n.188 (2010) (arguing that various versions of popular constitutionalism “seem[] a crude and possibly self-defeating way of promoting ultimate, authoritative settlements of constitutional issues . . .”).

⁹⁸ See Goldsmith & Levinson, *supra* note 70, at 1803–04; Spiro, *supra* note 24, at 452 n.16; Whytock, *supra* note 32, at 164–66.

⁹⁹ See Goldsmith & Levinson, *supra* note 70, at 1813–14 (cataloguing these and other reasons for non-settlement of constitutional questions in the domestic system).

¹⁰⁰ Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Education*, 347 U.S. 483 (1954).

list of reasons for the non-settlement of questions surrounding the violation of more than one aspect of constitutional law goes on quite a bit longer.

For critical constitutional scholars, the prospect thus looms large that in Hartian terms, the United States lacks a mature constitutional legal system: an agreed upon set of secondary rules and processes by which primary constitutional rules may be authoritatively identified and applied.¹⁰¹ Yet one could well imagine (and examine empirically) a particular setting in which the function of legal recognition is served by a customary rule, or by a more or less formal cluster of methodologies defining the terms by which debates over meaning are held. One could equally imagine (and examine empirically) a form of settlement in a particular field through distributed lower courts and arbiters, executive offices and agencies, and even professional norms and cultural customs. Far from imaginary, the United States has long relied on bureaucratic structures other than courts to settle manifold domestic law questions in more and less formal ways.¹⁰²

Indeed, one of the most intriguing implicit findings in recent studies of legal constraints surrounding the use of force has challenged the expectation that a singular court of compulsory jurisdiction is the only effective way to achieve functionally effective settlement in the meaning and application of law. Trevor Morrison, for example, describes the longstanding practice among executive branch officials of treating Office of Legal Counsel (OLC) opinions as binding within the executive branch,¹⁰³ and further characterizes OLC's practice of treating prior OLC opinions as binding on the OLC itself.¹⁰⁴ Focusing separately on the role of international law in constraining official use-of-force behavior, Laura Dickinson interviewed military lawyers in the Judge Advocate General's (JAG) Corps with active-duty service, and found organizational and professional cultural mechanisms through which lawyers embedded with combat troops functioned to operationalize and settle basic law of war rules—up to and including military-agency processes of adjudication and discipline.¹⁰⁵

It is certainly fair to wonder in evaluating the import of such examples how authoritative such mechanisms really are and how settled the meaning assigned to rules by these branch or agency-specific structures really could be. But for Hart, the most useful assessment of a legal system's maturity is relative: the assessment of any legal system's maturity could only be judged with reference to a conventional domestic law counterpart. In constitutional terms, one might imagine it useful to

¹⁰¹ See generally THE RULE OF RECOGNITION, *supra* note 94.

¹⁰² See generally, e.g., Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013).

¹⁰³ Morrison, *Stare Decisis*, *supra* note 51, at 1455–56.

¹⁰⁴ *Id.* at 1481 (counting the number of instances in which the OLC departs from that office's own prior opinions, finding evidence of such a departure in just over five percent of more than 1,000 studied opinions).

¹⁰⁵ As she then concluded in the mode of compliance studies: “the presence of lawyers on the battlefield can—at least sometimes—produce military decisions that are more likely to comply with international legal norms.” Dickinson, *supra* note 47, at 3.

compare, for example, the availability of authoritative settlement of the legality of executive branch use-of-force actions under the Constitution's Article II, with the availability of authoritative settlement of the legality of, for example, use-of-force actions by private security companies under federal statutory law, or the comparative frequency of interpretive settlement on analogous topics of public and private law. Either way, Hartian jurisprudence allows for the prospect that secondary rules and structures may exist whether or not in the form of traditional courts.

B. International Law

Hart himself was notably equivocal about the relevance of his model to international law. On one hand, Hart was little persuaded that the standard critique of international law—*i.e.*, its lack of effective sanctions for violation—sufficed to render international law (as realist international relations theorists had it) not “law.”¹⁰⁶ Even granting, for example, that the U.N. Security Council could not effectively impose sanctions against veto-bearing members for violations of Chapter VII's prohibition of aggressive war, the Charter's primary rule against the use of force was nonetheless “thought and spoken of as obligatory,” and carried significant pressure for conformity.¹⁰⁷ Indeed, in Hart's view, international law prohibitions on violence did not need sanctions to be effective in the same way primary rules against violence domestically required, for the risks and costs of war carried ample “natural deterrents” not otherwise present domestically.¹⁰⁸ International law was certainly “law.”

Hart's hesitation was rather over whether it could be persuasively demonstrated that international law was part of a mature legal system—that it had secondary rules and processes of change and adjudication (like those that could be applied by institutions like legislatures and courts), and a secondary rule of recognition specifying how its sources and rules were identified.¹⁰⁹ Treaties could not really be analogized to legislation, Hart suggested, since international law, unlike domestic law, would still recognize the validity of agreements extorted by violence.¹¹⁰ The International Court of Justice (ICJ), while boasting a high rate of compliance with its decisions overall, was for most states not really a court of compulsory jurisdiction; a state is only subject to its judgments so long as the state consents.¹¹¹ And there was still no unifying rule of recognition, no settled-upon way to identify what counted as “law” or not. What remained was to imagine that

¹⁰⁶ MORGENTHAU, *supra* note 67, at 285.

