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THE THIRD BOUND

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INTRODUCTION

Our topic is the “bounds on executive discretion.” A number of the articles assume, implicitly or explicitly, that there are two principal bounds: law and politics. Yet another subset of the articles—a partly overlapping subset—illustrates, implicitly or explicitly, that there is also a distinct third bound on executive discretion: *conventions*, roughly understood as unwritten but obligatory rules of the political game.<sup>1</sup>

I will argue that conventions pervasively shape and constrain executive discretion and are an indispensable tool for understanding the issues discussed in the articles. Debates among legal academics over executive

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<sup>1</sup> For a more precise definition and analysis of conventions, see generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013). I will assume that analysis as background here.

discretion misfire if and when the role of conventions is overlooked or misunderstood. In particular, legal debates over executive discretion should take account of three distinctions: (1) between contingent politics and conventions; (2) between intragovernmental conventions and extragovernmental conventions; and (3) between conventions against *doing* things and conventions against *saying* things. The last distinction, in particular, illuminates the strong resistance, in contexts such as immigration, to executive policy statements that make explicit a pattern of enforcement discretion, one that would otherwise remain implicit. Even holding legal authority constant, making that authority explicit through general policy statements may trigger the normatively inflected political sanctions that are characteristic of conventions.

I do not at all mean to claim that executive-constraining conventions are necessarily desirable from a welfarist standpoint—they may or may not be. Nor do I claim that they cannot be overridden or broken, or anything like that. Conventions have a dimension of weight, often have implicit override conditions, and may be more or less fragile. Indeed, part of the story is that as the political parties have become more polarized over time, a number of intragovernmental conventions resting on reciprocal cooperation have broken down, and the politics of executive action have become both more legalized and more political—in the ordinary convention-independent sense of “political.” But I will claim that the role of conventions cannot safely be neglected in any analysis of executive discretion.

## I. EXAMPLES

Let me begin with some examples of conventions that shape and constrain executive discretion. There are also conventions that shape and constrain the behavior of other branches, and indeed the government as a whole, but I will focus strictly on executive-governing conventions in the United States constitutional order. In parliamentary systems lacking a formal and institutional separation of executive power from other powers, of course, the whole question of categorization would have to be approached differently.

### A. *Removal*

I will begin with some examples of conventions surrounding the removal of executive officials. In the *Free Enterprise Fund* litigation, the Supreme Court and the lower courts treated the Commissioners of the Securities and

Exchange Commission as though they have for-cause tenure.<sup>2</sup> Legally speaking, however, they simply do not. The relevant statutes say nothing about tenure, and thus fail to override the longstanding background default principle that for-cause tenure must be express.<sup>3</sup> There is a limited exception in which the Court has been willing to imply for-cause tenure for administrative officers who are in essence mini-judges exercising purely adjudicative functions,<sup>4</sup> but the SEC does not fit that description. The independence of the Commissioners, in the sense of for-cause tenure, is not based on a statute but on unwritten rules with normative force. As one lower court put it, it is just “commonly understood” that the Commissioners are independent.<sup>5</sup>

Somewhat similarly, there is a powerful convention that Presidents cannot fire the Chair of the Federal Reserve except for serious cause.<sup>6</sup> Here, too, there is no legal rule to that effect, but it is a universally agreed-upon rule of the political game—agreed upon in a tacit sense.<sup>7</sup> The most telling evidence is that when Presidents have attempted to maneuver a Fed Chair out of office, they have proceeded covertly and circumspectly, so as not to outrage public opinion.<sup>8</sup>

In 2007, President George W. Bush failed to renew the terms of seven United States Attorneys, and public opinion rose up in outrage.<sup>9</sup> Bush’s action was indisputably within his legal power; the relevant statutes do not grant United States Attorneys for-cause tenure, and indeed the Court ruled early and clearly that no such tenure exists.<sup>10</sup> Yet a network of conventions that

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2 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). In his response to the symposium articles, Peter Strauss makes the odd remark that “(n)either can the proposition be considered a matter of ‘convention,’ as Professor Vermeule suggests, since Chief Justice Roberts’s opinion *holds* that the PCAOB’s considerable powers are valid”—as though conventions cannot be incorporated into judicial holdings. See Peter L. Strauss, Response, *Things Left Unsaid, Questions Not Asked*, 164 U. PA. L. REV. ONLINE (forthcoming 2016); *infra* Section II.A (discussing the adoption of conventions as law).

