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Public Choice and International Law Compliance: The Executive Branch Is a "They," Not an "It"

Neomi Rao

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Article

**Public Choice and International Law
Compliance: The Executive Branch Is a
“They,” Not an “It”**

Neomi Rao[†]

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[†] Assistant professor, George Mason University School of Law. For their comments, I thank David Bernstein, Lisa Bernstein, Michelle Boardman, Eric Claeys, Richard Klingler, Nelson Lund, William Marshall, John McGinnis, Mary Ellen O’Connell, Jeffrey Parker, Jeremy Rabkin, David Schleicher, Ilya Somin, Mark Weisburd, John Yoo, Todd Zywicki, and participants at the University of Chicago Legal Scholarship Workshop, the Law & Economics Center Manne Faculty Forum, the University of North Carolina faculty workshop, and the George Mason Levy Workshop. Stephanie Cook provided helpful research assistance. I am grateful to the many former government officials, including friends and former colleagues, who shared their experiences about the process of legal decision making within the executive branch. A number of observations in this paper are drawn from my experience in the White House Counsel’s Office as Associate Counsel and Special Assistant to the President. Copyright © 2011 by Neomi Rao.

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Novel questions raised by the war on terror and the evolving technology of warfare have highlighted the importance of executive branch legal interpretation. In particular, agencies often address difficult questions about the scope and application of international law without review by Congress or the courts. The executive branch in the United States stands at the forefront of analyzing legal consequences following from the use of force—but the President may have to contend with conflicting advice.

For example, after September 11, 2001, President George W. Bush had to determine whether al Qaeda and Taliban fighters were entitled to prisoner of war (POW) protections under the Geneva Conventions. As has now been widely reported, his advisers disagreed about what to do.¹ The Department of Justice's Office of Legal Counsel argued that neither group was entitled to legal protection, although the President could choose to apply the Geneva Conventions to either group.² The State Department argued that the Conventions should apply to both groups and that a failure to do so would weaken the United States' relationships with its allies and undermine the ability

1. See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

2. Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002) [hereinafter *Memorandum for Alberto R. Gonzales*], available at www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf (including subject line "Application of Treaties and Laws to al Qaeda and Taliban Detainees").

to demand POW treatment for captured Americans.³ Military lawyers from the Department of Defense pressed for application of the Conventions and argued that they were customary international law.⁴ President Bush ultimately determined that the Conventions did not apply to al Qaeda, because the group was neither a state, nor party to the Conventions.⁵ The President did not suspend the Conventions with regard to Afghanistan, but found that the Taliban were “unlawful combatants” who had lost their POW status.⁶ But it didn’t stop there—after the President made his decision, memos from the State Department expressing alternative views were leaked to the press, fueling criticism of the President’s policy. More recently, reports have surfaced about internal legal disputes in the Obama Administration over whether congressional authorization was required under the War Powers Resolution⁷ for military actions in Libya⁸ and also whether the United States can lawfully attack al Qaeda operatives in areas such as Yemen and Somalia, which are outside the battlefield theater of Afghanistan and areas of Pakistan.⁹

3. Memorandum from Colin L. Powell to the Counsel to the President and Assistant to the President for Nat’l Sec. Affairs 1–4 (Jan. 26, 2002) [hereinafter Memorandum from Colin L. Powell], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>.

4. John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2290 (2009) (reporting that some Judge Advocate Generals “challenged President Bush’s decision in February 2002 . . . that members of al Qaeda and the Taliban were not to receive the status of prisoners of war under the Geneva Conventions” (citing Julian E. Barnes, *Military Fought to Abide by War Rules*, L.A. TIMES, June 30, 2006, at A1)).

5. Memorandum from George W. Bush, President of the U.S., to the Vice President, Sec’y of State, Sec’y of Def., Attorney Gen., Chief of Staff to the President, Dir. of Cen. Intelligence, Assistant to the President for Nat’l Sec. Affairs, and Chairman of the Joint Chiefs of Staff (Feb. 7, 2002) [hereinafter Memorandum from George W. Bush], available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (including the subject line “Humane Treatment of al Qaeda and Taliban Detainees”).

6. *Id.* (“I accept the legal conclusion of the [A]ttorney [G]eneral and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time.”).

7. 50 U.S.C. §§ 1541–48 (2006).

8. See Charlie Savage, *Two Top Lawyers Lost to Obama in Libya Policy Debate*, N.Y. TIMES, June 17, 2011, at A1.

9. See Charlie Savage, *White House Weighs Limits of Terror Fight*, N.Y. TIMES, Sept. 16, 2011, at A1 (detailing dispute between Department of Defense general counsel Jeh Johnson and State Department legal adviser Harold Koh over the standards for the use of force outside the battlefield theater).

Internal disputes among the agencies that handle questions of international law are commonplace, although usually less visible. This Article examines how this internal dynamic of conflict and competition within the executive branch shapes the interpretation and compliance with international law—it presents a public choice analysis of how the United States complies with international law.

In the United States, even our unitary executive, which exercises significant control over foreign affairs, includes numerous agencies that analyze and interpret the requirements of international law within the framework of their particular interests and incentives. Lawyers throughout the executive branch work through issues relating to international law from the unique perspectives and cultures of their agencies. Executive branch processes for mediating legal disputes are irregular and inconsistent—they coordinate efforts at best imperfectly and at worst leave agencies to pursue conflicting interpretations of international law. The executive branch often behaves as a “they” not an “it,”¹⁰ even with respect to questions of international law.

This Article describes the particular interests and incentives of the agencies that shape international law interpretation and the institutions available (or not) for coordinating interests. Moreover, it identifies how disaggregated decision making and imperfect coordination within the executive branch affect international law compliance in the United States.¹¹ Ana-

10. This observation has been made of the White House in the context of the administrative state. *E.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) (“[W]e demonstrate that scholars may have underestimated the complexity of White House involvement. Presidential control is a ‘they,’ not an ‘it.’”). Kenneth Shepsle notably made a similar observation for Congress. *See* Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992) (describing the “meaninglessness of the concept of ‘legislative intent.’ Individuals have intentions and purpose and motives; collections of individuals do not”).

11. I focus on the United States because a public choice analysis must consider the dynamics within a particular institution. The public choice framework does not treat states as undifferentiated actors. Yet the consequences of bureaucratic competition for international law compliance in the United States may shed light on international law compliance more generally if similar bureaucratic behavior is observed in other states. *See infra* Part IV.C. In other countries, there is some evidence of conflicts between agencies with responsibility for international legal policy. *See, e.g.*, MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* 169–74

lyzing these dynamics provides a richer explanation of how the executive branch interprets and determines compliance with international law. The uncertainty and instability of coordination provide an incentive for executive branch officials to compete for control of international policymaking in the White House. This competition may result in exploiting the flexibility and ambiguity of international law to serve policy goals. Government officials may benefit from the indeterminacy of international law, particularly in relation to new circumstances for which there are few relevant precedents and limited if any state practice.

This Article begins by situating the public choice analysis of international law. Part I briefly examines some of the competing approaches in international relations and how international law scholars have used them to address questions of compliance. Many leading approaches to international relations, including natural law, realist, constructivist, and institutional theories, start with an assumption of a unitary state that behaves as a person in international law. In this view, states are “billiard balls” or “black boxes” with respect to international relations.¹² These theories disagree about how states behave and, accordingly, make different predictions for whether and how states will comply with international law. For example, realist theories treat international law as largely irrelevant to the behavior of states, and rational choice theorists, such as Jack Goldsmith and Eric Posner, have argued that states comply with international law only when it is in their self-interest.¹³ In recent years, the unitary state model has been challenged by liberal theorists who have focused on domestic non-state actors, such as government officials and private interest groups. Notably, Harold Koh and Anne-Marie Slaughter have highlighted the disaggregation of the state in international law and identified how government agencies and officials as well as private entities engage in a transnational process of lawmaking and

(2010) (recounting a discussion with foreign legal advisers about the role of international law in their countries and how their respective legal adviser offices function).

12. See, e.g., JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 11 (2001) (describing “offensive realism” as treating “states like black boxes or billiard balls”).

13. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 1 (2005) (theorizing that “international law emerges from states acting rationally to maximize their interests”).

cooperation below the state level.¹⁴ Koh and Slaughter are largely optimistic about how the involvement of these non-state actors will improve precision and compliance with international law.¹⁵

Unitary and disaggregated theories have largely talked past each other. Although some political scientists in international relations have suggested that these approaches can be complementary, there has been little work in this direction by international law scholars. This Article provides one approach to filling this gap by analyzing how the executive branch tries to coordinate international law interpretation between agencies that regularly disagree and compete for control over foreign policymaking. Like disaggregated theories, the public choice account looks inside the “black box” to study domestic actors. Like unitary theories, it also looks at institutional mechanisms for coordinating agency interests in the formation of “state” interests. The public choice approach considers the importance of institutional coordination mechanisms in addition to the particular incentives of domestic actors. It considers how the “they” of the executive branch seeks to function as an “it.”

Part II sets forth the public choice of international law compliance.¹⁶ This public choice analysis examines how various legal departments within the executive branch interpret international law and thereby shape the scope and form of compliance. A number of legal departments have responsibility for international law interpretation. As explained in greater detail in Part II, each of these agencies has a particular institutional perspective, culture, and set of incentives with regard to providing advice about the interpretation and application of international law. For example, the State Department Legal Adviser

14. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207 (1993) (stating that “[l]iberals focus not on state-to-state interactions . . . but on an analytically *prior* set of relationships among states and domestic and transnational civil society”).

15. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 206 (1996) (arguing that the theory of transnational legal process “predicts that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm-internalization”).

16. I use the term “public choice” because this Article analyzes the executive branch as a collectivity and examines the interests and incentives of the government officials who make determinations about international law. See *infra* notes 108–19.

often takes a conscience-based approach to international law and expresses concerns about diplomatic consequences. The Department of Defense General Counsel represents a military tradition and strong commitment to the laws of war. The Department of Justice Office of Legal Counsel has an institutional perspective favorable to the exercise of presidential authority. The National Security Council Legal Advisor serves the President's interests and considers international law in light of the core constitutional powers and prerogatives of the President. Because of their different interests and perspectives, these agencies will sometimes conflict in their interpretation of international law and the President will have to assess these different perspectives. Ordinary executive branch mechanisms avoid conflict on most run-of-the mill legal issues, however, disputes will frequently arise with respect to high-stakes questions.

Part III explains how the executive branch has difficulty consistently coordinating these divergent interests. Bureaucratic competition is especially prevalent with respect to foreign affairs and national security because a number of agencies have overlapping jurisdiction in this area. Although several offices have authority to resolve disputes over legal interpretation, there is no singular mechanism for resolving such disputes. The unpredictability of this process encourages agencies to compete for control over international policy. Even after a presidential decision, agencies may continue to resist by appealing to Congress, the media, or other nations. Failures of coordination and uncertainty create an incentive for ongoing competition between different bureaucratic interests. Such competition may make it difficult for the President to assert and maintain control over agencies. Yet the President may benefit from a system that allows for the full exchange and consideration of different alternatives with regard to foreign policy and international law. Institutions may be designed less for consistency and more for maximizing flexibility and responsiveness to particular circumstances.

Part IV examines some of the consequences of the public choice analysis. First, this analysis may complement some unitary theories by providing greater information about the actors and institutions that formulate state interests. In particular, it complements rational choice theories by looking at the incentives of government officials who determine the inputs for the

state's interest with respect to international law and foreign policy.

Second, public choice analysis predicts that ongoing competition between agencies will encourage them to take advantage of indeterminacy in international law. New types of warfare and evolving technological capacity make indeterminacy about the content and application of international law particularly acute. Agencies will use the imprecision or uncertainty of international law strategically to suit their policy agendas. Repeated use of international law for political, strategic, and instrumental ends may create habits of flexible or instrumental compliance, rather than the more robust compliance predicted by liberal disaggregated theories. Whereas Koh and Slaughter predict that the involvement of non-state actors will result in greater compliance with international law, the public choice approach supports realist or rational choice predictions that states comply with international law when it is in their interests and not for other legal or moral reasons. Moreover, if government officials in other countries face similar incentives, one might expect international law to retain its actual or perceived softness. This provides an explanation based on sub-state interests for why international law does not exhibit the clarity and stronger enforcement mechanisms often considered an aspiration for international law.

Disputes within the executive branch over the meaning and application of international law have important consequences for our foreign policy. These disputes are often kept behind closed doors, but once revealed they provide valuable information about how the President assesses legal questions, particularly those arising from the use of force. The spread of the war on terror and technological advances that allow for intelligence gathering and attacks by unmanned drones present new and evolving questions under international law. The executive branch will have to assess these questions in the first instance as it determines foreign and military policy, often with only the limited involvement of Congress and the courts. The public choice approach provides one way to understand this dynamic and suggests some consequences for compliance with international law.

I. SITUATING THE PUBLIC CHOICE APPROACH

Theories of international law compliance usually begin with some conception of the state and how it behaves in re-

sponse to the requirements of international law. This Part provides context for the public choice approach by briefly considering some of the leading theories of international relations and international law and demonstrating the gap that is filled by the public choice method.

The public choice analysis in this Article looks at the agencies and individuals in the executive branch who determine compliance with international law—a disaggregated approach that focuses on domestic decision making. It looks inside the “black box” of the state and pulls apart the incentives and interests of officials and bureaucracies within the executive branch. It then examines the available institutions and procedures within the executive branch for coordinating and aggregating these interests, and considers how these institutions affect agency interests and incentives.¹⁷ While some theories focus on unitary state explanations and others draw on domestic approaches, this Article seeks some combination by examining the domestic interests and incentives of executive agencies as well as coordinating institutions that bring together disparate and competing interests.¹⁸ It examines some of the domestic interests that make up the “state’s” interest and behavior with respect to international law compliance.

Furthermore, as I briefly explain in this Part, this Article focuses on the executive branch because of the central role that the President plays with respect to the interpretation of, and compliance with, international law. All three branches have important constitutional authority in this area, but the executive makes many of the on-the-ground decisions about international law. Second, the characteristics of international law matter, and I explain the importance of areas of “softness” in

17. See *infra* Part IV.

18. Political scientists have sought to open the “black box” of states to see how domestic processes affect foreign policy and international relations. Some of the best work in this area has sought to bring together realism with a consideration of domestic processes, studying how domestic preferences and conflicts are resolved through institutions that affect state behavior in international relations. See, e.g., BRUCE BUENO DE MESQUITA & DAVID LALMAN, WAR AND REASON: DOMESTIC AND INTERNATIONAL IMPERATIVES 18–19 (1992) (“Our model of rationality, then, ultimately joins together the two main intellectual traditions in international relations: the realist viewpoint and the domestic perspective.”); Helen V. Milner, *Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics*, 52 INT’L ORG. 759, 759 (1998) (observing that “[t]he central paradigms of the field of international relations (IR)—realism and neoliberal institutionalism—have ignored a key aspect of international relations: domestic politics”).

international law for predictions about compliance. International law varies both with respect to its level of domestic obligation and also with the extent of its legalization. In particular, international law may be indeterminate as applied to new and evolving forms of warfare and technological advances. The perceived or actual indeterminacy of international law affects how government actors interpret and apply international law by inviting policy judgments and allowing for a range of plausible or defensible interpretations.