¹⁰⁷ HART, *supra* note 25, at 220.

¹⁰⁸ *Id.* at 219.

¹⁰⁹ *Id.* at 214; see also Goldsmith & Levinson, *supra* note 70, at 1801–02 (embracing the view that that international law suffers from a lack of secondary rules and structures); Koh, *supra* note 28, at 2616 (attributing to Hart the view that international law lacks features “central to the very concept of law”).

¹¹⁰ HART, *supra* note 255, at 232.

¹¹¹ *Id.* at 233.

international law was “at present in a state of transition towards” developing rules and structures that would make it more like a mature legal system over time.¹¹²

Nearly sixty years since *The Concept of Law* appeared, it is perhaps unsurprising to find that many of the particular examples Hart highlighted in 1961, to illustrate the ways in which international law lacks the secondary rules and structures required of a functioning legal system, are today outdated. While Hart wrote, for instance, of the absence of an international law “rule of recognition” by which uncertainty about the existence of a primary rule might be settled, as it concerned treaties, that absence was surely filled in some substantial measure by the Vienna Convention on the Law of Treaties, which opened for signature in 1969 and entered into force in 1980.¹¹³ Today, the great majority of states has ratified or at least signed the Convention, which, *inter alia*, defines the kind of agreements that count as treaties and how those agreements may be authenticated.¹¹⁴ The same multilateral Vienna Convention makes clear (*contra* Hart) that agreements entered into by coercion (by the threat or use of force) today are void and without any legal effect.¹¹⁵ And for the many treaties entered into voluntarily and ratified universally—characteristics that describe both the UN Charter (containing the rule prohibiting wars of aggression) and the four primary Geneva Conventions (regulating the use of force in war)—not even Hart would likely resist the analogy to legal change by a secondary process (for better or worse) akin to legislation.¹¹⁶

Such significant changes aside, Hart was, if anything, more concerned in this context about the absence of an international court of compulsory jurisdiction¹¹⁷—an institution he takes to be an essential mechanism to make “authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.”¹¹⁸ Indeed, it is still true that the singular court Hart discussed, the ICJ, may assert jurisdiction only over state parties, and only to the

¹¹² *Id.* at 236.

¹¹³ See Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331; see also Goldsmith & Levinson, *supra* note 70, at 1805 (noting that “the secondary rules for treaty-making are relatively well-settled, and there is much less disagreement over what counts as a treaty.”).

¹¹⁴ There are a host of interpretive debates about the application of particular provisions of the Geneva Conventions and associated protocols. See, e.g., INT’L COMM. RED CROSS INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) (discussing debate surrounding conduct sufficient to establish “direct” participation in hostilities within the meaning of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3). Whether or not the treaties themselves are part of binding international law is not one of them.

¹¹⁵ Vienna Convention, *supra* note 113, arts. 51–52.

¹¹⁶ HART, *supra* note 25, at 232 (distinguishing international law from municipal legislation on the grounds that international law recognizes the validity of agreements extorted by coercion); *id.* at 236 (noting that multilateral treaties, universally binding, “would in fact be legislative enactments and international law would have distinct criteria of validity for its rules).

¹¹⁷ *Id.* at 232–33.

¹¹⁸ *Id.* at 96.

extent they consent to the exercise of its authority.¹¹⁹ Yet here, too, the situation today is hardly the same as it was in 1961. Most obvious, the ICJ is far from the only international court in operation: various international and regional courts of specialized subject matter or geographical jurisdiction are empowered by multilateral treaty to issue authoritative decisions on particular questions of violation.¹²⁰ At a minimum, then, the availability of authoritative, formal international adjudication of interpretive disputes (or not) must be assessed at the retail level, that is, with reference to particular disputes involving particular questions of substantive law.

But even where compliance scholars might acknowledge the availability of such settlement in some realms of international law, the absence of an international court of compulsory jurisdiction in other subject matter fields continues to provide fodder for the animating puzzle in compliance literature: how to explain state compliance in the absence of unitary, international authorities, including a compulsory court.¹²¹ Here, it becomes necessary to move beyond Hart's particular examples and show how modern practice helps demonstrate the falsity of the expectation that a singular court of compulsory jurisdiction is the only effective way to achieve settlement in the identification and application of law. Hart certainly posited that rules of recognition would commonly be found in an authoritative text, or the opinions of a singular institution with the power to interpret it. He likewise recognized that "authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken" would commonly be provided by a conventional court.¹²² But neither Hart himself nor his concept of law *requires* that the systemic function of recognition and settlement be served *only* by such structures.

As legal scholars have long pointed out, formal domestic legal structures regularly struggle and fail to adjudicate, on the merits, violations of even some of their most important primary rules, most especially in the realm of public law.¹²³ In this respect, it should seem unremarkable to imagine that alternative structures—whether or not courts, whether or not "of compulsory jurisdiction," and indeed whether or not international—would develop to provide settlement of legal meaning to accomplish a functionally equivalent effect, that is, to render primary rules at least effectively constraining on state governments bound by them. Indeed,

¹¹⁹ Statute of the International Court of Justice, art. 36, Apr. 18, 1946, 33 U.N.T.S. 993.36.