3 See Vermeule, *supra* note 1, at 1175, 1195 (noting the convention regarding not firing SEC Commissioners despite the lack of statutory protections).

4 See *Wiener v. United States*, 357 U.S. 349, 356 (1958) (“We have not a removal for cause involving the rectitude of a member of an adjudicatory body, nor even a suspensory removal until the Senate could act upon it by confirming the appointment of a new Commissioner or otherwise dealing with the matter. Judging . . . the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.”).

5 *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988).

6 See Vermeule, *supra* note 1, at 1176-78, 1196-99 (explaining this convention).

7 See *id.* (discussing this convention in further detail).

8 See *id.* at 1198-99 (reviewing Paul Volcker’s departure from the Federal Reserve).

9 *Id.* at 1201.

10 See *id.* (“U.S. Attorneys are appointed for four-year terms, and it is clear that as a strictly legal matter they serve at the pleasure of the President; *Parsons v. United States*, 167 U.S. 324 (1897).] itself

limited presidential control over U.S. Attorneys had grown.<sup>11</sup> As described by Mary Jo White, herself a former U.S. Attorney, the President may replace the whole set *en masse*, at the time of a partisan change of administration, but may not engage in selective replacement during the middle of a presidential term.<sup>12</sup> The rationale for the convention is rather obviously to protect the independence of U.S. Attorneys through a form of herd immunity or safety in numbers, preventing the President from singling out particular prosecutors based on their decisions.<sup>13</sup>

### B. Directive Power

Now let me turn to conventions governing the so-called “directive authority,” raised by Coglianese and Firth in their article.<sup>14</sup> Although the scope and limits of the directive power of the President are among the most contested issues in administrative law,<sup>15</sup> the debates would be greatly improved by the recognition that conventions pervasively shape and constrain that power. The President’s legal powers of direction are substantially greater than his actual discretion to direct, and not only because “politics” is an additional constraint—unless we define politics, unhelpfully, to include conventions. I return to the definitional issues shortly, but let me offer some examples.

There is a clear and powerful convention that restricts presidential direction of agency adjudication, especially in formal proceedings.<sup>16</sup> What makes this convention particularly striking is that it governs even where the department head, herself subject to presidential direction, would otherwise

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involved a federal district attorney, and the Court held that a statutory term of years does not, as a matter of statutory interpretation, immunize the office-holder from at-will discharge by the President.”).

<sup>11</sup> See *id.* at 1201-02 (describing the conventions).

<sup>12</sup> See Julie Scelfo, *Former U.S. Atty. Says Independence Threatened*, NEWSWEEK (Mar. 14, 2007, 8:00 PM), <http://www.newsweek.com/former-us-atty-says-independence-threatened-96115> [https://perma.cc/KYY8-ASDC] (“Essentially, all U.S. attorneys, as political appointees, are expected to be replaced when the party changes. . . . It is an entirely different matter when replacement of the U.S. attorneys are [sic] made during the same administration. . . . [Replacement in the middle of a President’s term,] in my experience and to my knowledge, is quite unprecedented.”).

<sup>13</sup> See Vermeule, *supra* note 1, at 1203 (“The key distinction is between wholesale partisan replacement and retail replacement, a distinction that supporters of the convention justify as preventing Presidents or their underlings from pressuring prosecutors to bring particular, politically charged cases.”).

<sup>14</sup> Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869, 1871 (2016).

<sup>15</sup> See *id.* at 1875-76 (“One side of this debate treats the President’s directive authority as virtually unconstrained, whether as a matter of constitutional law (the unitary executive theory) or as a matter of statutory presumption. . . . The other side of the debate holds that, even absent a specific statutory prohibition, presidential authority over administrators is constrained in that the President cannot make decisions that have been entrusted by Congress to administrators.”).

<sup>16</sup> See Vermeule, *supra* note 1, at 1211-14 (analyzing this convention).

have legal authority to intervene. As Elena Kagan put it, “The only mode of administrative action from which [President] Clinton shrank was adjudication. At no time in his tenure did he attempt publicly to exercise the powers *that a department head possesses over an agency’s on-the-record determinations.*”<sup>17</sup> The convention, then, is definitely a constraint on the directive power of the President as President.