A. UNITARY STATE THEORIES AND INTERNATIONAL LAW COMPLIANCE

The traditional analogy between states and persons has served as a foundation for many different theories that disagree about fundamental aspects of state behavior, including why states formulate international law, and how and whether they comply with such law. Unitary theories put aside the individuals, entities, and interests that go into formulating state action. They model the state as a singular entity in order to provide theoretical predictions about state behavior with respect to international law.

1. Realism and Rational Choice Theory

The natural law literature analogizes the state in international relations to persons in the state of nature.¹⁹ The analogy envisioned both states and individuals as autonomous, liberal agents²⁰ and drew from the analogy many of the traditional prerogatives of states, including the basic tenets of sovereignty. Accordingly, the state had the characteristics of an individual—a singular unified entity that could act in the field of international relations with and against other states. For example, Hobbes repeatedly drew a connection between man in the state of nature and nations in the international realm. The analogy between persons and states occurred in a context in which both

19. Edwin DeWitt Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 *YALE L.J.* 564, 564–75 (1917) (discussing the analogy between natural and international persons considered by natural law thinkers such as Grotius, Hobbes, Rutherford, and Pufendorf).

20. See generally RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 14 (1999) (tracing the development of the analogy between the independent state and the liberal individual agent through modern political theorists and arguing that “there is no powerful theorist of a rights-based liberalism who has not subscribed to the basic account of the liberal agent”).

people and states had only the most minimal obligations to one another and the primary motivation for both persons and states was self-preservation.²¹ The law of nations was like the law of nature—both operated in the absence of centralized enforcement authority.²²

Drawing from natural law sources, realist theory developed at the beginning of the twentieth century posited that states have at their core an interest in self-preservation and the expansion of power.²³ A state's interests may change over time and the methods of power may also evolve, but a state's behavior will be determined by how it perceives its interests and its ability to exercise power.²⁴ Structural realism focuses in particular on how the structure of the international system causes states to pursue power.²⁵

Both the traditional and structural variants of realism emphasize the unitary nature of the state, an entity with its own interests and motivations in international relations. Realism

21. THOMAS HOBBS, *LEVIATHAN* 189 (C.B. MacPherson ed., Penguin Classics 1985) (1651) (explaining that the basic right of nature “is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto”).

22. *Id.* at 394 (“[T]he Law of Nations, and the Law of Nature, is the same thing. And every Sovereign hath the same Right, in procuring the safety of his People, that any particular man can have, in procuring the safety of his own Body. And the same Law, that dictateth to men that have no Civil Government, what they ought to do, and what to avoyd in regard of one another, dictateth the same to Common-wealths, that is, to the Consciences of Sovereign Princes, and Sovereign Assemblies; there being no Court of Naturall Justice, but in the Conscience onely; where not Man, but God raigneth; whose Lawes, (such of them as oblige all Mankind,) in respect of God, as he is the Author of Nature, are *Naturall*; and in respect of the same God, as he is King of Kings, are *Lawes*.”).

23. See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 5 (2d ed. 1954) (explaining the main principle of political realism as “the concept of interest defined in terms of power”). John Mearsheimer explains his theory of “offensive realism,” which emphasizes that great powers “look for opportunities to gain power at each others’ expense.” MEARSHEIMER, *supra* note 12, at 5. The status quo is unstable “because the international system creates powerful incentives for states to look for opportunities to gain power at the expense of rivals, and to take advantage of those situations when the benefits outweigh the costs. A state’s ultimate goal is to be the hegemon in the system.” *Id.* at 21.

24. MORGENTHAU, *supra* note 23, at 8–9.

25. See generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 81–99 (1979) (“The concept of structure is based on the fact that units differently juxtaposed and combined behave differently and in interacting produce different outcomes.”).

takes states as the units of international politics and emphasizes their essential similarity, rather than their internal differences.²⁶ As John J. Mearsheimer has noted, realist theory “tends to treat states like black boxes or billiard balls.”²⁷ It assesses interests at the state level, as opposed to as an aggregation of preferences by individuals and entities within the state. These state interests are largely defined by the international situation that states face—i.e. anarchy, threats to security and dominance, and the mutual interest in cooperation.²⁸

In the realist view of international relations, international law has little role in explaining the behavior of states.²⁹ Realists have rejected the “legalistic-moralistic” approach, suggesting instead that states create and comply with international law when it serves their particular interests and not because of legal or moral obligations.³⁰ International law reflects the interests of powerful states and therefore the underlying balance of power between states.³¹ Without centralized enforcement, state compliance with international law is a function of self-interest, rather than legal obligation.

26. *See id.* at 93–96 (emphasizing that states are the primary actors in the international sphere and that although varying in size and power, “[s]tates are alike in the tasks that they face, though not in their abilities to perform them. The differences are of capability, not of function”). Waltz argues that “[i]n defining international-political structures we take states with whatever traditions, habits, objectives, desires, and forms of government they may have. . . . We abstract from every attribute of states except their capabilities.” *Id.* at 99.

27. MEARSHEIMER, *supra* note 12.

28. *See, e.g., id.* at 10 (arguing that offensive realism “assumes that the international system strongly shapes the behavior of states. Structural factors such as anarchy and the distribution of power . . . are what matter most for explaining international politics”).

29. *See* Slaughter Burley, *supra* note 14, at 207–08 (explaining how realists denied the relevance of international law in a realm governed by power and diplomacy).

30. *See* GEORGE KENNAN, *AMERICAN DIPLOMACY, 1900–1950*, at 95 (1951) (discussing the “legalistic-moralistic approach”); MORGENTHAU, *supra* note 23, at 10–11 (noting that political realism “maintains the autonomy of the political sphere” from the moral sphere and taking issue with the “‘legalistic-moralistic approach’ to international politics”).

31. *See* Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 15–16 (Stephen D. Krasner ed., 1983) (observing that “[d]ominant actors may explicitly use a combination of sanctions and incentives to compel other actors to act in conformity with a particular set of principles, norms, rules, and decision-making procedures”).

It is unsurprising then, perhaps, that realism has had few proponents among international legal scholars.³² As realism, and in particular structural realism, questions the importance and relevance of international law, international legal theory has often proceeded along different lines.³³ Recent work in international law, however, has leveraged realist international relations theory into international law by using rational choice theory. Rational choice theory posits a model of individuals who are rationally self-interested and make choices based on their interests and well-being.³⁴ Similarly, states behave rationally when they pursue what is in their highest interest.³⁵

Describing international law through a rational choice model, Jack Goldsmith and Eric Posner explain a state's interests as the "state's preferences about outcomes."³⁶ They argue that a state "can make coherent decisions based upon identifiable preferences, or interests, and it is natural and common to explain state action on the international plane in terms of the primary goal or goals the state seeks to achieve."³⁷ Goldsmith and Posner thus take the state as a unitary actor that can formulate goals and interests and work to actualize them through international law.

In part, rational choice approaches arise as a reaction and critique of the predominant view in international law scholarship that states can, should, and do comply with international law for non-instrumental reasons.³⁸ Rational choice theorists

32. See generally MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 57–98 (2008) (providing a helpful history of compliance theory); Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1792 (2003) (explaining the relationship between realism and international law scholarship and noting that "[l]iberal international law scholars, dismissed by realists as hopelessly naïve, generally respond by ignoring or rejecting realist critiques").

33. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 337–38 (1989).

34. See, e.g., Jon Elster, *Introduction to RATIONAL CHOICE* 4 (Jon Elster ed., 1986) (explaining that to act rationally "means to choose the highest-ranked element in the feasible set" of alternatives).

35. See, e.g., ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 17 (2008) ("States are assumed to be rational, self-interested, and able to identify and pursue their interests. . . . States do not concern themselves with the welfare of other states but instead seek to maximize their own gains or payoffs.").

36. GOLDSMITH & POSNER, *supra* note 13, at 6.

37. *Id.*

38. See *id.* at 14–16.

reject the idea that states have a moral obligation to follow international law, separate from any rational interest they have in creating or complying with international law.³⁹ At least they predict that states may have an interest in complying with international law, but it will be for some reason other than a propensity to comply with international law.⁴⁰ Thus, they explain compliance largely along realist lines—states comply when it serves their interests, broadly conceived, but not because of the independent pull of legal obligation.

Rational choice theory, however, does not always support realist conclusions about international law. For example, Andrew Guzman applies rational choice theory from an institutionalist perspective. He explains how concerns for reputation can provide incentives for states to comply with international legal rules.⁴¹ A state will factor its reputation for compliance with international agreements into the costs and benefits of deciding whether to comply.⁴² “Because international law increases the costs of a violation, it puts a thumb on the scale in favor of compliance or, as is sometimes said, generates ‘compliance pull.’”⁴³

Although Guzman and Goldsmith and Posner disagree about the effects of international law and state behavior, they model the state as a unitary entity whose preferences and behavior are predicted with reference to the “state” and its interactions with other states.⁴⁴ Moreover, in the view of rational choice theory, states have interests and act to pursue them in a rational way through international law, but “have no innate

39. *See, e.g., id.* at 9 (observing that “preferences for international law compliance tend to depend on whether such compliance will bring security, economic growth, and related goods; and that citizens and leaders are willing to forgo international law compliance when such compliance comes at the cost of these and other goods”).

40. *Id.* at 10.

41. GUZMAN, *supra* note 35, at 34–36.

42. *Id.* at 40–41 (“When a state is deciding whether to comply, it will take into account a variety of cost and benefits unrelated to law—domestic interests, political relations with other states, and so on—but it will also consider the legal implications of a violation.”).

43. *Id.* at 41.

44. GOLDSMITH & POSNER, *supra* note 13, at 5 (“Both ordinary language and history suggest that states have agency and thus can be said to make decisions and act on the basis of identifiable goals.”); GUZMAN, *supra* note 35, at 19 (explaining the reasoning for adopting an assumption of a unitary state in his rational choice theory).

preference for complying with international law.”⁴⁵ States seek to maximize their own welfare and ultimately act based on political cost-benefit considerations with regard to international law.

2. Responding to Realism

Although realism remains a dominant perspective in international relations, there are a number of competing theories that attempt to demonstrate the relevance of international institutions and define the international sphere through institutional and social constructs. These theories create more space for international law, but like realism, they begin from a unitary state perspective that takes the state as the unit of international relations.

For example, Alexander Wendt, constructivism’s leading proponent, explains that the identities and interests of states are constructed by shared ideas, rather than, as realists maintain, given by nature or determined by forces such as power or dominance.⁴⁶ Constructivism asserts that states can go beyond self-interest and act in ways that promote the collective interest.⁴⁷ Yet Wendt retains the state as the primary unit of analysis and treats states as intentional or purposive actors.⁴⁸ Although non-state actors may increasingly affect and constrain states, “system change ultimately happens through states” and

45. GUZMAN, *supra* note 35.

46. Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 396 (1992).

47. ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 242–43 (1999) (explaining that states see themselves as part of a “society of states’ whose norms they adhere to not because of on-going self-interested calculations that it is good for them as individual states, but because they have internalized and identify with them. This is not to deny that states are self-interested in much of what they do *within* the boundaries of that society. But with respect to many of the fundamental questions of their co-existence states have already achieved a level of collective interest that goes well beyond ‘Realism’”).

48. Alexander Wendt, *The State as Person in International Theory*, 30 REV. INT’L STUD. 289, 291 (2004).

To say that states are ‘actors’ or ‘persons’ is to attribute to them properties we associate first with human beings—rationality, identities, interests, beliefs, and so on. Such attributions . . . are found in the work of realists, liberals, institutionalists, Marxists, constructivists, behaviouralists, feminists, postmodernists, international lawyers, and almost everyone in between. To be sure, scholars disagree about which properties of persons should be ascribed to states . . .

Id. at 289 (footnote omitted).

“[i]n that sense states are still at the center of the international system.”⁴⁹

Institutionalists pose another response to realism by focusing on how states can cooperate through international institutions. Robert Keohane argues that states “build international regimes in order to promote mutually beneficial cooperation” and that such regimes “reduce transaction costs for states, alleviate problems of asymmetrical information, and limit the degree of uncertainty that members of the regime face in evaluating each others’ policies.”⁵⁰ Keohane, however, starts from the same assumption of unitary, self-interested states put forth by realists.⁵¹ Although Keohane does not focus on international law, his approach focuses on international institutions that are often “creatures of international law,” and his work has been imported into international legal discourse.⁵²

In political theory, scholars have reacted to realism by positing cosmopolitan duties of states to protect human rights and meet other global responsibilities.⁵³ Cosmopolitanism adopts a moral point of view that relates to global concern for the well-being of all persons, regardless of nationality.⁵⁴ Charles R. Beitz, a foremost cosmopolitan theorist, rejects realist skepticism about the possibility of moral judgments in international relations.

Although cosmopolitan theory sometimes places responsibility on individuals, a number of theories have shifted attention to institutions and focus on states and national govern-

49. WENDT, *supra* note 47, at 9.

50. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* xi (Princeton Univ. Press ed., 2005).

51. *Id.* at 25.

52. Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 *AM. J. INT’L L.* 64, 79–80 (2006) (discussing Keohane’s impact on “subsequent analyses of the relationship between international law and power”).

53. *See, e.g.*, CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 6 (1979) (arguing for the possibility of a normative political theory of international relations and the “plausibility of a more cosmopolitan and less state-centered perspective”).

54. *See id.* at 55 (“It is the rights and interests of persons that are of fundamental importance from the moral point of view, and it is to these considerations that the justification of principles for international relations should appeal.”); TERRY NARDIN, *LAW, MORALITY AND THE RELATIONS OF STATES* 274 (1983) (“The essential element of cosmopolitan justice in the circumstances of the states system is the idea of an international minimum standard to be observed by states in their treatment of individuals, regardless of whether these are their own nationals or those of another country.”).

ments as the locus of cosmopolitan moral obligations.⁵⁵ Even if individuals fail in their moral obligations, states can help individuals realize their obligations.⁵⁶ In addition, states have unique responsibilities of their own apart from people who make up the state.⁵⁷ In this cosmopolitan view, the state is, or at least has the capacity to be, a *moral agent*.⁵⁸

Constructivism, institutionalism, and cosmopolitanism retain the unitary state model, but all reject to varying degrees the realist view of what does and should affect state behavior. Conceptualizing state behavior as socially constructed, institu-

55. See Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1670 (2003) (describing the development of an institutional turn in cosmopolitan theory).