¹²⁰ *See, e.g.*, European Convention on Human Rights, arts. 19–51, Apr. 11, 1950, 213 U.N.T.S. 2889 (establishing European Court of Human Rights); Rome Statute of the International Criminal Court, arts. 5–15, July 17, 1998, 2187, U.N.T.S. 38544 (establishing International Criminal Court's jurisdiction).

¹²¹ SIMMONS, *supra* note 48, at 114 (noting the puzzle created in international law by the absence of, *inter alia*, an "international tribunal broadly accepted as a legitimate interpreter of legal obligations").

¹²² HART, *supra* note 255, at 96.

¹²³ *See* Goldsmith & Levinson, *supra* note 70, at 1808–16 (2009); Spiro, *supra* note 24, at 452 n.16; Whytock, *supra* note 32, at 164–66.

both through domestic legal systems, and through formal and informal structures internationally, it has become evident how international legal meaning even in fields without a singular court of compulsory jurisdiction might achieve at least as much settlement as we might expect to observe in any ordinary context of municipal law. Instances of what one might call distributed settlement abound in both domestic and international legal systems.

In the domestic courts, consider the U.S. courts' engagement with the Geneva Conventions and their application to U.S. military operations in Afghanistan after the attacks of September 11, 2001.¹²⁴ A dispute famously arose about the application of Article 3 of the Geneva Conventions when Salim Hamdan, detained by U.S. forces in Afghanistan, faced a U.S. military commission prosecution for offenses against the law of war, allegedly committed as the driver for Al Qaeda leader Osama bin Laden. The Geneva Conventions by their terms apply to two situations: "armed conflicts" identified in Article 2 that "arise between two or more of the [state] Parties," (commonly called international armed conflicts, or "IACs"), and "armed conflicts" identified in Article 3 that are "not of an international character occurring in the territory of one of the [state] Parties" (often called non-international armed conflicts or "NIACs").¹²⁵ Article 3, common to all four Geneva Conventions, sets forth a set of important rules to be followed in "armed conflicts not of an international character," including prohibitions against "cruel treatment and torture," and the requirement that all criminal sentences be "pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."¹²⁶

Hamdan challenged the legality of the commissions in federal court for, among other things, violating the Article 3 requirement that sentences be pronounced by "regularly constituted courts." The Bush Administration responded to this claim with its view that the Geneva Conventions did not by law apply to U.S. military operations against Al Qaeda; the U.S. conflict with Al Qaeda was governed neither by Article 2 (it was not a conflict between states, as Al Qaeda was not a state), nor by Article 3 (for because U.S. military operations against Al Qaeda were transnational in scope, the conflict could not be considered a conflict "not of an international character").¹²⁷

The question of the effect of Article 3 in Hamdan's case was litigated through the U.S. domestic legal system and resolved by the U.S. Supreme Court. Relying on the text of the treaties, interpretive commentaries by the International Committee of the Red Cross, and prior decisions of the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY) (a court created by U.N.

¹²⁴ Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 [hereinafter Geneva III].

¹²⁵ Geneva III, *supra* note 124, arts. 2–3.

¹²⁶ Geneva III, *supra* note 124, art. 3.

¹²⁷ Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

Security Council Resolution in 1993), the U.S. Court held that the Article 3 phrase “conflict not of an international character” did indeed apply to the conflict in which Hamdan was captured in Afghanistan. The Court explained that a conflict “not of an international character” was “distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations.” So long as the non-state party was involved in a conflict “in the territory of” a state party to the Conventions, Article 3 must be understood to apply.¹²⁸

Following the Court’s ruling, the U.S. government suspended the operation of military commission trials, and the commission rules were revised by Congress with a set of rules affording defendants a greater array of “judicial guarantees” of procedural fairness. Indeed, within a week of the *Hamdan* decision, the Deputy Secretary of Defense issued an order directing the review of “all relevant directives, regulations, policies, practices and procedures . . . to ensure they comply with the standards of Common Article 3.” Within eight weeks, the President announced publicly that all detainees held by the United States (detainees the government had previously viewed as not legally entitled to Geneva protection) would receive the protections Common Article 3 required.¹²⁹

How are we to evaluate this example as evidence that it may be possible for a domestic, not international, court to achieve an authoritative settlement of the import of international law? If one were hoping for an internationally authoritative judgment issued by a supranational sovereign, *Hamdan* is not it. *Hamdan* of course purports to bind only the government of the United States (and even there, only by “consent,” for the Supreme Court itself lacks any army to enforce its judgments against the President). It has not settled the meaning and application of Article 3 for all states, in all settings, for all time.

Yet it is not immediately apparent why supranational adjudication should be required for meaningful settlement in such a setting. As Hart recognized, adjudicative judgments would be by their nature imperfect, for “judgments may not be couched in general terms and their use as authoritative guides to the rules depends on a somewhat shaky inference from particular decisions.”¹³⁰ No adjudicative judgment from any court with jurisdiction of any scope can conclusively or universally settle all questions of legal meaning. *Hamdan* presented a question about the application of international law in a context that involved no disagreement—no need for coordination or authoritative settlement—*between states*. Rules of adjudication are required only insofar as needed to remedy “inefficiencies” in the way in which the social pressure of law is implemented; adjudication is only necessary for the purpose of establishing whether, “on a particular occasion, a primary rule has been broken.”¹³¹ What would seem to matter far more in Hart’s terms is that here, there can be little question that from an internal

¹²⁸ *Id.*

¹²⁹ See GOLDSMITH, *supra* note 144, at 180–81.