Many executive-branch lawyers have spoken of unwritten conventions protecting the independence of the Office of Legal Counsel (OLC).<sup>18</sup> In the most high-minded version of this account, OLC is supposed to give the President entirely independent legal advice and to act as an impartial legal arbiter in interagency jurisdictional disputes; the President would violate convention by directing OLC to give one opinion or another.<sup>19</sup> There is good reason to think that the high-minded picture is partly aspirational, although there have been important cases in which OLC did actually contradict the President’s wishes.<sup>20</sup> It is not that the conventions are unreal, but they have probably weakened over time, and were always subject to bending or breaking when political pressure became sufficiently great.<sup>21</sup>

In a different example, Michael Livermore and Ricky Revesz discern a tradition of appointing relatively independent voices to the position of Office of Information and Regulatory Affairs (OIRA) Administrator, and opine that the tradition would likely be difficult to break.<sup>22</sup> The cash value of this tradition seems to be that the OIRA Administrator has leeway to make regulatory policy and to apply the cost–benefit framework of relevant executive orders, without fear or favor.<sup>23</sup> Although Livermore and Revesz phrase the “tradition” in terms of appointment, it would seem, *a fortiori*, that replacing an OIRA Administrator on openly political grounds would probably be even more likely to provoke convention-based political sanctions.

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17 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2306 (2001) (emphasis added).

18 See Vermeule, *supra* note 1, at 1209–11 (discussing the conventions pertaining to the OLC).

19 See *id.* at 1209 (describing the supposed role of the OLC under this view).

20 See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1457 n.36 (2010) (discussing impoundment of Congressional appropriations and the line-item veto, among other examples).

21 See Daphna Renan, *The Law Presidents Make* 6–19, 37–39 (unpublished manuscript) (on file with author).

22 Michael A. Livermore & Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 420, 421 (Daniel Carpenter & David Moss eds., 2014).

23 See Vermeule, *supra* note 1, at 1205–06 (describing the role of the OIRA Administrator).

## II. CONVENTIONS AS THE THIRD BOUND

A. *Neither Law Nor Politics*

Whatever the details, the relevant point for our purposes is that conventions are a *tertium quid*, neither law nor politics, at least not necessarily so. They are not “law,” or not necessarily “law.” The classical British view was that law and conventions are entirely distinct; “law” was by definition enforceable in court, whereas conventions were not. The more nuanced modern view in the Commonwealth is that although conventions may not be enforced in court, they may be “recognized” and used as an aid to interpreting statutes or deciding other legal questions. In our system, the “law” may or may not be enforceable in court, and although it is possible for legal rulemakers to adopt conventions as legal rules, they do not have to be so adopted, so conventions may or may not be enforced in court.<sup>24</sup>

When will conventions be adopted as law? All else equal, courts are more likely to read conventions into open-ended or ambiguous texts with unclear originalist referents. As Justice Jackson urged, “Usage may sometimes impart changed content to constitutional generalities, such as ‘due process of law,’ ‘equal protection,’ or ‘commerce among the states.’”<sup>25</sup> And of course Justice Frankfurter suggested that custom may provide a “gloss” on the executive power.<sup>26</sup>

The articles by Patricia Bellia, on the one hand, and by Jack Goldsmith and John Manning, on the other, persuade me that the Faithful Execution Clause is fertile ground for such an approach.<sup>27</sup> Consider a set of cases: (1) the *Youngstown* case,<sup>28</sup> in which the President claimed inherent power to seize and operate steel mills necessary for war production; (2) *In re Debs*,<sup>29</sup> which recognized inherent executive power to obtain an injunction against violent labor strikes; (3) *Cunningham v. Neagle*,<sup>30</sup> which upheld the power of a United States Marshal to kill a man who posed an imminent threat to a Supreme Court Justice; and (4) *Zivotofsky II*,<sup>31</sup> in which the Court found inherent presidential power to recognize foreign governments. The Court invalidated

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24 For the details, see generally Adrian Vermeule, *Conventions in Court*, 38 DUBLIN L.J. 283 (2015).

25 *Ray v. Blair*, 343 U.S. 214, 233 (1952) (Jackson, J., dissenting).

26 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). For an outstanding analytic taxonomy of gloss and its rationales, see Curtis A. Bradley, *Doing Gloss*, 83 U. CHI. L. REV. (forthcoming 2016).

27 Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016).

28 *Youngstown*, 343 U.S. 579.

29 158 U.S. 564 (1895).

30 135 U.S. 1 (1890).