56. See, e.g., Henry Shue, *Mediating Duties*, 98 ETHICS 687, 697–98 (1988) (arguing that institutions, including states, enable individuals to meet global responsibilities at lower a cost).

57. Michael J. Green argues that institutional agents are “different kinds of agents than individuals are” and that “there is a distinctive set of institutional responsibilities that are structurally different from individual responsibilities.” Michael J. Green, *Institutional Responsibility for Global Problems*, 30 PHIL. TOPICS 79, 86–88 (2002). These responsibilities may include dealing with “global problems.” *Id.* at 89.

Part of the reason for the institutional move is to allow the state to overcome limitations on individual morality. See, e.g., Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 599 (1983) (“[A] state may demand more of its people than its people, as individuals, must demand of themselves when cosmopolitan goals require sacrifices of them.”); Green, *supra*, at 90. The basic idea is that where individuals may be limited by self-interest and lack of capacity to tackle social or global problems, states have the ability and responsibility to address such problems. See IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 250 (2000) (“Obligations of social justice are not primarily owed by individuals to individuals. Instead, they concern primarily the organization of institutions.”).

58. This cosmopolitan view is not just academic. In its strongest form, doctrines such as responsibility to protect (R2P) posit the duty of states to protect people in other states from genocide, ethnic cleansing and the like, by military means if necessary, even when such efforts have little to do with the state’s self-interest. See, e.g., INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶ 1.35 (Dec. 2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (stating that sovereignty implies responsibility to one’s citizens). The doctrine of R2P means that states have responsibilities to protect their own citizens and people and also have a responsibility to people in other states. See Carla Bagnoli, *Humanitarian Intervention as a Perfect Duty: A Kantian Argument*, in HUMANITARIAN INTERVENTION, NOMOS XLVII 117, 130 (Terry Nardin & Melissa S. Williams eds., 2006) (“It follows from it that neutrality is morally inadmissible, that the decision not to intervene calls for blame and other moral sanctions. The perfect duty to coerce the offender is complementary to the perfect duty to protect the victim.”); Neomi Rao, *The Unbearable Lightness of Responsibility to Protect* (unpublished manuscript) (on file with author).

tional, or moral creates a potentially important role for international law.

3. Limits of Unitary Actor Theories

Despite their serious disagreements about the nature of the state and how it should respond to international law, unitary-actor theories start from the same foundational assumption about the state as a single institution. Modeling the state as a unitary actor in international law leads theorists to two important conclusions.

First, the state should be treated as if it were a unitary actor in international relations—a black box undifferentiated by its internal processes. These theories do not deny that domestic processes might affect state decisions and even in some instances determine state decisions, but nonetheless, they use a simplifying assumption that sub-state actors are ultimately less important than the “state” for making predictions about international behavior.

Second, as a unitary actor, the state can formulate its interests in a *coherent* manner. It allows the attribution of various interests and goals to the state, rather than to the messy collectivity of individuals and institutions that comprise the state. This may be the greatest attraction of the unitary-actor assumption—states can behave in predictable ways because they are, for all relevant purposes, a single institution in the sphere of international law.

Yet unitary theories leave largely unanswered the questions about how states formulate their interests.⁵⁹ The public choice analysis highlights some of the limitations of unitary state theories by demonstrating the pervasive disaggregation of interests and incentives within the executive branch, the branch most likely to control state action in a unitary manner. Public choice may also be complementary to some unitary theories, particularly rational choice theories, because it provides information about the domestic processes that generate state interests and shape the form of international law compliance.⁶⁰

59. See *infra* Part IV.A.

60. See *infra* Part IV.A; see also GUZMAN, *supra* note 35, at 21 (explaining how liberal approaches that are similar to public-choice analysis can be reconciled with rational choice approach because “[o]nce the domestic political process plays itself out, however, the state may pursue those policy goals on the international stage in a rational and unitary way. From this perspective, the liberal model serves as an input for the institutionalist model”).

B. LIBERAL APPROACHES: DISAGGREGATING THE STATE

In recent years, scholars have challenged the model of unitary states acting within the international system and proposed instead a liberal account of international relations that disaggregates the state. This work has looked inside the “black box” of the unitary state and considered how domestic processes, pressures, interests, and institutions affect foreign policy. “Liberal theory rests on a ‘bottom-up’ view of politics in which the demands of individuals and societal groups are treated as analytically prior to politics.”⁶¹ State preferences represent subsets of domestic society and powerful interest groups, and the configuration of state preferences determines state behavior in international relations.⁶²

In international law, liberal scholars have focused on transnational cooperation and non-state actors working together. For example, Anne-Marie Slaughter explains that the nation-state “is disaggregating into its separate, functionally distinct parts.”⁶³ In this view, the traditional model of the unitary state in international law does not explain the activity at the ground level, where many different actors, both in government and outside of it, effectively pursue foreign policy. Slaughter calls into question the idea of the unitary state and notes that this “fiction of a unitary will and capacity for action” blinds us from seeing the international system as it really is.⁶⁴

Contrary to the dominant unitary perspective, Slaughter argues, international regulation across borders occurs through a “disaggregated state” of many semi-autonomous institutions that have the power and authority to fulfill their mandates and interact with similar institutions in other countries.⁶⁵ Govern-

61. Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 517 (1997); see also Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 433–35 (1988) (modeling international relations as a two-level game in which international negotiations take place on both the international and domestic levels, and to succeed negotiators have to find a winning solution to both games simultaneously).

62. Moravcsik, *supra* note 61, at 519–20.

63. Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997) (“These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.”).

64. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 12–13 (2004).

65. *Id.*; see also Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1285 (2005) (reviewing ANNE-MARIE SLAUGHTER, A NEW

ment officials regularly form networks with their counterparts in other countries to develop transgovernmental policy.⁶⁶ Kal Raustiala has identified detailed case studies of the transgovernmental networks at work in regulatory areas such as securities, antitrust, and the environment.⁶⁷ Importantly, Slaughter posits that transnational networks can improve compliance with international law.⁶⁸

Focused more specifically on international law compliance, Harold Koh recognizes a similar phenomenon in his work on the “transnational legal process,” which describes “how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.”⁶⁹ He offers this process as a theory about why nations comply with international law most of the time.⁷⁰ He argues that nations do so because through a “repeated cycle of interaction, interpretation, and internalization—the transnational legal process—international law acquires its ‘stickiness,’ and nations come to ‘obey’ out of a perceived self-interest that becomes institutional habit.”⁷¹ This transnational legal process similarly focuses on a disaggregated state. It highlights a complicated

WORLD ORDER (2004)) (noting that a significant assumption behind Slaughter’s work is that disaggregated actors have the legal power and authority to enter into cross-border relations and that this power also provides evidence for the existence of a disaggregated state).

66. Slaughter, *supra* note 63, at 189–90 (“Bureaucrats charged with the administration of antitrust policy, securities regulation, environmental policy, criminal law enforcement, banking and insurance supervision—in short, all the agents of the modern regulatory state—regularly collaborate with their foreign counterparts.”).

67. See, e.g., Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 26–49 (2002) (discussing networks in securities regulation, competition policy, and environmental regulations).

68. *Id.* at 7 (explaining that national governments would exercise “their national authority to implement their transgovernmental and international obligations and represent[] the interests of their country while working with their foreign and supranational counterparts to disseminate and distill information, cooperate in enforcing national and international laws, harmonizing national laws and regulations, and addressing common problems”).

69. Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996).

70. *Id.* at 206 (“[A] theory of transnational legal process has . . . explanatory power regarding questions of causation. It predicts that nations will come into compliance with international norms . . .”).

71. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 655 (1998).

array of governmental and non-governmental actors working together across borders to create and to ensure compliance with international law.⁷²

For Koh, nations follow legal norms because “domestic decision-making becomes ‘enmeshed’ with international legal norms, as institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes.”⁷³ Koh does not, however, provide a detailed mechanism for how such entrenchment occurs, but rather proposes it as a theory of the way government actors behave.⁷⁴

Even more than Slaughter, Koh stresses the normativity of his arguments. Koh argues that the transnational legal process promotes obedience to, or compliance with, international law or international law norms, which he assumes is a positive good.⁷⁵ Koh’s theory stresses the ability of both sub-state and private actors to influence government action in the direction of compliance with international law.⁷⁶ Thus, the disaggregated state is normatively desirable to the extent that it promotes compliance with international law.

From the description of domestic and transnational cooperation, that is *non-state activity*, however, Slaughter and Koh have drawn conclusions about *state behavior*—namely that there will be greater compliance with international law and development of more precise norms of international law.⁷⁷ Slaughter and Koh focus on how disaggregated actors work

72. See, e.g., Koh, *supra* note 69, at 207 (noting that nongovernmental organizations “are not just observers of, but important players in, transnational legal process”).

73. *Id.* at 204.

74. See Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 801 (2005) (criticizing the work of Koh and Slaughter because “one cannot derive from their discussions any clear predictions about how and when nonstate actors cause compliance with international law or generate other forms of international cooperation”).

75. Koh, *supra* note 69, at 204–05 (explaining that the “critical idea is the normativity of transnational legal process” in that “[t]o survive in an interdependent world [all nations] . . . must eventually interact with other nations” and accordingly internalize international legal norms).

76. *Id.* at 207.

77. See SLAUGHTER, *supra* note 64, at 213 (“Government networks also strengthen compliance with international rules and norms, both through vertical enforcement and information networks and by building governance capacity in countries that have the will but not the means to comply.”); see also *id.* at 214–15 (noting that government networks “can harness the coercive power of national government officials” in addition to other forms of “soft power”).

transnationally and conclude that this fosters international cooperation and soft forms of international law.⁷⁸ They posit that liberal approaches demonstrate the relevance of international law and predict an increase in state compliance with international law.⁷⁹ This prediction, however, does not follow necessarily from the increase in non-state activities—at least it is not clear how the proliferation of non-state international cooperation and dialogue will improve the creation of, and compliance, with international law by states.

C. BRINGING TOGETHER THE “THEY” AND THE “IT”

Unitary theories recognize that domestic factors may influence state behavior, yet generally exclude these factors from their theories. Similarly, liberal approaches focused on domestic actors minimize or fail to take account of institutions that formulate the state’s view. Liberal theorists acknowledge that the state often acts in a unitary manner, but do not provide an account of how domestic factors affect the behavior of a state *qua* state.

By contrast, public choice considers how the “they” of the executive branch seeks to function as an “it” with regard to international law. In doing so, it follows suggestions in the political science literature that unitary and domestic approaches can be complementary. For example, Andrew Moravcsik, a proponent of liberalism in international relations, has suggested that liberal theories can provide the first step in a two-stage process of explaining state behavior. First, liberal theories can help explain how states define their preferences; and second, state interactions on the international level may be explained by realist and institutionalist theories of strategic interaction.⁸⁰ Similarly, Helen V. Milner has modeled the preferences of domestic agents and how they are brought together institutionally in order to systematically study the domestic influences on international politics.⁸¹

78. *Id.* at 261 (“[G]overnment networks promote convergence, compliance with international agreements, and improved cooperation among nations on a wide range of regulatory and judicial issues.”).

79. *Id.* (“A world order self-consciously created out of horizontal and vertical government networks could go much further. It could create a genuine global rule of law . . .”).

80. Moravcsik, *supra* note 61, at 544.

81. See HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 97, 234 (1997) (“Three internal factors condition a state’s ability to cooperate: the structure of domes-

This Article proposes a similar two-step process to explain aspects of international law compliance within the executive branch. Like liberal theories, the public choice analysis of international law compliance focuses on variation in domestic politics—specifically the preferences and interests of key actors and agencies who interpret international law and make decisions about compliance within the executive branch. Yet, like state-centered theories, public choice examines the available institutional mechanisms within the executive branch for coordination of interests.

D. THE CENTRALITY OF THE EXECUTIVE BRANCH

This Article considers behavior of officials in the executive branch because of the central role that the President plays with respect to the interpretation of and compliance with international law. As seen above, many theories of international law compliance focus either explicitly or implicitly on the activities of the executive. Unitary-state theories find their best case for unitary action in the executive.⁸² Liberal theories focus on a wide array of government and nongovernment actors, but many of the transnational activities they describe relate to the work of executive branch agencies, precisely because they are most likely to engage their foreign counterparts.

With international law, as with foreign affairs more generally, the President has a natural advantage in serving as the point of national unity. Speaking with “one voice” on international matters is often advanced as an essential component of strengthening state power, because it does not display indecision, internal division, or weakness to other nations.⁸³ Moreover, as a practical matter, analyzing the executive branch allows for study over a more manageable part of the federal

tic preferences, the nature of domestic political institutions, and the distribution of information internally. . . . [T]hese aspects of the domestic game combined with the international game determine whether cooperation is possible and what its terms will be.”).

82. Those who adopt a unitary theory recognize the different components of the government, but nonetheless treat it as a unitary entity for the purposes of modeling its behavior with regard to international law and foreign affairs. *See, e.g.*, GOLDSMITH & POSNER, *supra* note 13, at 6 (discussing their assumption that state interests are pegged to the state’s political leadership); *infra* notes 265–75 and accompanying text.

83. The Founders recognized the need for a central authority in the realm of foreign affairs. *See, e.g.*, THE FEDERALIST NO. 42, at 213 (James Madison) (Ian Shapiro ed., 2009) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”).

government. Even in the most unitary branch, we can see the divergence of agency interests and the difficulty of institutional coordination. Public choice problems only multiply when considering the role of Congress, the Supreme Court, and private actors.

Focus on the executive branch in this Article, however, should not be taken to undermine the importance of all three branches to foreign policy and international law interpretation. Despite the interest in projecting a unitary face abroad, the Constitution divides the foreign affairs power—as it does the domestic powers—between the three branches.⁸⁴ This separation is often overlooked or minimized in the context of international policy.⁸⁵ Congress and the Supreme Court have important constitutional roles with respect to international law.⁸⁶

84. See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 8 (2007) (arguing that the interest in speaking with “one voice” is a policy preference and one that is “fundamentally opposed to the constitutional design”). See generally Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 *YALE L.J.* 1762 *passim* (2009) (providing a thorough treatment of the textual and historical understanding of the constitutional powers of the three branches in foreign affairs).