¹³⁰ HART, *supra* note 255, at 97.

¹³¹ HART, *supra* note 255, at 96.

perspective—that is, from the perspective of the U.S. President, the Secretary of Defense, and other U.S. government agencies and officials to whom the *Hamdan* decision was directed—the U.S. Supreme Court’s ruling was an amply authoritative settlement of an interpretive dispute about the import of international law in a particular case of alleged violation. If the object of a primary international law rule is to compel (or restrict) action by a state official decision maker or set of decision makers, then it may be that all the adjudicative settlement required is that which suffices to persuade that decision maker that the law is authoritatively settled for his state.

Perhaps a greater problem for the significance of the *Hamdan* example is the suspicion that, while it has the effect of constraining the behavior of the particular state over which it has binding jurisdiction, *Hamdan* (or comparable judgments by other courts of limited jurisdiction) provides no *international* settlement of meaning—that while the law is settled enough to compel compliance by the state in which the matter arose, domestic courts of other states might well come to different conclusions about the meaning and application of Article 3, or lack mature systems of adjudication entirely. And when a dispute arises surrounding the law of armed conflict that *does* involve a disagreement among states, *Hamdan* will serve no more purpose than to demonstrate a single state’s view of the meaning and effect of Article 3.

Yet contemporary practice also offers examples suggesting that even courts of limited jurisdiction may, through cumulative judgments over time, have the same effect of achieving settlement in international meaning. Take, for example, the remarkable inter-jurisdictional penetration of a decision by the special criminal tribunal created for the former Yugoslavia (the ICTY) on the subject of what counts as a “non-international armed conflict” (NIAC) triggering the application of the Geneva Conventions’ Common Article 3. The ICTY’s *Tadić* test defining what counts as a NIAC (a war involving at least one non-state actor) has been subsequently embraced by, among others, the International Criminal Court, the European Court of Justice, and the U.S. federal courts.¹³² *Tadić* is likewise recognized by the International Committee of the Red Cross (ICRC) as the controlling test, and *Tadić* is cited by multiple states in official defense department

¹³² See, e.g., Prosecutor v. Haradinaj et al., Case No. T-04-84-A, ¶ 60 (Int’l Crim. Trib. For the Former Yugoslavia July 19, 2010 (offering a detailed list of criteria to determine intensity, including metrics of death, damage, and social upheaval); INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶¶ 492–95 (2d ed. 2016); Rome Stat. of the Int’l Crim. Ct. arts. 8(2)(d), 8(2)(f), July 1, 2002, 2187 U.N.T.S. 90; Prosecutor v. Germain Katanga, No. ICC-01/04-01/07, ¶ 381 (Sept. 30, 2008); Case C-285/12, Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides, 2014 E.C.R. 39; United States v. Hamdan, 801 F. Supp. 2d 1247, 1278 & n. 54 (U.S. Ct. Mil. Comm’n Rev. 2011) (en banc), *rev’d*, Hamdan II, 696 F.3d 1238 (D.C. Cir. 2012), *overruled on other grounds* by Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014).

law of war manuals (including the United States') as the relevant principle of law.¹³³

Even acknowledging the absence, at least in the most general terms, of a singular, authoritative global executive or judicial decision maker for all law-of-war purposes, the inter-jurisdictional acceptance of *Tadić* demonstrates how a distributed network of legal decision makers, each authoritative in its own jurisdiction, may have the same effect. The same phenomenon is apparent in U.S. domestic law, where countless constitutional decisions are reached in lower federal and state courts, and by legislatures and executive branch actors at the federal and state levels every day; such decision makers must draft, apply, and enforce constitutional and international law rules as a matter of course under circumstances no singular court will ever review.¹³⁴ It may not be an ideal legal system in some abstract sense. Neither can it be said to produce uniform settlement of all legal disputes. But it is not broadly possible to distinguish the NIAC standard, or indeed many parts of international law, from our domestic legal system in this respect.

Such phenomena may themselves be assessable only in retail fashion (depending on the particular question of international law). And for each such instance, scholars can point to a contrary example supporting the notion of irremediable uncertainty in the meaning and application of various aspects of international law, in the absence of a singular global court or police force. Jack Goldsmith and Daryl Levinson, for instance, point to NATO's 1999 air bombing campaign in Kosovo (undertaken without U.N. Security Council authorization), noting that states and scholars have debated ever since whether there is now a developing customary international law exception for humanitarian intervention to the otherwise-applicable requirement of Article 2(4) of the U.N. Charter that a state use force against another state only with such authorization (or in apparent self-defense).¹³⁵ The Kosovo example is perhaps not as useful as might appear for purposes of illustrating the uncertainty of meaning surrounding a treaty text, for there was vast agreement that the intervention, when undertaken, was "illegal" (a point so apparently uncontested that even Goldsmith and Levinson describe the campaign as "in violation of" Article 2 without need of elaboration).¹³⁶ But a better

¹³³ YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES, BELOW THE THRESHOLD: THE LAW GOVERNING THE USE OF FORCE AGAINST NON-STATE ACTORS IN THE ABSENCE OF A NON-INTERNATIONAL ARMED CONFLICT 3-4 (2015), https://law.yale.edu/system/files/yls_glc_below_the_niac_threshold_2015.pdf [<https://perma.cc/K3YU-XADM>] (citing military manuals of the United States, United Kingdom, France and Germany).