31 *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

executive action in the first but sustained it in the other three.<sup>32</sup> In the last, it went so far as to invalidate a contrary federal statute as an invasion of executive power that is not only inherent but exclusive.<sup>33</sup> There is no obvious or even nonobvious set of legal distinctions that makes these cases line up together, although with enough work, one could doubtless construct some sort of theory. But the real engine of the decisions is a tacit appeal to a widespread conventional sense of the appropriate functions of government and the Executive in particular. Our confidence that the Executive must have the constitutional power to kill an assassin gunning for a Supreme Court Justice is pre-theoretical and persists undiminished even in the face of theoretical or legal uncertainty. It is a “can’t help” shared by almost everyone in the relevant community. More recently, and more explicitly, the *Free Enterprise Fund* decision shows the Court incorporating conventions of SEC independence into its treatment of the Faithful Execution Clause and other constitutional clauses bearing on executive power.<sup>34</sup>

On the other side, conventions are not “politics” either. More accurately, they may or may not be a species of “politics,” depending on what we mean. The notion of “politics” is fatally ambiguous. It includes at least two critically different subcategories: ordinary contingent politics and moralized politics,

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<sup>32</sup> See *Youngstown*, 343 U.S. at 587 (“Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President.”); see also *Zivotofsky*, 135 S. Ct. at 2094 (“[T]he power to recognize foreign states resides in the President alone . . . .”); *Debs*, 158 U.S. at 599 (“[W]e hold . . . that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions . . . .”); *Neagle*, 135 U.S. at 67, 75-76 (“We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death . . . . [I]n the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; . . . that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.”).

<sup>33</sup> See *Zivotofsky*, 135 S. Ct. at 2096 (“To allow Congress to control the President’s communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional.”).

<sup>34</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-97 (2010) (“This novel structure does not merely add to the Board’s independence, but transforms it. . . . Without the ability to oversee the Board, or to attribute the Board’s failings to those whom he *can* oversee, the President is no longer the judge of the Board’s conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith.”).

in which there are widely shared unwritten rules of the political game.<sup>35</sup> Such rules are founded on a sense of obligation, and a public act violating the rules provokes retaliatory sanctions or moralized outrage.<sup>36</sup>

Imagine the political reaction to two different proposals by a sitting President: (1) top marginal tax rates should go down, or (2) the stars and stripes on the U.S. flag should be replaced by an Apple logo, conditional on an enormous donation by Apple to the U.S. Treasury. Although both proposals would suffer objections from “public opinion,” the nature of the relevant “politics” would be very different. In the second case, even to make the proposal would violate a convention against the sale of public symbols, and would thus provoke outrage, not merely policy opposition. Semantically, we can say that conventions are a subspecies of politics, but at a minimum, conventions are a distinctive type of politics. I will reserve the label “politics” for contingent quotidian politics, as in the example of top marginal rates.

### B. *Intragovernmental Versus Extragovernmental Conventions*

It follows that conventions may, but need not, be based upon the force of “public opinion.” Michael Gerhardt’s article usefully distinguishes publicly salient issues from low-visibility issues.<sup>37</sup> Some conventions are indeed enforced by the threat of moralized outrage on the part of the diffuse mass of public opinion; let us call those extragovernmental conventions.<sup>38</sup> Other conventions are enforced by the credible threat of retaliation from the other political party, another branch of the government, or some other institutional actor, even as to issues about which the general public is largely oblivious.<sup>39</sup> The usual case involves a tit-for-tat mechanism, like cooperation between government actors in an indefinitely iterated prisoners’ dilemma or assurance game.<sup>40</sup> We might call those intragovernmental conventions.

In a further distinction, intragovernmental conventions can be cross-party or intraparty. An example of the latter is the Hastert Rule. “[F]or some period of time starting in the 1990s, the Republican Party in the House of

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<sup>35</sup> See Vermeule, *supra* note 1, at 1186–94 (describing these two categories).

<sup>36</sup> See *id.* (discussing the consequences of breaching either a “thin” or a “thick” obligation).

<sup>37</sup> See Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1675 (2016) (“Public opinion matters most in presidential calculations on matters of great political salience, but that is only one factor that can influence Presidents.”).

<sup>38</sup> See Vermeule, *supra* note 1, at 1186 (noting “the threat of political backlash from the public, possibly resulting in an electoral defeat”).

<sup>39</sup> See *id.* at 1188 (using as examples senatorial courtesy over appointments, the filibuster rule, and pairing of absent senators in the United States and the “convention that incoming governments of a given party do not disclose to the public the confidential internal documents and memoranda of the other party” in the United Kingdom).