85. RAMSEY, *supra* note 84, at 379–80 (explaining that his textual account of the Constitution’s text in foreign affairs closely resembles the “standard description of constitutional government in domestic affairs”); see also SLAUGHTER, *supra* note 64, at 13 (noting that in domestic affairs “[w]e do not choose to screen out everything except what the president does or says, or what Congress does or says, or what the Supreme Court does or says. But effectively, in the international system, we do”).

86. The Constitution gives Congress authority to define and punish “Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. This power gives Congress a significant role in formulating customary international law. See Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations”*, 42 *WM. & MARY L. REV.* 447, 452 (2000) (“An analysis of the Clause supports the conclusion that the framers delegated extraordinary foreign affairs powers to Congress, far broader than those granted on the domestic front.”); see also Paulsen, *supra* note 84, at 1809 (“Given international law’s foggy and (in part) common law nature, Congress possesses in effect a common-law-making power to pass criminal laws concerning matters it decides are a violation of the Law of Nations.”). Congress also participates in the formation of international agreements, including treaties requiring the support of two-thirds of the Senate, and may enact statutes to implement treaty obligations. See Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 *TEX. L. REV.* 961, 962 (2001) (discussing the difference between treaties and executive agreements).

Along with the political branches, the judiciary interprets and ensures compliance with international law as an ordinary incidence of its duty to decide cases and controversies. U.S. CONST. art. III, § 2; see also Paulsen, *supra* note 84, at 1816–17 (2009) (explaining that international law may be invoked in U.S. courts just as domestic law and there is no “foreign affairs exception”

Precisely what the allocation of constitutional powers is with regard to foreign affairs has been the subject of much dispute, and the branches may conflict in the pursuit of their aims.⁸⁷ For the purposes of this Article, it is sufficient to highlight that the U.S. Constitution provides for separation of powers over foreign affairs, including the mechanisms for interpreting and complying with international law.

Nonetheless, over time the President has consolidated power over foreign policy. With regard to international law, the President plays a central, though not exclusive, role in its formation, interpretation, and compliance. The Constitution gives the President authority to represent the United States in its interactions with other nations and to create international law by negotiating treaties and other agreements with foreign powers.⁸⁸ As Commander-in-Chief of the nation's military, the President leads the conduct of war, which provides a significant source of authority to interpret the obligations of the law of war.⁸⁹ Many have argued that executive power has been at its height since the attacks of September 11, 2001.

to the power of American courts to decide questions of international law or of U.S. law that draw upon norms of international law"). Although the Court has sometimes deferred to the political branches in foreign affairs, *see, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318–19 (1936) (discussing the broad power of the President over foreign affairs), it has often directly engaged in deciding difficult issues regarding the domestic effects of international law, *see* *Medellin v. Texas*, 552 U.S. 491, 526–27 (2008) (holding, in one part of the opinion, that certain non-self-executing treaties do not give the President the power to make them self-executing).

87. *See* EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957* (4th ed. 1957) (“[T]he Constitution . . . is an invitation to struggle for the privilege of direct[ing] American foreign policy.”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 25 (2d ed. 1996) (“Whether one finds the mantle of national authority over foreign relations buried in the Constitution or more or less outside it, separation and checks and balances govern the conduct of foreign affairs also, but here they look different, have different consequences, raise different issues.”); RAMSEY, *supra* note 84, at 8 (“The Constitution deliberately fosters multiple voices in foreign affairs, as it fosters multiple voices in domestic affairs.”).

88. U.S. CONST. art. II, § 2, cl. 2. Article II also gives the President the power to “appoint Ambassadors, other public Ministers and Consuls.” *Id.* The President “shall receive Ambassadors and other public ministers.” *Id.* at art. 2, § 3. These explicit grants of power have often been interpreted to give the President the power to recognize governments, modify relationships with governments, and determine the contents of communications with foreign governments. *See* HENKIN, *supra* note 87, at 36–38 (discussing the foreign affairs powers of the President).

89. HENKIN, *supra* note 87, at 45–50 (describing the President’s powers as Commander-in-Chief).

Questions about the scope and applicability of international law arise during the course of all manners of executive branch activities including trade, financial regulation, and environmental policy. Lawyers within the various agencies must determine the applicability of international law. In the process of executing domestic laws, the President must decide to what extent and in what manner international law affects how he proceeds with his work.⁹⁰ Such on-the-ground determinations will largely be confined to the executive branch and most of these questions will never be reviewed in court.⁹¹

Moreover, even after determining that international law applies to a contemplated action, the President may have, in certain circumstances, the authority to disregard international law.⁹² This may include the unilateral authority to terminate treaties.⁹³ To varying degrees, it is thought that the President

90. See Paulsen, *supra* note 84, at 1812 (“If the Constitution’s grant of ‘the executive power’ is rightly understood as embracing the power to determine and direct the content of the United States’ policies with respect to relations with other nations, this is truly an enormous sphere of constitutional power within which the President possesses authority to interpret the obligations of international law for the United States.”); see also *Al-Bihani v. Obama*, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of reh’g en banc) (explaining that “international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms” and “[t]o the extent there is ambiguity in a statutory grant to the President of war-making authority, the President . . . is to resolve the ambiguity in the first instance”).

91. Questions about the scope of executive branch behavior may stay out of the court for any number of reasons, including secrecy of some actions, the difficulty of finding an appropriate plaintiff with standing, and the possibility that courts will decline to review “political” questions. See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47 (D.D.C. 2010) (determining the political question doctrine barred judicial consideration of an injunction prohibiting the targeted killing of Anwar Al-Aulaqi in part because “there are no judicially manageable standards by which courts can endeavor to assess the President’s interpretation of military intelligence and his resulting decision based on that intelligence—whether to use military force against a terrorist target overseas”).

92. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters’ note 3 (1987) (“[T]he President has the power, when acting within his constitutional authority, to disregard a rule of international law or an agreement of the United States”); cf. Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 325 (1985) (arguing that “[w]hen Congress approves of a presidential act violative of a customary international law, that act is constitutionally permissible”).

93. See *Goldwater v. Carter*, 617 F.2d 697, 699, 708–09 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979); see also Paulsen, *supra* note 84, at 1778 (explaining that if the President’s “executive power includes the power over foreign affairs . . . , a treaty may not extinguish or limit such constitutional power” (footnote omitted)).

may disregard international law when it conflicts with constitutional requirements.⁹⁴ The extent to which the President may disregard international law in a particular circumstance, however, will depend on legal analysis, but also on security, military, diplomatic, and political considerations.⁹⁵ In sum, the President's grant of executive power gives him significant, though by no means exclusive, authority to determine the extent and manner of United States compliance with international law.

E. THE "SOFTNESS" OF INTERNATIONAL LAW

Before turning to the public choice of international law compliance, it is important to take into account some particular characteristics of international law. Compliance with international law is complicated because (1) there are different levels of domestic obligation associated with various forms of international law; and (2) international law has varying degrees of "softness" that invite policy judgments and allow a wide range of plausible interpretations.

At the outset, there are different types of international law that have different domestic effects in the United States. There is widespread agreement that statutes incorporating international law and self-executing treaties can be enforced domestically.⁹⁶ The President interprets treaty obligations in the first instance and courts generally defer to executive interpretation when treaties are ambiguous.⁹⁷

94. See generally HENKIN, *supra* note 87, at 241–45 (explaining that the President "has independent constitutional authority in foreign affairs as Executive, as treaty-maker, as 'sole organ,' and as Commander in Chief. Under these powers, the President can act in ways that make or affect law in the United States, and it may be that as far as the Constitution is concerned he can exercise these powers even in ways that are inconsistent with U.S. international obligations"); Paulsen, *supra* note 84, at 1812–16 ("[T]he President has the largely discretionary power to adopt, interpret, and apply principles of internal law, as he thinks most proper, as an aspect of the Article II 'executive Power' with respect to foreign affairs and as an aspect of his power as the military's Commander in Chief.").

95. Jack Goldsmith has observed that the President "could in theory reverse any OLC decision and set legal policy for the executive branch." GOLDSMITH, *supra* note 1, at 79.

96. See generally *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008); John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655 (2010).

97. See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 960–63 (1994); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1211–12 (2007) (arguing

Other forms of international law, such as non-self-executing treaties or customary international law, have international effect, but their domestic effect remains in dispute. There is a robust and ongoing debate about what is legitimately included within this area of law and whether and to what degree it is binding on the President.⁹⁸ Some maintain that customary international law is part of federal general common law, enforceable by U.S. courts, but this position has been seriously contested in recent years.⁹⁹ As far as the executive branch is concerned, such law is not binding,¹⁰⁰ although it may deserve respect and the President may use such law when making decisions relating to foreign affairs and military preparedness. Customary international law poses particular problems of interpretation, especially as it has expanded away from traditional forms and toward new categories not firmly rooted in actual state practice.¹⁰¹

In addition to questions about enforceability, international law exhibits varying degrees of “softness” and differs with respect to its precision, obligation, and enforcement.¹⁰² More precise terms, more binding agreements, or better mechanisms for enforcement produce greater legalization or hardness in international law. Theorists have explained that international law rarely exhibits significant hardness—instead states routinely choose forms of legalization that are soft as to precision, obliga-

that “self-executing treaties and statutes incorporating international law should be subject to executive interpretation to the extent that they are ambiguous and the executive’s interpretation is reasonable” and that judicial deference has “significant advantages” over allowing courts to interpret ambiguous treaties).

98. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 844–46 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997). The debate continues in the federal judiciary as well, as is evident in such decisions as *Al-Bihani v. Obama* in which Judges Brown, Kavanaugh, and Williams exchanged lengthy opinions over the appropriate use of international law norms for the interpretation of statutes by the judiciary. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (denying reh’g en banc).

99. See Bradley & Goldsmith, *supra* note 98.

100. See, e.g., Auth. of the Fed. Bureau of Investigation to Override Int’l Law in Extraterritorial Law Enforcement, 13 Op. O.L.C. 163, 168–70 (1989).

101. See Bradley & Goldsmith, *supra* note 98, at 839–40.

102. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421–24 (2000).

tion, and/or enforcement.¹⁰³ Thus, although one might see precise terms, they will often be coupled with low levels of enforceability; or, alternatively, an agreement may have open-ended terms, subject to wide-ranging interpretation, but have relatively strict enforcement mechanisms.¹⁰⁴ Similarly, domestic statutes pertaining to the conduct of foreign affairs may also be manipulated through interpretations, such as Harold Koh's definition of "hostilities" under the War Powers Resolution to not include drone attacks, aerial piloted attacks, and other military efforts.¹⁰⁵ Moreover, although some traditional rules and doctrines of international law may be well-established, newer norms of international law may be less determinate, particularly as applied to new circumstances such as the war on terror and the evolving technologies for fighting it. The variability and softness of international law encourages interpretations that combine law with political judgment, making it difficult to separate the two.¹⁰⁶

This short discussion highlights the well-accepted understanding that assessments of international law depend, often to a significant degree, not only on formal legal interpretation, but on practical considerations about the effects on foreign and domestic policy.¹⁰⁷ Regardless of whether "harder" international law is desirable, lawyers and officials within the executive branch treat international law compliance along a continuum that considers a combination of legal, political, diplomatic, and national security concerns. In addition, since international law interpretation is often less settled by courts, the political branches retain more leeway. The available legitimate or plaus-

103. *See id.* at 455–56.

104. *See* Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401, 404–08 (2000).

105. *See Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. (June 28, 2011) (written testimony of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State), http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf (explaining that "hostilities" is an "ambiguous standard" that does not apply to the armed conflict in Libya); Savage, *supra* note 8.

106. *See* Abbott et al., *supra* note 104, at 419 ("Law and politics are intertwined at all levels of legalization . . . [I]t is reasonable to assume that most of the time, legal and political considerations combine to influence behavior.").

107. A number of former State Department legal advisers "acknowledged that where international law is unsettled or legitimately open to differing interpretations, they would naturally favor the interpretation most consonant with the course of action advocated by policy-makers." SCHARF & WILLIAMS, *supra* note 11, at 205.

ible interpretations allow for a range of policies that might be compliant with international law.

II. PUBLIC CHOICE OF INTERNATIONAL LAW COMPLIANCE

This Part will explain what I call the *public choice of international law compliance*. By this I mean describing and evaluating how officials and agencies within the executive branch interpret international law and make decisions about compliance. The emphasis here is on key domestic processes that determine compliance with international law. Pulling apart the interests, incentives, preferences, and approaches of different agencies and entities reveals an executive often at odds with itself. The public choice analysis demonstrates how the executive branch is a “they” and not an “it” even with regard to foreign affairs and international law compliance.¹⁰⁸

Bureaucratic competition and the difficulty of presidential control have been examined in the domestic context¹⁰⁹ and also with respect to international relations,¹¹⁰ but nonetheless these observations play surprisingly little role in how theorists evaluate state compliance with international law. The public choice analysis applies these tools to the agencies responsible for questions of international law compliance. Foreign policy emerges out of a process that involves many different agencies and individuals who act in part based on their particular interests, concerns, and agendas, and often will have divergent or conflicting interests and preferences with regard to how the state pursues foreign policy within the framework of international law.¹¹¹ These actors work out their differences in a man-

108. See Bressman & Vandenbergh, *supra* note 10, at 49 n.5 (citing sources where this observation has been made in the context of the administrative state and also for Congress); see also Putnam, *supra* note 61, at 432 (“If the term ‘state’ is to be used to mean ‘central decision-makers,’ we should treat it as a plural noun: not ‘the state, it . . .’ but ‘the state, they . . .’”).

109. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 257–76 (1st ed. 1989).

110. See GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 143–98, 255–93 (2d ed. 1999).

111. The political science literature offers further insight into the question of how domestic politics influences foreign policy and international relations, although this literature is not particularly concerned with international law compliance. See, e.g., ALLISON & ZELIKOW, *supra* note 110, at 113; Putnam, *supra* note 61, at 460 (“Unlike state-centric theories, the two-level approach recognizes the inevitability of domestic conflict about what the ‘national interest’ requires.”); Steven B. Redd, *The Influence of Advisers and Decision Strate-*

ner that is often ill-defined and haphazard. Even when the state must act in a centralized manner, key decision makers frequently divide over what action to take. The resolution of differences in this process does not necessarily proceed in a linear or coordinated manner.

Thus, the public choice analysis of executive branch action fills a critical gap between unitary state theories and explanations of the state as disaggregated in international law. Like disaggregated theories, the public choice account looks inside the “black box” to study various actors. Like unitary theories, it also looks at institutional mechanisms for coordinating agency interests in the formation of “state” interests.