¹³⁴ See Goldsmith & Levinson, *supra* note 70, at 1808-16.

¹³⁵ *Id.* at 1805.

¹³⁶ See, e.g., INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000) (concluding the NATO intervention had been "illegal but legitimate"). There seems equally little dispute about the illegality of Saddam Hussein's 1991 invasion of Kuwait (condemned by the UN Security Council), or even Russia's 2014 invasion of Ukraine (which Russia itself defends not on the grounds that any such invasion would be lawful under Article 2, but rather on the grounds that its accusers have mischaracterized or misunderstood the facts).

example of unsettled law in this realm is not hard to find: the legality of the United States' 2003 invasion of Iraq, which the United States controversially maintained was authorized by existing U.N. Security Council Resolution, an interpretation much of the rest of the world rejected in more or less express terms. One might equally cite the increasingly urgent question whether a particular cyberattack might count as a "use of force" within the meaning of Article 2 of the U.N. Charter, or whether the existence of a "continuing imminent threat" might justify invocation of the "inherent right of self-defense" under Article 51. Indeed, interpretive disputes about particular alleged violations in this realm—what in U.S. law are often called "open questions"—abound.

Hart's framework is especially important in evaluating the significance of such examples. For Hart's approach to such questions was necessarily relative—that is, if one's interest in "international law" is to understand the relative maturity or effectiveness of a legal system, such maturity could only be judged with reference to a developed domestic counterpart. Here, it is far from apparent that the absence of authoritative settlement of actions implicating Article 2(4) is any more common in the international setting than it is in domestic law. The failure of the U.S. legal system to provide authoritative adjudicative settlement (or its functional equivalent) of disputes surrounding the U.S. statutory Authorization for Use of Military Force, for example, or the U.S. Constitution's Declare War or Commander-in-Chief Clauses is well known. Happily, the comparative frequency of interpretive settlement (of one form or another) on analogous topics of domestic and international public law begins to sound like just the kind of question one might be able to shed more light on—by examining the matter empirically.

III. An Empirical Path Forward

Where it is possible and necessary to distinguish between primary rules and secondary systems,¹³⁷ the results of an empirical study attempting to shed light on the vitality of a primary obligation or a secondary system by looking at compliance alone are either indeterminate or circular. To the extent the empiricist who asks "does law constrain?" is interested in understanding whether an official *feels* constrained to behave a particular way, findings of compliance (without more) produce circular results about the role of law as such in shaping that feeling. Does the official feel obliged to behave in a certain way because of law, or does the

¹³⁷ While such distinctions are likely second nature among contemporary lawyers, until quite recently, the political science literature in this realm generally treated substantive rules of international law (like rules of conduct contained in treaties) and secondary structures (organizations like international courts) as largely interchangeable units of analysis—all "legal institutions," unmodified. See Hafner-Burton et al., *supra* note 26, at 48 ("[O]ften political science scholarship has not clearly distinguished the roles of customary international law, formal legal agreements such as treaties, and organizations such as tribunals. Instead, these phenomena are treated as a loosely defined amalgam of 'legal institutions.'"). The extent to which that semantic habit pervaded the literature remained visible as political scientists developed empirical studies of international legal constraint. See, e.g., Morrow, *supra* note 42, at 560 ("Realists give pride of place to calculations of power and interest and believe that such calculations are rarely affected by international institutions, such as international law.").

existence (or emergence) of a law reflect some other, extra-legal sense of obligation? To the extent the empiricist who asks “does law constrain?” is interested in the impact (or absence) of secondary rules and structures—the effectiveness of mechanisms for dealing with uncertainty in meaning or law’s putative violation—compliance is indeterminate. If an executive has complied, is this an indication of the extent to which officials share a social acceptance of the sense of a primary obligation, or of the existence of more robust secondary rules of recognition or adjudication than otherwise understood, or one or more of both?

Indeed, even if compliance studies are refined to distinguish more carefully between primary rules and secondary processes, Hart’s jurisprudence points to a more profound problem for the hope that behavioral outcomes alone can tell us something meaningful about the role of legal beliefs or processes in influencing decisions. Scholars across disciplines have long struggled with the problem of distinguishing law and (for example) politics at the level of theory, a problem all the more difficult at the level of human behavior, perhaps especially so in this realm.¹³⁸ Hartian jurisprudence helps navigate that dilemma. Hart recognized that it is neither at times possible to establish a singular causal basis for human behavior, nor is it a necessary measure of the maturity of a legal system to show such a cause.¹³⁹ Where legal uncertainty and periodic law violation are standard features of any system, what distinguishes a mature legal system is not compliance *because* of law, but rather the existence of a sense of obligation felt *for whatever reason* by public officials to both primary rules and secondary processes within which law is made and applied—processes officials must regard as “common standards of official behavior and appraise critically their own and each other’s deviations as lapses.”¹⁴⁰

Hart’s model in this regard should seem especially apt in the context of executive branch decision-making. As more journalistic or qualitative accounts of executive decision-making have suggested, decisions involving the use of force regularly turn on multiple, often causally intertwined considerations negotiated among a group of (themselves individually conflicted) decision makers.¹⁴¹ The prospect of isolating any one causal factor in this context seems especially ill-fated. More, just as we can readily name common circumstances in which well-developed rule-of-law societies forgive even manifest law violation—think of the driver who exceeds the speed limit to get an ill passenger to a hospital—so, too, we might imagine extraordinary circumstances that lead executive officials to view law violation as the lesser breach of social obligation.¹⁴² Just as letting the speeding

¹³⁸ See Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 782–83 (2012); Bradley & Morrison, *Presidential Power*, *supra* note 54, at 1122–24.