<sup>40</sup> See, e.g., *id.* at 1187–89 (discussing the applicability of the prisoners’ dilemma to these conventions).

Representatives, when it controlled the House, followed an internal convention called the ‘Hastert Rule,’” under which “no legislation would be approved unless a majority of the majority party voted in favor.”<sup>41</sup> “The convention thus excluded approval by a majority comprising the minority party plus a minority of the majority party.”<sup>42</sup> The rule has recently been more honored in the breach than in the observance.<sup>43</sup>

Intragovernmental conventions are sociologically vulnerable. They tend to break down when, for external political and sociological reasons, new actors come on the scene who will not play by the preexisting rules. In the United Kingdom, a number of conventions suddenly broke down in the 1920s, in large part because of an influx into Parliament of members from new social classes, who were not in any long-term reciprocity relationship with the existing elites, or who rejected the existence of relevant conventions in the first place.<sup>44</sup>

Our own version of this is the recent breakdown of cooperation between the Democratic and Republican parties over Senate norms, especially presidential appointments, particularly recess appointments, that Gerhardt referred to in his article.<sup>45</sup> A large part of this story is the influx into the Republican Party of an insurgent element, opposed to the establishment element, which has no interest in long-run reciprocal cooperation with establishment Democrats.<sup>46</sup>

When these Senate conventions break down, Presidents end up relying on increasingly aggressive claims of legal authority.<sup>47</sup> This reliance is not just or not mainly a story of presidential aggrandizement, although it is partly that. It is also, counterintuitively, a symptom of presidential weakness. The breakdown of implicit conventions and understandings across parties and

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<sup>41</sup> Vermeule, *supra* note 24, at 286.

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., *House Votes Violating the “Hastert Rule,”* N.Y. TIMES, <http://politics.nytimes.com/congress/votes/house/hastert-rule> [<https://perma.cc/AN7P-SF9W>] (listing the “[v]otes that passed without the support of a majority of the majority party in the House”).

<sup>44</sup> See generally Richard Toye, ‘Perfectly Parliamentary’? *The Labour Party and the House of Commons in the Inter-War Years*, 24 TWENTIETH CENTURY BRIT. HIST. 1 (2014) (discussing the Labour Party of the 1920s).

<sup>45</sup> See Gerhardt, *supra* note 37, at 1658-61 (discussing developments in the practice of recess appointments).

<sup>46</sup> See Raf Sanchez, *Tea Party Victory Dashes Barack Obama’s Lingering Hopes for Compromise with Republicans*, TELEGRAPH (June 11, 2014, 7:42 PM), <http://www.telegraph.co.uk/news/worldnews/republicans/10893084/Tea-Party-victory-dashes-Barack-Obamas-lingering-hopes-for-compromise-with-Republicans.html> [<https://perma.cc/3QD7-EGV3>] (reporting on the Tea Party’s electoral successes in the 2014 Republican Party primary elections and what it would mean for cooperation with the Democrats).

<sup>47</sup> See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4-5 (2014) (highlighting the recent examples of recess appointments, changes to immigration enforcement, and the execution of the No Child Left Behind Act of 2001).

across branches necessitates more formal or visible presidential aggression.<sup>48</sup> One immediate consequence is the possibility of tit-for-tat “self-defense” retaliation by institutions or parties, in various settings.<sup>49</sup>

For another example of the consequences that result when conventions break down, let me quote from Nicholas Bagley’s article:

The Obama Administration’s willingness to bend the law [in the ACA financing controversy] is to some extent understandable. Congress’s refusal to meet the financial obligations that it assumed in prior legislation is a breach of a longstanding convention that Congress will appropriate the money to satisfy those obligations. . . . [The Administration’s] decision nonetheless sets a troubling precedent for future battles over the appropriations power. . . . It’s impossible to anticipate the full consequences of weakening the legislature’s power of the purse. . . .<sup>50</sup>

Bagley’s sketch identifies not only the tit-for-tat structure of the Administration’s position, but also the long-run effects of retaliation on the informal precedents that structure executive–legislative relations.