This Part first provides a brief overview of some of the basic tenets of public choice theory, including some applications of these insights to international law. Then I examine international law compliance in the executive branch of the United States through a public choice framework by describing the key legal offices that determine the interpretation and scope of international law. For each agency, I examine and explain its operating structure; its culture, including the agency’s self-image as well as its external image; its incentives with regard to international law interpretation and compliance; and finally its relationship to the White House and President. This account provides a richer description of how the executive branch determines whether and how to comply with international law and considers some of the dynamics that shape decision making and the attempts to coordinate divergent viewpoints.

A. AN OVERVIEW OF PUBLIC CHOICE THEORY

Public choice theory provides a richer understanding of collective action within the government, examining in greater detail the incentives and operations of legislatures and bureaucrats with regard to domestic policy and regulation. Public

gies on Foreign Policy Choices: President Clinton’s Decision to Use Force in Kosovo, 6 INT’L STUD. PERSP. 129, 145 (2005) (“The broad policy implication of this theory and these case study and empirical studies is that leaders will often be constrained by domestic/political considerations above all else.”).

[I]ndividual decision makers vary in their subjective estimations of costs and benefits, even when faced with the same information. One cannot conclude therefore, that regardless of who had been sitting in the White House, he or she would have also decided to use force given identical military, economic, and political conditions.

Alex Mintz, *The Decision to Attack Iraq: A Noncompensatory Theory of Decision Making*, 37 J. CONFLICT RESOL. 595, 614 (1993) (citations omitted).

choice starts from an assumption that collective entities do not make decisions, but instead are comprised of individuals who make decisions based on advancing their rational interests.¹¹² Broadly speaking, public choice analysis focuses on political dynamics in order to try to explain the outcomes of the political or bureaucratic process.¹¹³

In studying these dynamics, public choice theory looks at the incentives and preferences of individuals within an organization in order to understand how the institution works. “Public choice helps to illuminate the ways in which specific institutional actors—flesh-and-blood legislators, judges, and bureaucrats—interact, and how differing institutions operate individually and in combination.”¹¹⁴ “Public choice” refers to a number of different theories and concepts often given this label.¹¹⁵ The analysis focuses on compromises that must be made between competing political interests.¹¹⁶

112. MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 7–10 (2009) (discussing the assumption of individual rationality); Ronald A. Cass, *Introduction: Economics and International Law*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 1, 36 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

113. For a more detailed discussion of public choice concepts and their applications, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997); STEARNS & ZYWICKI, *supra* note 112.

114. STEARNS & ZYWICKI, *supra* note 112.

115. For example, one branch focuses on interest-group theory and describes the political process as a competition between self-interested individuals and groups, including politicians and special interests. In this view, legislation and regulation generally result from powerful interest groups using politicians and the political process to improve their welfare, rather than the general welfare of the public. “In short, legislation is ‘sold’ by the legislature and ‘bought’ by the beneficiaries of the legislation.” William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875, 877 (1975); see also FARBER & FRICKEY, *supra* note 113, at 12–37; George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

Another related branch, sometimes called social choice, studies the democratic process and suggests not just that it might be a product of special interests but rather “that political outcomes will be entirely incoherent and that the whole concept of the ‘public interest’ is meaningless.” FARBER & FRICKEY, *supra* note 113, at 38; see also WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 167 (1982) (explaining how the meaning of social choices is obscure and may simply be the “accidental amalgamation of what the manipulators (perhaps unintentionally) happened to produce”).

116. See Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice*

Of particular relevance to this Article, scholars have offered competing public choice accounts of bureaucratic behavior.¹¹⁷ For example, William Niskanen set forth a principle of agency expansion—that rational bureaucrats seek to maximize their budgets and, consequently, their salaries and power.¹¹⁸ By contrast, James Q. Wilson posited that agencies tend to be risk averse and will behave in a manner that protects their autonomy, which includes maintaining independence from oversight by other agencies.¹¹⁹ Wilson examined how the culture of an agency, including whether it had a strong mission, affects its behavior, priorities, and ability to adapt to changing circumstances.¹²⁰ Public choice may not explain the full range of political behavior, but it provides a useful tool for pulling apart the motivations of individuals who make up government institutions in order to better understand institutional decision making.¹²¹

Although currently limited, there has been a growing interest in public choice applications to international law.¹²²

Theory and International Economic Law, 10 AM. U. J. INT'L L. & POL'Y 745, 748 (1995) (explaining that public choice theory assumes “politics must consist primarily of the effecting of tradeoffs and compromises among competing interests, rather than a solidaristic pursuit of an overarching common goal to the exclusion of opposing claims”).

117. STEARNS & ZYWICKI, *supra* note 112, at 342–55 (providing an overview of the various theories of bureaucratic action).

118. WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38 (1971).

119. WILSON, *supra* note 109, at 90–112.

120. James Q. Wilson noted the effects of culture, including that

[f]irst, tasks that are not part of the culture will not be attended to with the same energy and resources as are devoted to tasks that are part of it. Second, organizations in which two or more cultures struggle for supremacy will experience serious conflict as defenders of one seek to dominate representatives of others. Third, organizations will resist taking on new tasks that seem incompatible with its dominant culture.

Id. at 101.

121. There is disagreement about whether these positive descriptions should lead to normative insights about how courts, agencies, and ordinary people should view the political process and the outputs of that process, and indeed, what those normative insights should be. *See, e.g.*, FARBER & FRICKEY, *supra* note 113, at 42–47 (1991); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

122. *See generally* Cass, *supra* note 112, at 1–4 (describing the potential for growth in the field of public choice and international law); D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1041–48 (2011) (reviewing MAXWELL STEARNS & TODD ZYWICKI, PUBLIC

Scholars have used public choice theory to explain various aspects of international policy. For example, Enrico Colombatto and Jonathan R. Macey have explained international insider-trading regulation from the perspective of regulators who found an international regulatory regime in their interest because it increased their power and authority.¹²³ Alan O. Sykes and Andrew T. Guzman have analyzed the domestic political incentives that cause agencies to seek greater regulatory control through particular international trade regimes.¹²⁴ Julie Roin has examined factors accounting for the difficulty of international harmonization of tax policy.¹²⁵ Public choice analysis in these areas has focused on specific issues and problems and evaluated the domestic political considerations that drive international policy and cooperation.¹²⁶ It takes a hard look at the compromises between competing interests, rather than assuming an ideal of compliance with international law.¹²⁷

This Part seeks to apply public choice insights to the question of how the executive branch in the United States determines compliance with international law. In international matters, the President represents the state abroad¹²⁸ and this provides a certain amount of very important unity. Nonetheless, even the unitary executive is an aggregation of different individuals, institutions, and interests with respect to international policy. The public choice of international law compliance

CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009), criticizing the authors for their omission of public choice applications to international policy and organizations and stressing the importance of this topic); Stephan, *supra* note 116, at 767.

123. Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 951–54 (1996).

124. See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 906–13 (2002) (explaining that when governments attempt to expand their laws extraterritorially it leads to global overregulation); Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991) (discussing the public choice perspective as it relates to the escape clause of Article XIX).

125. Julie Roin, *Taxation with Coordination*, 31 J. LEGAL STUD. S61 (2002).

126. Colombatto & Macey, *supra* note 123, at 932 (“Public choice theory rejects the idea that states have interests, and instead posits that international institutions are vehicles through which politicians, bureaucrats, and interest groups reflect their own interests.”).

127. See Stephan, *supra* note 116, at 767 (noting that public choice suggests “appetites more than ideals might dominate the lawmaking process, a conclusion that is at least dreary if not disillusioning”).

128. U.S. CONST. art II, § 2.

examines the interests and incentives that several key agencies have with regard to the interpretation and compliance with international law.

B. INTERNATIONAL LAW INTERPRETATION IN THE EXECUTIVE BRANCH

This Part identifies several key agencies and actors responsible for decisions about international law interpretation and application throughout the executive branch. It examines in greater detail the State Department Legal Adviser, the Department of Defense General Counsel, the Department of Justice Office of Legal Counsel, and the National Security Legal Advisor. Each of these offices, and a number of others not considered in detail here,¹²⁹ play an important role in the interpretation of international law and the formation of foreign policy. In the case of conflict, however, no agency enjoys a constant supremacy over the others. Moreover, each agency has a particular culture and institutional interests that shape how it provides legal analysis.¹³⁰ When advising the President or his close advisors, these agencies and individuals may disagree over how to interpret and apply international law and thus may compete for the attention and trust of the President. This occurs despite the fact that the President appoints the heads of these offices and retains the ability to remove them from office.

Examining these agencies in greater detail reveals a dynamic of negotiation and competition between them. Each agency has a specific function and mandate. Agencies also have their own organizational culture, “a persistent, patterned way of thinking about the central tasks of and human relationships within an organization.”¹³¹ Some of these agencies and their legal offices will have a stronger sense of “mission” than other offices and this will affect the way in which they make decisions. Agencies also have distinct constituencies and interest groups that monitor and seek to shape agency positions.

129. Other legal offices include intelligence agencies, such as the Central Intelligence Agency and Department of National Intelligence; litigating divisions of the Department of Justice, including the Solicitor General’s Office; White House lawyers, including the Counsel to the President and the General Counsel of the U.S. Trade Representative; and lawyers within other agencies specifically focused on international law matters.

130. See WILSON, *supra* note 109, at 86 (explaining how agency beliefs shape how an agency performs its tasks).

131. *Id.* at 91.

Moreover, the internal dynamics and relationships of each office or agency help to identify its interests and incentives with regard to international law interpretation.¹³² These dynamics include the relationship between the political appointees and career lawyers, as well as the type of career legal staff generally found in the office, and the dynamics between the legal office and the agency of which it is a part. Finally, each entity will have a particular, and often shifting, relationship to the White House and will compete to influence centralized decision making. This dynamic of competition on key policy matters will further affect the manner in which agencies interpret and apply international law.

This public choice analysis also considers institutions available for coordination and observes that the executive branch has no singular process for deciding whether and in what manner to comply with international law. Instead there are myriad pathways by which international law considerations come to bear on centralized decision making. Moreover, because there are so many providers of international law interpretation, conflicts over the scope and applicability of international law frequently arise and these are not consistently coordinated into a singular state interest.¹³³

This Part provides a more realistic description of how even centralized executive branch decision making may depend upon diverse sources of legal interpretation and result from an ill-defined process by which issues of international law are raised and addressed.¹³⁴ These public choice insights suggest that international law compliance results, at least in part, from the negotiation and competition between different stakeholders in the executive branch, rather than from a unitary interest or purpose.

132. The descriptions of agency behavior are based on published accounts of former administration officials and other publicly available accounts of how these offices work and have handled particular policy issues. Some of this material draws from my personal observations as Associate Counsel in the Office of the Counsel to the President (the White House Counsel's Office), as well as from interviews and conversations with former administration officials who had responsibility for the interpretation of international law and the formation of foreign policy.

133. See *infra* Part III.

134. One possibility is that such disaggregation is purposeful and serves the interests of the President in formulating foreign policy and determining compliance with international law. See *infra* notes 257–60 and accompanying text.

1. State Department Legal Adviser

The legal adviser's office in the State Department

furnishes advice on all legal issues, domestic and international, arising in the course of the Department's work. This includes assisting Department principals and policy officers in formulating and implementing the foreign policies of the United States, and promoting the development of international law and its institutions as a fundamental element of those policies.¹³⁵

The office of the legal adviser (frequently referred to as "L") primarily provides advice to various offices within the State Department, but also may have a broader role in overseeing international law related matters in other agencies or the White House.¹³⁶

The State Department's mission and culture emphasize diplomacy and relationships with other nations.¹³⁷ The specific culture of the legal adviser's office values international law and considers it a positive good for the promotion of human rights and as a solution to problems of international scope.¹³⁸ The legal adviser's office has a distinct mission with regard to international law—it works to ensure U.S. compliance with international law and seeks to promote international law norms within the government and abroad.¹³⁹

Moreover, the legal adviser sometimes considers it essential to engage in international legal diplomacy by promoting the efforts of international law and the role of the United States as a supporter of international law. As John B. Bellinger, legal adviser during the George W. Bush Administration, noted: "I also wanted to make sure that other countries understood that the United States does take international law se-

135. *Office of the Legal Adviser*, U.S. DEP'T OF ST., <http://www.state.gov/s/l/> (last visited Oct. 22, 2011).

136. SCHARF & WILLIAMS, *supra* note 11, at xix.

137. See *Bureau of Resource Management*, U.S. DEP'T OF ST., <http://www.state.gov/s/d/rm/index.htm#/mission> (last visited Oct. 22, 2011) ("Advance freedom for the benefit of the American people and the international community by helping to build and sustain a more democratic, secure, and prosperous world composed of well-governed states that respond to the needs of their people, reduce widespread poverty, and act responsibly within the international system.").

138. See Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 680 (1962) (explaining the values and policy interests involved with practicing in the Office of the Legal Adviser).

139. *Id.* at 634; see also *Office of the Legal Adviser*, *supra* note 135.

riously. . . . I considered this aspect of the office's work to be a central part of my tenure as Legal Adviser."¹⁴⁰

The approach of the legal adviser is often referred to in terms of "conscience."¹⁴¹ "L" upholds international morals and legal obligations for the government at large. Conscience here may stem from particular international obligations or simply wider cosmopolitan principles—a general outlook that persists across administrations. The norms of "L" may differ from other agencies also charged with the interpretation of international law. In the idealistic or symbolic view, compliance with international law may be a kind of moral imperative, the right way forward for the United States and the world.¹⁴²

Davis Robinson, legal adviser during the Reagan Administration, noted that his office "for many years was viewed in the government at large as the moral conscience of American foreign policy."¹⁴³ Similarly, the current legal adviser, Harold Koh, has repeatedly written and spoken about the normative and moral dimensions of international law compliance.¹⁴⁴ As Koh explained in a public lecture, the legal adviser serves not only as counselor, but also "as a *conscience* for the U.S. Government with regard to international law. The Legal Adviser . . . offers opinions on both the wisdom and morality of proposed international actions."¹⁴⁵ The staff attorney-advisers similarly adopt a perspective of international lawyers who believe in the "importance and utility of adherence to international rules and

140. SCHARF & WILLIAMS, *supra* note 11, at 137.

141. *Id.* at xix.

142. See Philip Allott, *The International Lawyer in Government Service: Ontology and Deontology*, 23 WIS. INT'L L.J. 13, 23 (2005) ("Like a sailor on dry land, the ideal international lawyer in government service will have in the mind's eye a more distant horizon, the wonderful possibility of human social progress beyond the dreadful reality of human social evil.").