¹³⁹ Because many laws “prohibit people from doing things which many of them would never think of doing,” what defines law as law is not fear of sanction, but the sense of an especially strong social obligation “from any motive whatever.” HART, *supra* note 25, at 51.

¹⁴⁰ HART, *supra* note 25, at 116–17.

¹⁴¹ See, e.g., BEN RHODES, *THE WORLD AS IT IS* 226–37 (2018); see also CHAYES, *supra* note 22, at 28–40 (examining the role of international law in shaping executive decision-making in crisis).

¹⁴² See, e.g., CHAYES, *supra* note 23, at 31–33.

driver off with a warning does not lead us to question the possibility that traffic laws either describe or affect some form of constraint, certain instances of non-compliant behavior may be less evidence of inoperative constraint, as of a rational balancing of anticipated consequences, including the knowing violation of law.

How, then, might Hart propose we measure the effect of law on decisions regarding the use of force? In the first instance, he would surely insist the empiricist distinguish in her inquiry between the perception of a particular sense of obligation, and the assessment of any, or any effective, secondary systems that might cure legal indeterminacy or settle questions of law violation. The shape of the inquiry flows from there. To test the vitality of a putative legal rule prohibiting, say, the President from introducing ground combat troops into major hostilities without congressional authorization, an empiricist would first assess individual officials' sense of the existence of an obligation not to introduce ground troops without Congress' permission. Here, the empiricist's question is not, importantly, whether an individual official is aware of the legally binding effect of, say, the Declare War Clause of Article I of the Constitution, but rather whether the individual feels a sense that they *ought for whatever reason* not to engage in (or recommend) the conduct our asserted primary rule proscribes. Likewise, to test for the likely effectiveness of any primary rule prohibiting, for instance, the deliberate targeting of civilians, Hart would presumably want to assess the individual officials' sense of an obligation not to target civilians. Again here, the empiricist's question is not whether an individual official is aware of the legally binding effect of, say, Article 51 of Additional Protocol I,¹⁴³ but rather whether the individual feels a sense of obligation for whatever reason not to engage in the conduct Article 51 proscribes.

To test for the maturity of a legal system surrounding either rule, the empiricist would begin by examining whether public officials recognize a framework of secondary rules within which law about the scope of executive power is interpreted and applied—whether officials recognize “common standards of official behavior” for the management of law, deviation from which is recognized as a lapse.¹⁴⁴ In contemplating a course of action, do officials accept and use a common method for identifying a legal rule? Do officials seek to engage or rely on elements of such a structure? Do they recognize failure to adhere to the legal process as a breach? Here, the empiricist's question is not, importantly, about official recognition of particular secondary processes the Constitution intended, or processes that seem compelled as a matter of some independent interpretive judgment about the meaning of the operative law, but rather what official decision makers identify and understand those processes in this context to be.

¹⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 (“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”).

¹⁴⁴ HART, *supra* note 25, at 117.

It may be helpful to make the foregoing more concrete by considering the effect of such a shift in methodology on a commonly discussed example—one that goes to the core of the President’s power to use force.¹⁴⁵ Consider President Obama’s initial military intervention in Libya in 2011, undertaken without prior congressional authorization.¹⁴⁶ How would one evaluate this example as evidence or not of law’s role in decision-making? A conventional answer readily categorizes this instance as evidence that “legal checks on unilateral uses of military force are weak at best,”¹⁴⁷ for prior congressional authorization (unmodified) is the presumptive constitutional rule, and the President’s behavior is in this respect manifestly non-compliant. (The conventional answer, likewise, perfectly blurs whether the “weakness” of “legal checks” is in the officials’ lack of internalized acceptance of the substantive rule requiring congressional authorization, or in some inadequacy associated with the process for interpreting and applying it, or both.)

A Hartian empiricist attempting to understand what a Libya-type case tells us about the vitality of constraints in the legal system would resist resting any conclusion on the finding of non-compliance alone. For what if the decision maker understood, even if erroneously, the use of force in that instance to be in accord with legal obligations? What if the decision maker in that instance felt an obligation to go to Congress, and understood the law to require as much, but felt an even stronger obligation (for moral or other reasons) to act in contravention of his legal obligation in this particular case? One might find the decision to bomb Libya under such circumstances problematic for a variety of reasons, but it would be inaccurate to conclude that the decision maker’s action reflected the weakness of law’s “constraint” *per se*. Instead, a Hartian empiricist would explore the extent to which executive branch decision makers perceived an obligation to go to Congress under the circumstances Libya presented.¹⁴⁸ An empiricist would then separately examine the extent to which executive branch decision makers recognized a shared process for resolving whether their sense of an obligation aligned with what the law required or not.

In the Libya example, the contemporaneous opinion prepared by OLC on the constitutionality of the intervention, which may be taken as at best an imperfect indicator of executive branch *lawyers’* sense of the primary constitutional obligation, suggests the existence of a sense of obligation, but to a different

¹⁴⁵ One might equally usefully apply this analysis to the Bush Administration’s decision to use force in Iraq in 2003, notwithstanding deep concerns about the existence of UN Security Council Authorization under the UN Charter’s Article II.