We might well imagine, after the controversy that Bagley identifies, that a new set of litigated cases over the scope and limits of legislative appropriations will arise. This highlights another consequence of the breakdown of conventions: law substitutes imperfectly for regulation-by-convention, as behavior that would have remained extrajudicial becomes legalized and litigated. The most obvious example is the recess appointments case, *NLRB v. Noel Canning*,<sup>51</sup> which arose from the breakdown of tacit conventional constraints on the abuse of the filibuster for appointments and an aggressive tit-for-tat reaction from the presidency. I believe that *Zivotofsky II*<sup>52</sup> is also an example of this effect. In an earlier era, conventions of interbranch comity would have prevented the full-bore constitutional showdown from producing a full merits decision by the Court.

As both of these decisions show, a breakdown in conventions can end up increasing presidential power at the expense of Congress. *Zivotofsky II*, the first case to squarely invalidate a statute on exclusive executive power grounds

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48 *See id.* at 8 (“[M]any of the most pointed ways in which Congress and the President challenge one another can plausibly and profitably be modeled as *self-help* rather than *self-aggrandizement*, as efforts to enforce constitutional settlements rather than to circumvent them.” (emphasis added)).

49 On the structure of such arguments, see generally N.W. Barber, *Self-Defence for Institutions*, 72 CAMBRIDGE L.J. 558 (2013) and Pozen, *supra* note 47.

50 Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1734–35 (2016).

51 134 S. Ct. 2550 (2014).

52 *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

under Category III of Jackson's *Youngstown* concurrence,<sup>53</sup> was one of the presidency's greatest victories in court. *Noel Canning* invalidated the particular appointments at issue, but announced a constitutional framework that explicitly recognized a more expansive recess appointment power than the Administration's opponents favored.<sup>54</sup> In that sense *Noel Canning* was a victory for the presidency, if not for President Obama.<sup>55</sup> In both cases, to the extent that the Administration's opponents decided to breach conventions and take their chances in court out of a fear of excessive executive power, the long-run result was perverse and self-defeating.

### C. Conventions About Doing Things Versus Conventions About Saying Things

Finally, let me turn to another distinction which I believe has been systematically overlooked in debates over executive enforcement discretion: the distinction between conventions about doing things, on the one hand, and conventions about saying things, on the other. Conventions about doing things, as discussed above, are obvious.<sup>56</sup> However, there are also conventions regulating speech acts. There exists a category of executive discretion such that the Executive may do things without violating any law or convention, but will violate a convention, triggering political backlash or public outrage, if the Executive makes explicit that he or she is doing those things. Some things may be done, but may not be talked about. Making things explicit may be a separate violation.

There is an analogy here to the Victorian Compromise, in which "vice" was tolerated so long as it was kept out of sight and not discussed.<sup>57</sup> The Victorian Compromise was, in part, a convention—more accurately a network or structure of conventions—shaping the discretion of executive enforcers, such as police.<sup>58</sup> Closer to our time, David Strauss's fascinating unpublished

<sup>53</sup> See *id.* at 2084, 2096 (noting that "[b]ecause the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be 'scrutinized with caution,' and he may rely solely on powers the Constitution grants to him alone," and later declaring the statute unconstitutional); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

<sup>54</sup> See *Noel Canning*, 134 S. Ct. at 2577 ("We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length.").

<sup>55</sup> See *id.* at 2557 ("[T]he Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.").

<sup>56</sup> See *supra* Sections I.A–B.

<sup>57</sup> See Vermeule, *supra* note 1, at 1199 (defining "Victorian Compromise" as "in effect forcing those who would test their limits, or even violate them, to proceed on the quiet, so as not to trigger blaming, shaming, retaliation, electoral backlash, or other norm-enforcing sanctions").

<sup>58</sup> See, e.g., Joshua C. Tate, *Gambling, Commodity Speculation, and the "Victorian Compromise,"* 19 YALE J.L. & HUMAN. 97, 98–99 ("So long as the general social fabric was preserved, it did not

paper, *Do It But Don't Tell Me*,<sup>59</sup> recounts a number of areas in which executive agents may do (so far as conventions are concerned) what they may not discuss; the obvious example is torture of suspected terrorists, which the American public is seemingly willing to tolerate so long as it is not done openly.<sup>60</sup> Let me also offer, however, some less dramatic examples.

Bagley's article suggests the interesting hypothesis that tit-for-tat retaliation is subject to a convention against saying things.<sup>61</sup> In other words, the President cannot openly cite tit-for-tat as a rationale, even if it is otherwise constitutionally legitimate, in a second-best sense, to engage in tit-for-tat behavior, necessitated by constitutional breaches by other actors. Bagley quite properly does not appear to be claiming that the hypothesis is actually true, only that it is sufficiently plausible to bear investigation.<sup>62</sup> One would have to examine many cases more systematically to know whether it is in fact true. Nonetheless, it is a conceptually interesting possibility.