143. SCHARF & WILLIAMS, *supra* note 11, at 206 (quoting interview with Davis Robinson).

144. See, e.g., Koh, *supra* note 71, at 680–81 ("Nations obey [international law] because of people like us—lawyers and citizens who care about international law, who choose not to leave the law at the water's edge, who do their utmost to 'bring international law home.'").

145. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks to the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

norms” and “tend to favor [policies] that they believe enhance[] the stability and coherence of the international legal regime.”¹⁴⁶

Yet most legal advisers speaking about their role also recognize the essentially pragmatic nature of their job—to provide the best possible legal advice, and if it is not taken, to craft the best justifications under international law after the fact.¹⁴⁷ The legal adviser, like other administration lawyers, interprets international law against a backdrop of his department’s policy goals. As Richard Bilder noted in the 1960s, working in the Legal Adviser’s office caused one to develop a “pragmatic or functional approach to international law—a tendency to view that law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging real solutions to practical problems of international order.”¹⁴⁸

More recently, Koh has observed that as a government lawyer his role is to remove illegal options from consideration, but once that is done, his “client has a right to choose from the other options, even those you think are lawful if awful and if that’s the choice they make, you have to give it your vigorous defense.”¹⁴⁹ Koh also explained in his Senate testimony about the lawfulness of the Libya intervention that reasonable minds may disagree about the interpretation of the War Powers Resolution, “[b]ut that should not distract those of us in government from the most urgent question now facing us, which is not one of law but of policy.”¹⁵⁰ This pragmatic reality of justifying the

146. Michael K. Young, *The Role of the Attorney-Adviser in the U.S. Department of State: Institutional Arrangements and Structural Imperatives*, LAW & CONTEMP. PROBS., Spring 1998, at 133, 139–40.

147. For example, Michael J. Matheson, former legal adviser under the George H.W. Bush Administration, explained,

when the decision is made to use force, it’s important what argument is made to justify that decision. There are some ways of justifying that are more consistent with past practices; the Legal Adviser can have a considerable amount of influence on what arguments are made, which in turn greatly influences what precedential effect that use of force might have.

SCHARF & WILLIAMS, *supra* note 11, at 165; *see also id.* at 168 (quoting a former legal adviser during the Reagan Administration, Davis Robinson, who noted that if involved from the beginning, lawyers can help “with the fallout from the use of force—in the Congress, in the press, or wherever it is”).

148. Bilder, *supra* note 138; *see also* Young, *supra* note 146, at 138 (discussing the practical functions of attorney-advisers).

149. *State Department Lawyer Harold H. Koh Urges Lawyers to Stand by Principles in Politically Charged Environment*, ASC BLOG (June 20, 2011) [hereinafter *Koh*, ASC BLOG], <http://www.acslaw.org/acsblog/state-department-lawyer-harold-h-koh-urges-lawyers-to-stand-by-principles-in-politically-cha>.

150. *See* Koh, *supra* note 105, at 13.

Administration's policies and seeking congressional approval often runs against the more idealistic conscience-based depictions of "L."

The organization of the office reinforces the importance of international law compliance in the context of State Department policy goals. "L" has about 170 attorney-advisers¹⁵¹ who are overseen by a very thin political layer—the legal adviser and one or two special assistants chosen by him. The legal adviser thus must work largely with career lawyers and will not have any significant opportunity to change the composition of his office. Lacking any meaningful appointment or removal power over his staff, the legal adviser will have little capability to exercise political oversight and control. The legal adviser, as the sole political appointee, can hardly oversee the work of all the lawyers directly. Career lawyers will have autonomy and primary control over all but the most significant matters.

Moreover, "L" assigns attorney-advisers to specific policy bureaus of the State Department—which may further invest staff attorneys in the policy work of the Department. The incentives of these lawyers may over time grow to be aligned with the policy bureaus they regularly serve.¹⁵² The advantage of this is to create stability and institutional knowledge, but the structure may cause narrow policy interests to drive legal analysis. This structure also further diminishes the political control of the legal adviser over his staff.

Within the executive branch, "L" traditionally claimed control over international law interpretation. As international law becomes an important aspect of the policy work of other agencies, however, "L" no longer retains a firm hold on this function. International law matters continue to be shifted away from the Legal Adviser's office as other departments and agencies develop expertise. Former legal adviser Abe Sofaer has observed, "[a]s foreign policies become more specialized . . . [other agencies] have the lead in many international issues."¹⁵³ Many agencies now have special departments devoted to international affairs. Some typical examples include the Environmental Pro-

151. SCHARF & WILLIAMS, *supra* note 11, at 15.

152. See Bilder, *supra* note 138, at 638 (explaining that the organization of "L" is designed to allow "close and informal working relationships between the Office and the various policy bureaus").

153. SCHARF & WILLIAMS, *supra* note 11, at 158 (quoting interview with Abe Sofaer).

tection Agency's Office of International and Tribal Affairs or the Department of Labor's Bureau of International Labor Affairs.¹⁵⁴

The legal adviser's office thus faces threats to its autonomy from different quarters. Although the legal adviser generally maintains that his office serves as the authoritative interpreter and coordinator for international law, the legal adviser faces a number of obstacles to fulfilling this objective. As Koh has observed,

Collective government decision-making creates enormous coordination problems. We in the Legal Adviser's Office are not the only lawyers in government: On any given issue, . . . our Department as a whole then needs to coordinate its positions [with] our lawyer clients (POTUS/SecState/DepSecState); White House Lawyers (WH Counsel/NSC Legal Counsel/USTR General Counsel); DOD Lawyers (OGC, Jt Staff, CoComs, Services, JAGs); DOJ Lawyers (OLC, OSG, Litigating Divisions-Civ., Crim, OIL, NSD); IC Lawyers (DNI, CIA); DHS Lawyers, not to mention lawyers in the Senate and House.¹⁵⁵

In this process, the legal adviser is but one lawyer and lacks the authority to consistently coordinate the legal efforts of lawyers throughout the executive branch, a function that has over time shifted to White House lawyers in the Counsel's Office and the National Security Council.¹⁵⁶

The influence of the legal adviser on centralized decision making will depend in large part on the dynamic between the White House and the State Department.¹⁵⁷ The relationship between the legal adviser and the White House turns on a number of factors. Important among these is the relationship between the President and the Secretary of State and, in turn,

154. The Mission Statement of the Bureau of International Labor Affairs (ILAB) explains that the Bureau

leads the U.S. Department of Labor's efforts to ensure that workers around the world are treated fairly and are able to share in the benefits of the global economy. ILAB's mission is to use all available international channels to improve working conditions, raise living standards, protect workers' ability to exercise their rights, and address the workplace exploitation of children and other vulnerable populations.

Bureau of Int'l Labor Affairs, *ILAB Mission Statement*, U.S. DEP'T OF LAB., <http://www.dol.gov/ilab/mission.htm> (last visited Oct. 22, 2011).

155. Koh, *supra* note 145.

156. AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 90-91* (1999) (explaining that presidents since Kennedy have transitioned from a commitment to cabinet government toward the concept of foreign policy run by the White House and the NSC).

157. The former legal advisers interviewed for Michael Scharf's study disagreed about whether one's client was the President or the Secretary of State, but most agreed that they primarily worked for the Secretary and through him or her for the President. See SCHARF & WILLIAMS, *supra* note 11, at 173-75.

the relationship between the Secretary and his or her legal adviser. The Secretary must assure that the legal adviser has the opportunity to weigh in on policy matters and not be shut out of the process of providing legal advice within the Department.¹⁵⁸ Moreover, the Secretary must sometimes fight for the legal adviser within the White House.

Since the Kennedy Administration, the White House has sought to centralize control of foreign policy through the National Security Council (NSC), sometimes marginalizing or shutting out the State Department, along with its legal adviser—a pattern that sometimes continues to be played out.¹⁵⁹ The increasing importance of the NSC has diminished the central influence of the State Department, because the NSC legal adviser solicits advice from different agencies and offices and manages an inter-agency process in which the State Department is but one player. Other White House offices have also asserted a centralizing force, such as the Office of the White House Counsel.

Yet the legal adviser can sometimes play an important role by providing the White House with the legal rationale it needs, even when not directly related to international law. Recently, for instance, Koh provided a rationale for what constituted “hostilities” under the War Powers Resolution, concluding that the military activities in Libya did not trigger the statute’s requirement.¹⁶⁰ The White House Counsel signed on to this interpretation, and the President followed this interpretation, apparently bypassing the advice of the Department of Justice.¹⁶¹ This action triggered the nearly uniform response that such interpretation was unsupported by the Administration’s own description of its actions in Libya.¹⁶² Moreover, the Administration was criticized for failing to utilize the usual processes of working through the Office of Legal Counsel, to the detriment of its legal analysis.¹⁶³

158. *Id.* at 57.

159. See ZEGART, *supra* note 156.

160. Savage, *supra* note 8.

161. *Id.*

162. See *id.*

163. See Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 69–70 (2011) (arguing that although the President has the authority to overrule OLC, there are a number of institutional reasons why presidential overruling should be rare, including that the President benefits from OLC’s reputation for providing authoritative opinions).

By contrast, during the administration of President George W. Bush, the State Department often came into conflict with the White House and the Department of Justice. Soon after September 11, 2001, a group formed within the White House and included the White House Counsel, the Vice President's Counsel, the Department of Defense General Counsel, the Deputy White House Counsel, and Deputy Assistant Attorney General for the Office of Legal Counsel.¹⁶⁴ The group notably excluded the State Department legal adviser and would “plot legal strategy in the war on terrorism, sometimes as a *prelude* to dealing with lawyers from the State Department.”¹⁶⁵

The White House Counsel eventually determined that the Attorney General had primary responsibility for advising the President on matters of international law, even though on many issues the legal adviser would also be consulted. Nonetheless, in the case of conflicting interpretations, the Counsel's Office determined that the Attorney General would have the final call.¹⁶⁶ This created a constant source of tension between the legal adviser and the Department of Justice. Secretary of State Condoleezza Rice defended the legal adviser by repeatedly raising the dispute with the Attorney General.¹⁶⁷ The Secretary advocated for her department and its lawyers to maintain their traditional functions of advising with regard to the scope and applicability of international law, but with little effect.

In the Bush Administration, the legal adviser was often on the losing side of these battles.¹⁶⁸ Yet, this does not mean the office remained powerless. Because of the different centers of power, the legal adviser could appeal to other constituencies—Congress, the media, sympathetic foreign nations, NGOs, academics—outside of the White House in order to put pressure on centralized decision makers. For example, when President Bush decided, after substantial deliberation, that neither al

164. See GOLDSMITH, *supra* note 1, at 22.

165. *Id.* (emphasis added).

166. See *id.* at 22–24.

167. See *id.*

168. Other legal advisers have recounted turf battles with the Department of Justice and other agencies. For instance, the Department of Justice sought to control U.S. representation before the Iran-United States Claims tribunal in The Hague. SCHARF & WILLIAMS, *supra* note 11, at 57. Davis Robinson, the legal adviser at the time, noted this raised a serious and difficult “turf battle” and eventually the President had to confirm the State Department's role in representing the U.S. before the international tribunal. *Id.*; see also ZEGART, *supra* note 156 (describing the accretion of power to NSC and away from the State Department through specific examples in different administrations).

Qaeda nor Taliban fighters would receive POW status under the Geneva Conventions, someone leaked a memo from Secretary of State Colin Powell setting forth disagreements with this approach.¹⁶⁹ If necessary, the State Department can serve its perceived “mission” outside of centralized channels.

The legal adviser, because he oversees a legal office staffed primarily with career bureaucrats who share in the larger mission and culture of the State Department, may not be the quickest or most congenial source of legal advice for the White House (except when it is). The focus of this office on the larger imperatives of international law and diplomacy may sometimes, quite consciously, fail to provide the type of legal reasoning that supports presidential prerogatives and discretion. This has sometimes furthered the resolve of the White House to seek advice elsewhere. Yet, the State Department’s advice may temper outcomes. For example, with regard to the applicability of the Geneva Conventions to the Taliban, President Bush adopted the State Department’s rationale that the Conventions applied to Afghanistan, but that the Taliban were “unlawful combatants” who had lost POW status.¹⁷⁰ The adoption of this rationale and justification may have been important for diplomatic stability and other international relationships—issues that the State Department represents to the President as part of its institutional role. Yet the State Department also displays pragmatism and is not above taking forward-leaning interpretations to help the White House, as demonstrated by Koh’s recent interpretation of the War Powers Resolution.

Even in the face of waning influence and competition from other quarters, the legal adviser’s office has in general held tightly to its mission, which may preserve the culture of the office and the confidence of policy makers within State Department. The legal adviser may find a difficult balance between influencing White House policy decisions and maintaining its independence and particular conscience- or diplomacy-based approach.

169. Memorandum from Colin L. Powell, *supra* note 3; *see also* YOO, *supra* note 1, at 39; John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26.

170. *See* Memorandum from George W. Bush, *supra* note 5 (including the subject line “Humane Treatment of al Qaeda and Taliban Detainees”).

2. Department of Defense Office of the General Counsel

The General Counsel to the Department of Defense (DoD) provides advice on all legal matters to the Secretary of Defense and in recent years has taken an increasing role in the interpretation of international law. The Office of the General Counsel (OGC) focuses in large part on the law of war, which includes both customary international law norms pertaining to the law of war, as well as treaties and other conventions. In 1974, the Secretary of Defense issued a directive establishing the DoD Law of War Program.¹⁷¹ The program aimed to ensure that “the armed forces of the United States conduct all military operations in compliance with the international law of war and to prevent violations of the laws of war.”¹⁷² All members of the armed forces must go through law of war training, and legal advisors provide guidance during military operations about law of war principles such as military necessity and proportionality.¹⁷³

The organizational structure of DoD legal staff is complicated—the lawyers are divided into general counsel, staff judge advocates, and legal advisors.¹⁷⁴ DoD general counsels are mostly civilians who work for the Secretaries of Defense, Army, Navy, and Air Force.¹⁷⁵ They provide the tasks ordinarily associated with general counsel of other agencies, such as assessing the legal consequences of proposed policies and working with policy makers to implement policies consistent with legal requirements.¹⁷⁶ Staff judge advocates are “traditional military lawyers who practice administrative law, criminal law, legal assistance, claims, and procurement.”¹⁷⁷ Finally, legal advisors to the Unified Combatant Commanders focus on the legal aspects of war-fighting, including operational law and international agreement management.¹⁷⁸ The legal advisor “helps insure that the United States speaks with one voice in national security matters” and is an advocate for the orderly develop-

171. Michael F. Lohr & Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 CHI. J. INT'L L. 465, 470 n.23 (2003) (citing Dep't of Def. Directive 5100.77 (revised Dec. 9, 1998)).