¹⁴⁶ See, e.g., Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <https://www.nytimes.com/2011/06/21/opinion/21Ackerman.html> [<https://perma.cc/7ANU-VMH4>].

¹⁴⁷ GOLDSMITH, *supra* note 14, at 182.

¹⁴⁸ To assess the existence of a sense of an obligation, an empirical study might usefully posit a graduated array of hypothetical scenarios to test different formulations of potential constitutional obligations, adjusting individual variables to test the salience of the nature of the cause, the degree of force contemplated, the risk of escalation anticipated, etc.

substantive primary rule than prior congressional authorization in all cases. As OLC had it:

[T]he President’s legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President’s action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in ‘nature, scope, and duration’ to constitute a ‘war’ requiring prior specific congressional approval under the Declaration of War Clause.¹⁴⁹

From the perspective of the operative decision makers, the course embarked upon in Libya was quite plausibly consistent with OLC’s opinion. In this regard, Libya may be better described not so much as an example of the failure of legal constraint as a whole, but rather as evidence that the sense of primary obligation officials recognize is not as restrictive an obligation as some conventional scholars assume. Indeed, this assessment puts Libya in substantially the same category as conventional analysis puts the same President’s later decision—classically puzzling to Austinians—to refrain from using force in Syria in 2013 (following its use of chemical weapons) absent congressional authorization.¹⁵⁰

By the same token, one might conclude that the Libya case should be coded as an example supporting the existence of systemic maturity of secondary interpretive structures, for the President’s decision to seek the written guidance of the OLC might appear to evince the acceptance by public officials of a framework of secondary rules and structures within which the legal rule is recognized and/or authoritatively settled (a structure involving the OLC and its opinions’ typically precedential effect). It is certainly true that qualitative accounts—commonly offered by executive branch lawyers themselves—describe OLC as the institutional actor responsible for providing interpretive settlement of the interpretation and application of constitutional law.¹⁵¹ Whether official decision makers other than lawyers understand OLC as providing authoritative settlement of constitutional questions in this context is a hypothesis well worth testing. Indeed, President Obama’s reported decision several months after the initial attack on Libya to override or circumvent a subsequent OLC opinion might be more likely coded as an example tending to support the opposite conclusion, at least for statutory interpretation. This action suggests less than invariable acceptance of OLC views

¹⁴⁹ See Krass OLC Memorandum, *supra* note 33, at 10; accord Jack Goldsmith, *The Campaign Against Libya Is Constitutional*, SLATE (Mar. 21, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/03/war_power.html [https://perma.cc/8JFX-ZTT5].

¹⁵⁰ See, e.g., BEN RHODES, *THE WORLD AS IT IS* 226–37 (2018) (describing Obama’s decision to seek congressional authorization before using military force against Syria for crossing the chemical weapon “red line” the President had earlier identified).

¹⁵¹ See, e.g., Morrison, *Stare Decisis*, *supra* note 51, at 1456.

as part of a framework through which law is authoritatively interpreted, or legal meaning settled.¹⁵² One might thus usefully ask not only whether officials share the perception of OLC's role, but also whether OLC is an actor from which they themselves regularly seek guidance, and, perhaps above all, whether officials who seek OLC (or other legal) guidance do so under circumstances in which OLC's answer is not certain in advance.

A more comprehensive study of the perception of legal obligations among executive branch officials might well produce different results on the vitality of constitutional constraint than would a study on the comparative effectiveness of one or another mechanism for settlement. A sense of (some) obligation might be well engrained, but a secondary process of settlement less so. Or vice versa. Either result produces useful information about the independent maturity of both aspects of the legal system. But the Libya decisions just canvassed must be recognized as only singular examples in isolation. A survey capable of taking into account a broader set of examples, hypothetical or otherwise, would tell us more.

While it may seem daunting to imagine operationalizing such a study that explores decision-making beyond one or two specific case examples, it may be worth a final few words here to sketch a practical design. Consider, for example, a survey of a bipartisan population of senior national security policy advisers with service in one or more U.S. presidential administrations within a historically confined period. The survey might test confined hypotheses related to primary obligations to seek congressional and/or U.N. Security Council authorization to use force, through, for example, closed form questions involving a series of hypothetical situations, changing one element in the hypothetical in each successive question to illuminate the particular factors respondents believe relevant to their sense of obligation. A separate set of questions could explore the availability of commonly accepted secondary processes inside the executive branch for resolving these rules' application, examining when, why, how and from which institutional office or structure they typically sought legal advice or guidance in the course of their decision-making regarding the use of force. Such process questions avoid assuming the role of one legal office or another; they equally permit examining the extent to which officials pursued and/or acted on legal guidance even when they assessed the answer to their question might be uncertain.

Survey subjects could be recruited from among former federal employees likely to have been involved to some extent in executive branch decision-making regarding the potential or actual use of U.S. military force abroad (where "involvement" includes conducting research; preparing memos, talking points, or other written materials; participating in meetings, making recommendations, or taking decisions regarding the use of military force). U.S. government manuals make publicly available, for instance, listings of the individuals who served on the

¹⁵² See Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html> [https://perma.cc/4A4Q-M5CP].