Conventions against saying things regulate and prohibit *avowed partisanship*. There is no general norm against partisan behavior in the administrative state, nor could there be. Such behavior is everywhere. However, there is certainly a separate and independent norm against partisan *justifications* for partisan behavior. When the House Majority Leader Kevin McCarthy openly admitted that the Benghazi investigation of Hillary Clinton was part of a Republican strategy to "fight and win," he was widely excoriated by both parties and his bid for Speaker of the House was derailed.<sup>63</sup> The resulting norm is complicated and conflicted. Ideally, we want officials to act based on nonpartisan reasons; non-ideally, we know that often they do not, and as a second best, we want them at least not to talk about it openly. If there is a rationale for that constraint, it is the "civilizing force of hypocrisy":<sup>64</sup> the inability to give openly partisan

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matter if vice continued to exist beneath the surface . . . [T]he worst forms of vice were dealt with harshly, while less dangerous vices were allowed to go unpunished.").

<sup>59</sup> David A. Strauss, *Do It But Don't Tell Me* (Apr. 5, 2014) (unpublished manuscript) (on file with author).

<sup>60</sup> See *id.* at 12-16 (analyzing this example).

<sup>61</sup> See Bagley, *supra* note 50, at 1748-49 ("Politicians believe—with good reason—that the American public cares about the law and will punish a President who flouts it. Even if a limited right to self-help were to become a recognized, legitimate feature of the separation of powers, the President will likely hesitate before exercising that right, just as he hesitates before exercising his acknowledged right to veto a piece of legislation. Political repercussions thus offer a plausible mechanism for assuring that self-help stays within tolerable bounds." (footnote omitted)).

<sup>62</sup> See *id.* at 1748-51 (acknowledging the arguments in favor of and against the presidential use of self-help and the potential for evidence to point in either direction).

<sup>63</sup> See E.J. Dionne Jr., *Kevin McCarthy's Truthful Gaffe on Benghazi*, WASH. POST (Sept. 30, 2015), [https://www.washingtonpost.com/opinions/kevin-mccarthys-truthful-gaffe/2015/09/30/f12a9fac-67a8-11e5-8325-a42b5a459b1e\\_story.html](https://www.washingtonpost.com/opinions/kevin-mccarthys-truthful-gaffe/2015/09/30/f12a9fac-67a8-11e5-8325-a42b5a459b1e_story.html) [<https://perma.cc/U8BP-RUYZ>] (discussing this situation).

<sup>64</sup> See *Publicity*, STAN. ENCYCLOPEDIA PHIL. (Jan. 12, 2005), <http://plato.stanford.edu/entries/publicity/> [<https://perma.cc/8RRL-AJQS>] (citing to Jon Elster's idea that "[t]he presence of a public makes it especially hard to appear motivated merely by self-interest" and that "[i]n general,

justifications in a transparent public setting may actually constrain behavior, at least at the edges, if there is no plausible public-spirited justification available as a pretext.<sup>65</sup> Whether or not hypocrisy in fact acts as a civilizing force, however, it is unlikely that such a sophisticated rationale explains the genesis of the convention. Rather, the norm arises because people who will tolerate objectionable behavior if it is decorously concealed will become uncomfortable, and then outraged, if they are forced to confront it directly.<sup>66</sup>

The idea of conventions against making things explicit may help us understand a range of current controversies over enforcement discretion. I refer to a category that includes the white-hot debate over immigration enforcement discretion, currently being litigated; the debate over presidential signing statements with no independent legal force, discussed in the article by Christopher Yoo;<sup>67</sup> and Nick Bagley's observation on the announced delay of the employer mandates under the Affordable Care Act (ACA):

If the Administration wished to deprioritize enforcement, it could have kept quiet about its plans. The regulated community would still have felt obliged to comply even if the likelihood of enforcement was low. For policy reasons, however, the Administration wanted to relieve employers and health plans of certain obligations. The Administration thus used the public announcements of its nonenforcement policies to encourage the regulated community to disregard provisions of the ACA.<sup>68</sup>