172. *Id.* at 470.

173. *Id.* at 470–71.

174. A helpful account of the structure of Department of Defense lawyers can be found in William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 U. CHI. J. INT'L L. 431, 433 (2003).

175. *Id.*

176. *See id.*

177. *Id.*

178. *Id.* at 434.

ment of international law.¹⁷⁹ After restructuring in the 1990s, the general counsel of the military departments were designated as the “chief legal officers” of their respective departments and oversee both civilian and military attorneys.¹⁸⁰

DoD has thousands of civilian and military lawyers. Some are civilian political appointments, but a significant proportion of lawyers are career staff. The sheer size and diversity of functions and purposes makes it difficult to capture in this brief account the various incentives and dynamics among the legal staff.

There are, however, some recurring themes in the military legal tradition. Within DoD exists a culture of honor that focuses on how particular interpretations of international law and the law of war will affect the reputation of the armed services. When evaluating various policy options, the emphasis on military honor may be presented as a reason for compliance with international law. In this view, the military should hold itself to the highest international standards, even if the United States has not specifically accepted a particular treaty or formulation of customary international law.

For example, in the debate about whether the Geneva Conventions applied to al Qaeda and Taliban fighters, the Bush Administration determined that such protections would not apply.¹⁸¹ There was, however, significant dispute internally about the legal reasons for this conclusion.¹⁸² The Chairman of the Joint Chiefs of Staff, Richard Myers took the position that the Geneva Conventions were “‘ingrained in U.S. military culture,’ that ‘an American soldier’s self-image is bound up with the Conventions,’ and that ‘[a]s we want our troops, if captured, treated according to the Conventions, we have to encourage respect for the law by our own example.’”¹⁸³

The military lawyers argued for treating the Geneva Conventions as customary international law, making it irrelevant whether al Qaeda had signed the Conventions.¹⁸⁴ They insisted that “the principles applied to any war and to anyone that the

179. *Id.* at 435.

180. Kurt A. Johnson, *Military Department General Counsel as “Chief Legal Officers”: Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field*, 139 MIL. L. REV. 1, 2 (1993).

181. GOLDSMITH, *supra* note 1, at 113.

182. *Id.*

183. *Id.* at 113–14.

184. YOO, *supra* note 1, at 35.

United States fought.”¹⁸⁵ This sentiment requires holding the military to a certain standard, regardless of whether an argument could be made that the treaty did not apply in a particular circumstance. This approach is often justified as a pragmatic attempt to ensure protection for U.S. troops overseas—grounds for reciprocal treatment under the laws of war.¹⁸⁶

There is a public relations aspect to this as well. Some former military lawyers have argued that the United States must always try to keep up world public opinion by justifying and explaining military actions and the use of force.¹⁸⁷ Working within a culture of legal accountability and public opinion both at home and abroad, military lawyers often seek to ensure that military actions can be justified under international law, particularly the laws of war. This preserves the reputation of the U.S. military both at home and abroad, especially with other democracies.¹⁸⁸ Some observers have suggested that DoD lawyers have substantially internalized these norms.¹⁸⁹

Yet, depending on the circumstances, DoD may define international law norms to preserve military flexibility. A recent example, in the debate over the extent to which the United States can kill Islamist militants in areas such as Yemen and Somalia that are outside the battlefield in Afghanistan and areas of Pakistan, DoD general counsel, Jeh Johnson, has taken the view that the United States can target groups aligned with al Qaeda in countries that are unable or unwilling to suppress them.¹⁹⁰ By contrast, State Department legal adviser Koh has argued that the United States can take action outside the

185. *Id.*

186. *See id.* at 34 (“[Military lawyers] worried that if the United States did not follow the Geneva Conventions, our enemies might take it as justification to abuse American POWs in the future.”).

187. *See, e.g.,* Eckhardt, *supra* note 174, at 441.

188. James E. Baker, *LBJ's Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 CHI. J. INT'L L. 407, 411 (2003).

189. For example, James E. Baker, who served as legal adviser to the National Security Council under President Clinton, explains that the Law of Armed Conflict is not only operational law, but also provides good policy guidance because it sustains U.S. public support for such actions “not necessarily out of a societal sense of legal obligation but out of societal belief in the values of discrimination (distinguishing between civilians and combatants) and necessity, which are embodied in the [laws of war].” *Id.* at 412.

190. *See* Savage, *supra* note 9.

battlefield only in self-defense, a standard that would comport with the views of European allies.¹⁹¹

Another cultural dynamic within the Pentagon relates to risk-averse behavior by military commanders who fear public scrutiny and legal consequences of their actions and thus may depend upon military lawyers to sanction the legality of the use of force. Military lawyers thus may be used as a shield from the legal consequences that may follow from the use of force.¹⁹² Similarly, lawyers may help the military operators act close to the legal line.¹⁹³ On the battlefield, JAG officers provide advice about the scope of proposed actions and seek to ensure compliance with international law.¹⁹⁴

Although DoD values its reputation and culture of compliance with the laws of war, determining the contours of the law of war poses difficulties. There will often be debate about what precisely such law requires, because although some law of war is codified in treaties, most of it remains customary international law. In addition, many of the standards of the law of war turn on contextual factors such as necessity and proportionality.¹⁹⁵ Choosing between various actions may turn on factual assessments and policy considerations rather than on legal analysis because there will often be a spectrum of lawful options available.¹⁹⁶ “The laws of war are often written in vague terms, and are subject to different interpretations. They prohibit, for example, ‘disproportionate’ casualties and ‘outrages upon personal dignity’—terms that can mean very different things to different people, and that can easily be used as rhe-

191. *See id.*

192. *See* Lohr & Gallotta, *supra* note 171, at 467 (quoting Brigadier General Charles Dunlap as saying “savvy American commanders seldom go to war without their attorneys” because lawyers provide them “with a critical guarantee of legal coverage, turning complex issues of morality into technical issues of legality, so that whatever moral or operational doubts a commander may have, he can at least be sure he will not face legal consequences”).

193. *See* GOLDSMITH, *supra* note 1, at 91 (noting “the swarm of lawyers that rose up in the military and intelligence establishment to interpret multiplying laws and provide cover for those asked to act close to the legal line”).

194. *See* Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1, 15–27 (2010) (discussing how military lawyers influence conduct on the battlefield). Dickinson concludes that military lawyers on the battlefield make a difference with regard to international law compliance and suggests that internal organizational structure and institutional culture may be the key to ensuring greater compliance with international law. *Id.* at 27–28.

195. *See* Baker, *supra* note 188, at 422–23.

196. *See id.* at 415.

torical weapons.”¹⁹⁷ The malleability of these standards allows for multiple interpretations, and these interpretations may depend in part on the incentives and interests of the particular military lawyers.

Divisions over legal interpretation may arise between civilian and military lawyers, as well as between political and career attorneys. For example, John Yoo has identified a growing tension between civilian-military relations with respect to military policy and legal interpretation.¹⁹⁸ Yoo applies a principal-agent framework to the civilian-military relationship and notes that, particularly in the war on terrorism, the eventual goal remains unclear and the civilians and military may well have different preferences about how to proceed.¹⁹⁹ In bringing their opinions to the White House, civilian attorneys will likely have the upper hand, in part because structurally the DoD general counsel now oversees both civilian and military lawyers.

Yet, because of the size and scope of DoD, and the strong sense of culture and mission held by many of the career lawyers, it is sometimes possible for them to influence military policy through other channels, such as by appealing to the courts, Congress, and the media. For example, one way military lawyers can control policy is by dividing the “principal” into its component parts: “In the war on terrorism, for example, JAG opponents of President Bush’s policies went to Congress and testified against the administration’s positions on the military commission bill. JAG lawyers representing detainees at Guantanamo Bay also brought suit in federal court to enjoin military commission proceedings from taking place.”²⁰⁰ Judicial review of these issues would be disruptive to the President’s attempts to coordinate policy. As Yoo indicates, “The JAGs’ appeal to international law is understandable as an effort to create more autonomy by introducing foreign governments, international entities and NGOs into the principals’ decisionmaking process.”²⁰¹ Lawyers within the DoD tried to use international

197. GOLDSMITH, *supra* note 1, at 60.

198. Yoo, *supra* note 4, at 2283–87.

199. *Id.* at 2299.

200. *Id.* at 2300.

201. *Id.*

law to drive policy in a direction at odds with its civilian leadership and with the decisions made by the White House.²⁰²

As with the State Department legal adviser, failure to influence centralized White House decision making does not necessarily cause agency lawyers to fall in line and adopt the White House perspective. Quite the contrary, career lawyers may seek to further their autonomy by deliberately pursuing a course at odds with the administration. Career lawyers may have greater allegiance to a principle of military honor or to general principles of customary international law. When their analysis conflicts with the Commander-in-Chief's interpretation of international law, the White House will often face difficulty in reigning in this sort of disagreement—continuing recalcitrance can exact a cost on an administration forced to battle with critics from within its own agencies.

3. Department of Justice Office of Legal Counsel

The Office of Legal Counsel (OLC) is a small, elite office within the Department of Justice that interprets the Constitution and federal laws for the executive branch. It is often called upon to advise the President about the scope of his constitutional authority, including at times the requirements of international law. By statute, the Attorney General gives opinions on matters of law to the President,²⁰³ and this opinion-writing function has been largely delegated to OLC.²⁰⁴ OLC's best practices memorandum explains that its "central function" is to further the President's constitutional duties to preserve, protect, and defend the Constitution and to take care that the laws be faithfully executed.²⁰⁵ To accomplish this,

OLC must provide advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration. Thus, in rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain

202. *See id.* at 2290–91 (discussing efforts by JAG lawyers to challenge the Bush Administration's policy on military commissions by filing suit in federal court).

203. Judiciary Act of 1789, ch. 20, § 35, 28 U.S.C. §§ 511, 512 (2006).

204. Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 *CARDOZO L. REV.* 337, 337 (1993) (detailing the modern role of OLC).

205. Memorandum from David J. Barron, Acting Assistant Attorney Gen., to Attorneys of the Office (July 16, 2010) [hereinafter Memorandum from David J. Barron], <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> (explaining "Best Practices for OLC Legal Advice and Written Opinions").

the Administration's or an agency's pursuit of desired practices or policy objectives.²⁰⁶

The structure of OLC allows for a significant degree of political control over the office. The office usually has about twenty attorneys—on average a third are talented career lawyers who have served at OLC for many years and across administrations. The others are either political appointees or young lawyers chosen by political appointees because they share the general legal philosophy of the current administration. The President appoints the head of the office, the Assistant Attorney General for OLC. Indeed, the White House often takes special interest in the appointment of the head of OLC, more so than for other assistant attorneys general, precisely because of the close relationship between OLC and the White House.²⁰⁷ Although the Assistant Attorney General for OLC reports directly to the Attorney General, he also has other clients, perhaps most importantly the White House and the White House Counsel's Office.²⁰⁸

OLC has a culture of providing impartial legal advice of the highest quality. In the traditional view, OLC should render quasi-judicial advice, aiming to provide legal advice free from political and policy calculations. As former Assistant Attorney General for OLC Jack Goldsmith explains, "[T]he office has developed powerful cultural norms about the importance of providing the President with detached, apolitical legal advice, as if OLC were an independent court inside the executive branch."²⁰⁹ Both the long-serving attorneys and those passing through on their way to other appointments strive to maintain the office's reputation for impartiality and high quality legal analysis.²¹⁰

Yet many of those who have worked in OLC have found that this traditional view does not fully capture how OLC fulfills its role, nor how it should fulfill its role and its obligation

206. *Id.*

207. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 *CARDOZO L. REV.* 375, 421 (1993) (discussing the relationship between the White House and OLC); *see also* GOLDSMITH, *supra* note 1, at 25–31 (describing his appointment to head OLC, which began with an interview with key White House staff, including the White House Counsel, and then discussing how they would approach the Attorney General for his approval).

208. *See* McGinnis, *supra* note 207.

209. GOLDSMITH, *supra* note 1, at 33.

210. *See* McGinnis, *supra* note 207, at 422–24 (explaining how OLC's reputation serves the professional interests of its attorneys).

to the President. Goldsmith notes that OLC should be politically attuned to the policies of the administration, which means “OLC is not entirely neutral to the President’s agenda” and the President should get the benefit of the doubt with respect to legal advice.²¹¹ Similarly, John McGinnis explains that the central dilemma for the head of OLC is to provide “his key patrons, the White House Counsel and the Attorney General, with advice and opinions they find generally congenial while at the same time upholding the reputation of the office as an elite institution whose legal advice is independent of the policy and political pressures associated with a particular question.”²¹² Across administrations, OLC seeks to maintain a reputation as a source of independent legal advice while also preserving an institutional perspective favorable to the exercise of presidential power and protecting the President’s authority, particularly during times of war or crisis. Invariably, OLC finds that it must balance the various pressures of the office to provide careful legal advice, while also serving the interests of the President.²¹³

OLC has a distinct and unusual role because it serves not only the agency of which it is a part, the Department of Justice, but also operates as a specialized referral office for other agencies in the executive branch. Most legal offices serve only their particular agencies, but OLC provides advice to agencies and entities throughout the executive branch.²¹⁴ When requested, OLC will provide advice to other executive branch agencies on difficult questions of law or with respect to an intra-agency dispute referred to OLC for an “outside” legal opinion. Agencies seek formal OLC opinions for a variety of reasons, including to answer difficult questions or to deflect the political consequences of a particular legal decision.²¹⁵ OLC also may serve as a referee between two agencies with differing legal interpreta-

211. GOLDSMITH, *supra* note 1, at 35.

212. McGinnis, *supra* note 207, at 422.

213. See GOLDSMITH, *supra* note 1, at 38–39 (“There is no magic formula for how to combine legitimate political factors with the demands of the rule of law. . . . OLC’s success over the years has depended on its ability to balance these competing considerations—to preserve its fidelity to law while at the same time finding a way, if possible, to approve presidential actions.”).

214. McGinnis, *supra* note 207, at 425. In addition, OLC often provides Congress with the executive branch’s legal review of proposed legislation, including identifying constitutional problems as well as problems in administration. Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 466 (1993).