U.S. National Security Council (NSC) Principals and Deputies Committees, defined, by statute and presidential directive, as the “principal forum for consideration of national security policy issues requiring presidential determination.”¹⁵³ Subjects could likewise be recruited from a collection of sub-Deputy-level former officials who served during this period in senior NSC staff or NSC-relevant agency positions and are likely (based on statutory and/or administrative rules establishing their position) to have participated in use-of-force decision-making.¹⁵⁴ And to help compensate for the likelihood that certain officials may have great practical influence on use-of-force decision-making but carry formal titles that do not necessarily reflect that influence (or whose role is otherwise not publicly known), appropriate subjects could further be identified through referrals and credible popular sources. At the same time, the survey population could exclude those whose functions give them sets of political or professional interests that may skew study results—such as those currently serving in the U.S. government, and individuals whose primary title and/or official function was to serve as legal counsel.

To be clear, while a variety of methods might help ensure the survey pool features a reasonably representative sample of the target population—across political party, for example—it cannot be expected to produce much in the way of statistically significant results. The total pool of potential recruits is likely to number no more than 200 or so individuals, and while snowball sampling is likely

¹⁵³ PRESIDENTIAL POLICY DIRECTIVE, PPD-1, ORGANIZATION OF THE NATIONAL SECURITY COUNCIL SYSTEM (Feb. 13, 2009), <https://fas.org/irp/offdocs/ppd/ppd-1.pdf> [<https://perma.cc/VL8Z-BAKD>] [hereinafter PPD-1]. By statute and directive in each presidential administration, the NSC Principals Committee is established as the principal forum for consideration of national security policy issues requiring presidential determination. The NSC Deputies Committee is likewise charged with helping to ensure that issues being brought before the NSC have been properly analyzed and prepared for decision. While the membership of the NSC Principals and Deputies Committees varies by presidential administration (each President retains discretion to vary membership to some extent), the Principals Committee in the Obama Administration included, for example, such officials as the National Security Adviser, the Secretaries of the Departments of State, Defense, Energy, the Treasury, and Homeland Security of State, as well as the Attorney General, the Director of the Office of Management and Budget, the Representative of the United States to the United Nations, the Chief of Staff to the President, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. Officials such as the Deputy National Security Adviser, the Deputy Secretary of State, and the Assistant to the Vice President for National Security Affairs were also invited to NSC meetings as regular attendees. The Deputies Committee comprised deputies to each of these officials, as well as on occasion such officials as the Assistant to the Vice President for National Security Affairs, and the Assistant to the President for Homeland Security and Counter-Terrorism.

¹⁵⁴ For example, both administrations during this period used working group interagency committees (called Interagency Policy Committees (IPCs) during the Obama Administration, and Policy Coordination Committees (PCCs) during the George W. Bush Administration). In each administration, IPCs/PCCs were constituted by presidential directive and on an ad hoc basis—organized around both regional and thematic topics—to manage the development and implementation of national security policies, providing the “main day-to-day fora for interagency coordination of national security policy.” See PPD-1, *supra* note 153. IPCs/PCCs were generally charged with providing policy analysis for consideration by the Principals and Deputies Committees of the NSC, and to help ensure timely responses to decisions made by the President.

to be essential to ensure a reasonable response rate, the elite nature of the population suggests it would be surprising to yield a total response set of a quarter of this size. At the same time, a qualitative inquiry into the role law plays in decision-making about the use of force might produce a wealth of insights worth examining. In the centuries-long history of consideration about whether and why state policy makers might consult the law before going to war, it has been remarkably difficult to unearth the results of one inquiry that embraces as its methodology asking subjects directly. For now, the point here is not to answer the question of constraint. It is rather to urge that meaningful empirical understanding of whether public law constrains executive branch decision-making requires a far more granular assessment of laws and legal systems, of individual beliefs and official processes, than is possible to achieve by knowing what, in the end, presidents do.

Conclusion

With a view to identifying a more satisfying methodological approach to evaluating legal constraint, this Article suggests that law compliance—evidence that a particular actor chose to undertake or forbear from conduct that, but for a legal requirement or prohibition, they would not otherwise have done—is an insufficiently meaningful metric for assessing the influence of public law on official decision-making surrounding the use of force. While Hart long ago refuted the notion that law was simply a set of sanction-based commands, his insight seems to have been lost in contemporary studies of law’s effect on decision makers regarding the use of force. Understanding whether and how law influences decision-making even at the outer limits of executive power requires looking less at decision-making outcomes, and more at the way in which law informs the beliefs and shapes the environment in which officials arrive at their decision.

The dramatic period of international activity involving the use of force in the nearly two decades since the attacks of September 2001 has produced a raft of new empirical studies, in law and political science, aiming to understand whether, when, and why state officials are constrained by law governing the use of armed force. Accounts of U.S. government behavior in particular have featured radically different assessments of the same empirical record—from a government untethered by legal constraint, to one radically inhibited by law. While there should be little doubt by now that empirical inquiry can shed light on what guides state behavior, crafting an empirical study that can disentangle these conflicting perspectives requires a clearer conception of what legal constraint really means. Jurisprudential developments of the past half-century have shed substantial light on this question, offering insights into law’s meaning and function that apply with increasing utility to aspects of both constitutional and international law. Applying these insights suggests it is time to move beyond studies of law compliance, to studies that can measure more directly when obligations arise, and how legal systems mature.