These examples have a common structure. Imagine a set of executive enforcement decisions over an array of cases, *A*, *B*, and *C*. The enforcement decisions are made either (1) on a case-by-case basis, under an implicit or tacit policy; or (2) on an aggregate basis, under an explicit policy statement or set of enforcement guidelines. For clarity, let us hold all outcomes constant. We will assume, in other words, that *A*, *B*, and *C* are treated exactly the same way under both regimes. The same people are or are not deported, the same employers are or are not relieved of ACA obligations, and so on. I will put aside the objection, heard in many contexts, that approach (2) "makes law." As a matter of administrative law, this is a red herring because there is nothing binding about the prospective announcement of how the Executive intends

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this civilizing force of hypocrisy is a desirable effect of publicity" (quoting JON ELSTER, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97, 111 (1998)).

<sup>65</sup> See *id.* ("The public is meant to hold normative expectations regarding what representatives are supposed to say. One of these expectations is that any overt reference to mere self-interest in the course of justifying their position would be seen as unacceptable . . ." (footnote omitted)).

<sup>66</sup> Cf. Strauss, *supra* note 59, at 23-26 (arguing that this "moral ambivalence" may be an explanation for the "do it but don't tell me" regime).

<sup>67</sup> Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801 (2016).

<sup>68</sup> Bagley, *supra* note 50, at 1723.

to exercise discretion in a class of cases. They are best understood as “general statements of policy” under section 553(b)(3)(A) of the Administrative Procedure Act, and thus do not count as binding agency rules that must go through the process of notice and comment.<sup>69</sup> Were the other party to take the presidency, all of these policies could be changed with a stroke of the pen.

Given this structure, defenders of interpretive rules, of general policy statements in the immigration context, and so on argue that making enforcement guidelines explicit is better, from the standpoint of transparency, predictability, and the rule of law.<sup>70</sup> Whether or not that view is ultimately correct, it must grapple with a major complication: making enforcement policy explicit may sometimes bump up against conventions that require *keeping discretion subterranean*. Relevant audiences will tolerate exercises of enforcement discretion that they are dimly aware are going on, but do not want that discretion to be made explicit and elevated to the level of a policy.<sup>71</sup> I do not claim that there is in fact such a convention in any one of the areas I have mentioned, let alone every one of them. I suggest only that it bears considering whether the strong reaction to, for example, the Obama Administration’s immigration enforcement policy statements cannot be explained solely by their content, but must also be explained with reference to the very fact that the Administration has made them explicit. A tacit pattern of enforcement behavior yielding all the same outcomes, across an array of cases, would be a very different matter.

Once again, if such conventions against making things explicit do exist in a given area, it is a separate question whether their existence is good or bad from the standpoint of social welfare. It is also a complicated question. The principal effect of such conventions is to inhibit transparency, which has downsides as well as upsides; the relative costs and benefits of transparency are highly contextual and not susceptible to glib generalities.<sup>72</sup> If the “civilizing force of hypocrisy” exists,<sup>73</sup> then inhibiting transparency may have substantive effects in some cases, changing not only what may be said but what may be done. My suggestion is not normative, but analytic: the relevant debates over executive enforcement discretion and policy statements are incomplete, and may often be misguided, if participants fail to address the role of conventions.

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<sup>69</sup> *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993).

<sup>70</sup> See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 174-75 (2015) (making this argument).

<sup>71</sup> See generally Strauss, *supra* note 59.

<sup>72</sup> For an attempt to consider all relevant costs and benefits under an array of conditions, see generally ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* (2007).

<sup>73</sup> *Publicity*, *supra* note 64.

## CONCLUSION

Legal analysts of executive power have to think about more than “law” and “politics”—using the latter term in a thin sense to refer to the shifting contingencies of partisan conflict over first-order policies. Conventions, unwritten rules of the political game, including conventions against saying things, shape and constrain executive discretion as well. To the extent that one believes, as I do, that law is less constraining on the Executive than many lawyers believe, conventions are relatively more important than would otherwise be the case.

This is not to say that the importance of conventions is necessarily increasing over time. As we have seen, the increasing breakdown of intragovernmental conventions of reciprocal cooperation between the parties, and hence between the President and the Senate under conditions of divided government, has brought about the explicit legalization and juridification of a number of executive-power questions that were previously within the domain of convention. Yet, new conventions will eventually arise and stabilize, and in any event, there remains a robust set of conventions—surrounding removal, directive power, and enforcement policy—that places a third bound on executive discretion.

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