215. See Lund, *supra* note 214, at 492–95 (analyzing the incentives facing agencies considering whether to seek an opinion from OLC).

tions.²¹⁶ OLC opinions are generally treated as controlling within the executive branch on questions of law and therefore bind the actions of executive officials.²¹⁷

In domestic matters, if OLC's opinion is sought, its ability to issue binding interpretations for the executive branch is relatively unchallenged, but it faces greater competition from other agencies with regard to international law. For instance, OLC participates in the interagency process run by the National Security Council legal advisor, in which agencies can work through their differences about the interpretation and application of international law. A number of legal disputes are resolved informally in this process. If agreement cannot be reached, OLC might be called upon to resolve a dispute between agencies about the proper application of international law. Yet the State Department legal adviser and counsel from other agencies will often resist this role for OLC and press their own institutional competence, expertise, and authority in matters of foreign and military legal policy.

Nevertheless, OLC plays an ongoing role in international law interpretation. In ordinary times, OLC may be asked to determine whether a treaty is self-executing, how treaties should be interpreted in light of ratifying statutes, and the extent to which international agreements constrain proposed U.S. action. During the war on terrorism, OLC has been asked to analyze difficult and sensitive questions about the scope of interrogation methods, the applicability of the Geneva Conventions to al Qaeda and Taliban fighters, the use of warrantless surveillance techniques, and the legality drone attacks in a variety of circumstances.

As numerous accounts of the Bush Administration have detailed, OLC became a significant source of legal advice for the White House during the months and years following the attacks of September 11, 2001.²¹⁸ In this role, OLC often came into conflict with the State Department. As John Yoo explains,

216. An executive order directs that agencies with a dispute should seek the opinion of the Attorney General, who has delegated this opinion-writing function to OLC. See Exec. Order No. 12,146, 3 C.F.R. 409 (1979), *reprinted as amended in* 28 U.S.C. § 509 (2006). Before formulating a final opinion, OLC will usually ask each interested agency to submit a memorandum setting forth its legal analysis. The memoranda are generally shared with the other agencies in a back-and-forth process before a final opinion is rendered. See Memorandum from David J. Barron, *supra* note 205.

217. Lund, *supra* note 214, at 491.

218. See, e.g., GOLDSMITH, *supra* note 1.

OLC and the State Department often disagreed about the applicability of non-treaty international law and also about specific legal decisions such as whether the Geneva Conventions would apply to Taliban prisoners of war.²¹⁹ During this time, OLC exercised significant control over legal determinations relating to the war on terrorism, and other sources of legal advice, such as the State Department Legal Adviser, were often kept out of the loop.²²⁰

Yet OLC does not enjoy a permanent monopoly on advice. The office operated without a confirmed head for nearly seven years, including the first two and half years of the Obama Administration.²²¹ Recently, President Obama determined that military activities in Libya did not constitute “hostilities” for the purposes of the War Powers Resolution, adopting Koh’s rationale reportedly over the disagreement of OLC and the Department of Justice.²²²

The Libya example demonstrates how the incentives for offering particular types of legal advice may be more complicated for OLC than for other agencies, precisely because its “business” and its reputation depend upon other branches coming to them with legal problems. As Nelson Lund has observed, OLC faces competition for providing legal advice from countless other lawyers within the executive branch.²²³ The function of OLC is “wholly advisory, and there is almost nothing that both must be done and must be done by OLC.”²²⁴ If the Attorney General, other agencies, or the President lose confidence in OLC, they can easily turn to other sources of legal advice. Moreover, if the White House receives informal OLC advice that it disagrees with or if the White House believes that OLC’s analysis will not

219. YOO, *supra* note 1, at 33–34.

220. See GOLDSMITH, *supra* note 1, at 167 (explaining that some OLC opinions were never shown to the State Department and “[White House Counsel Alberto] Gonzales made it a practice to limit readership of controversial legal opinions to a very small group of lawyers”).

221. Jack Goldsmith resigned in July 2004 and Virginia Seitz was confirmed to the position in June 2011. See Jerry Markon, *Waiting Ends at the Justice Dept.*, WASH. POST, July 4, 2011, at A13.

222. See Savage, *supra* note 8.

223. Lund, *supra* note 214, at 488 (noting that the Justice Department has never secured a monopoly on providing legal advice within the government and that each agency has its own legal advisors that have “no formal obligation to submit even the most difficult legal questions to the Department of Justice”).

224. *Id.* at 496.

support a proposed course of action, the White House may simply decline to seek a formal OLC opinion.

This competition to control the provision of legal advice affects the behavior of OLC, particularly the Assistant Attorney General who heads the office. As Lund explains, the importance and influence of OLC will depend on what the head chooses to make of it and the functions of OLC will be “determined primarily by its relationship with the White House.”²²⁵ The relationship between OLC and the White House Counsel’s Office is often a close one in which legal opinions are often provided informally and cooperatively. Lund argues that the incentives for the head of OLC suggest that the office will be more responsive to the interests of the White House than to other agencies and will assist the White House in maintaining control over the legal policy of other agencies.²²⁶ These observations comport with the historical role of OLC, the individuals appointed to lead the office, and their subsequent appointments to the judiciary and other high-ranking government positions.

The incentives facing OLC provide some understanding of why that office has traditionally viewed international law questions from the President’s perspective and has generally been deferential to his decision-making authority with regard to international law. For example, OLC has typically defined customary international law narrowly, relying primarily on historical state practices as opposed to forward-leaning interpretations of new forms of customary international law.²²⁷ The debate over the applicability of the Geneva Conventions to al Qaeda and Taliban fighters highlights these institutional differences. OLC argued that the Geneva Conventions “had not assumed the status of customary international law that bound the United States There was no customary international law on terrorist organizations like al Qaeda that could launch a devastating international attack.”²²⁸ By contrast, the State Department argued that the Conventions must apply to Afghanis-

225. *Id.* at 495.

226. *Id.* at 499.

227. *See, e.g.*, Auth. of the Fed. Bureau of Investigation to Override Int’l Law in Extraterritorial Law Enforcement, 13 Op. O.L.C. 163, 170 (1989) (concluding that the FBI may use its statutory authority to investigate and arrest individuals who violate U.S. law even if their actions contravene customary international law and moreover that the President has inherent authority to order such investigations and arrests “in a manner that departs from international law”).

228. YOO, *supra* note 1, at 36.

tan, even if not to the Taliban fighters specifically, because of the consequences of declaring Afghanistan to be a “failed state.”²²⁹ Secretary Powell’s memo to President Bush explained that application of the Conventions to Afghanistan was necessary because it “preserves U.S. credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support.”²³⁰

OLC’s incentives encourage providing the President with legal interpretations that keep open political options, particularly with regard to foreign affairs. OLC is more likely than some of the other legal departments to interpret law in light of the President’s constitutional authority. This allows OLC to be more “useful” than other agencies to the White House when it contemplates actions close to the line of what international law forbids. OLC sometimes says “no,” but when it does, it risks, perhaps more than other agencies, the President turning to other sources of advice.

4. National Security Council Legal Advisor

The National Security Council (NSC) was created by the National Security Act of 1947 and was intended to “advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security.”²³¹ Operating from the White House, the NSC coordinates agencies dealing with defense and foreign policy and helps the President implement his foreign policies by getting these agencies to work together.²³² To be effective, however, the NSC must do more than just coordinate. It must “define a presidential strategy for the conduct of foreign and military affairs. The President has both unique responsibilities and a unique perspective; his breadth of view is not likely to be shared by any single agency.”²³³

NSC assists the President by considering national security issues from his viewpoint—filtering the demands of national security through the full range of the President’s foreign policy and military objectives, as well as his unique and singular re-

229. *Id.* at 34.

230. Memorandum from Colin L. Powell, *supra* note 3.

231. National Security Act of 1947, 50 U.S.C. § 402 (2006).

232. WILSON, *supra* note 109, at 273 (“The difficulty of getting the departments of defense and state as well as the CIA and the military to work together harmoniously toward presidential objectives is like untying the Gordian knot: even with a strong NSC staff, it is difficult and sometimes impossible.”).

233. *Id.*

sponsibilities. Since the 1960s, national security advisors “have clearly seen themselves as the president’s men; they have engaged in policy debates, offered policy advice, and managed the NSC process in ways that serve the particular political interests of the president and no one else.”²³⁴ Over time, the NSC has become a key center of foreign policymaking. The staff has significantly increased in size and is comprised of presidential appointees who are “expected to view foreign policy from his perspective.”²³⁵

President Reagan created the position of legal advisor to the NSC in 1987.²³⁶ As with other members of the NSC staff, the legal advisor is appointed by the President and takes on the obligation to represent the presidential perspective in working through disputes with other agencies.²³⁷ The President often appoints the legal advisor from elsewhere in the White House, as President Reagan did with the first advisor.²³⁸ During the George W. Bush Administration, several of the NSC legal advisors were picked from the White House Counsel’s Office. This ensures that the advisors were familiar to the President and key White House staff and could be trusted to represent the President’s perspective with respect to international law matters.²³⁹

The NSC legal advisor coordinates foreign legal policy between the State and Defense Departments, the military, and the intelligence agencies. He controls the interagency process with regard to questions of international law and referees turf wars between the various agencies, including in particular the State Department legal adviser and the Office of Legal Counsel. Consistent with the culture of NSC, the legal advisor serves the President’s interests and mediates conflicts in light of the core constitutional powers and prerogatives of the President as Commander-in-Chief. Although this position has received little scholarly or media attention, the NSC legal advisor can exert significant influence on the interpretation of international law,

234. ZEGART, *supra* note 156, at 85.

235. *Id.* at 86, 103 (discussing Congress’s limited oversight capabilities for the NSC compared to the Departments of State and Defense).

236. See BRADLEY HAWKES PATTERSON, *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 66–67 (2001).

237. *Id.*

238. *Id.*

239. This fits precisely with the mission of NSC articulated by a number of National Security Advisers and staffers interviewed by Amy Zegart in her study. ZEGART, *supra* note 156, at 85, 98.

determining its scope and how it will apply to proposed presidential actions. The legal advisor must enjoy the trust and confidence of the President, who can closely monitor the work of NSC. “Armed with rewards, sanctions, and a direct monitoring ability, the president could trust the NSC staff to weigh and assess the conflicting policy recommendations coming from the foreign policy bureaucracies.”²⁴⁰ Over time, this dynamic has significantly increased the authority of the NSC and its legal advisor in relation to the other agencies.

* * *

This Part has analyzed several of the key legal offices involved with making determinations about international law compliance. Although it does not examine all of the offices in the executive branch that handle matters of international law, it identifies the entities primarily responsible for international law interpretation. The agencies discussed here represent the wide diversity of interests and incentives within the executive branch, as well as various structural differences in how these offices operate both internally and in their relation to other agencies. It demonstrates how these agencies balance the dictates of law and policy in different ways based on their particular perspectives. The next Part focuses on how the President seeks to coordinate these diverse approaches and use them to his advantage.

III. COORDINATION FAILURES AND COMPETITION WITHIN THE EXECUTIVE BRANCH

The public choice analysis demonstrates that there are many different individuals and agencies that impact centralized decisions about international law compliance. Lawyers throughout the executive branch analyze the scope and applicability of international law. These lawyers have different interests and incentives and often approach questions of international law from their particular perspectives, which are shaped by, *inter alia*, the specific interests of the agencies they serve, the norms and culture of their offices, the interaction between political and career lawyers, and the relationship of their agencies to the White House.

This Part examines institutional mechanisms within the bureaucracy for dealing with difficulties of coordination that

240. *Id.* at 97–98.

arise from having conflicting interpretations of international law. First, it describes the available institutions for coordination of international law interpretation and observes that such coordination is uncertain and imperfect. Second, it predicts how agencies will behave within these constraints. The lack of coordination creates instability and uncertainty that makes it rational for agencies to continue to press their different perspectives and compete for control over interpretation of international law. Third, it raises, but does not answer, the question of whether such a system benefits the President by presenting a robust debate over difficult questions of international law and policy.

A. IMPERFECT COORDINATION

The difficulties of coordinating our vast bureaucracy have been well-developed in the domestic context.²⁴¹ Moreover, scholars have addressed the difficulties of asserting presidential control over the administrative state, again, largely with reference to domestic regulation.²⁴² These insights, however, have for the most part not played a significant role in understanding compliance with international law. Instead, many of the unitary theories discussed above assume that despite the difficulties of coordination and control, the “state” formulates decisions about international law in a coherent and unitary manner. Even those who would disaggregate the state, like Slaughter and Koh, focus on the possibilities and promise of decentralized action, not on the problems that can and do result from decisions about international policy being made by numerous agency entities.²⁴³

Yet coordination and cooperation present significant difficulties for the purpose of international law compliance. There is no consistent process for sifting through and coordinating these agency perspectives, interests, and incentives when interpreting international law. Congress and the President have made efforts to impose centralized control over these issues, but coordination efforts have generally not succeeded in unifying perspectives on international law in a systematic or consistent

241. See, e.g., WILSON, *supra* note 109, at 264–74.

242. See Bressman & Vandenberg, *supra* note 10, at 47; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Symposium, *Presidential Influence Over Administrative Action*, 79 FORDHAM L. REV. 2395 (2011).

243. See SLAUGHTER, *supra* note 64, at 213; Koh, *supra* note 69, at 204–05.

way.²⁴⁴ As James Q. Wilson observed, given the “incomplete control the president has over many important subordinates, it is hardly surprising that presidents have taken to reorganizations the way overweight people take to fad diets—and with about the same results.”²⁴⁵

For example, the Office of Legal Counsel, NSC legal advisor, and the State Department all have some authority to coordinate questions of international law. The Attorney General, and as a practical matter, the Office of Legal Counsel, have been delegated responsibility for resolving legal disputes between agencies, including on matters of international law. Yet OLC can only resolve disputes that are referred to it. The White House may decline to seek a formal OLC opinion when it has reason to believe the opinion will be unfavorable to the President’s preferred alternative. Accordingly, OLC’s authority to coordinate executive branch legal policy waxes and wanes depending on the extent to which it enjoys the trust of the White House and other agencies.²⁴⁶

In the George W. Bush Administration, OLC played a central role in assessing legal issues arising from the War on Terror. Recently, however, President Obama effectively shut out OLC’s institutional role in determining whether military actions in Libya constituted “hostilities” for the purposes of the War Powers Resolution.²⁴⁷ Rather than rely on OLC to solicit opinions from the relevant agencies, OLC was reportedly one of several offices to submit its opinion to the President, who made the final decision against the advice of the Department of Justice and along the lines suggested by the State Department legal adviser Harold Koh.²⁴⁸

Similarly, the legal advisor to the National Security Council oversees an interagency process that serves to mediate divergent agency perspectives. This creates a centralized process in the White House that is run by hand-picked advisors representing the President’s unique perspective. Historically, the State Department legal adviser has asserted a central and

244. See ZEGART, *supra* note 156, at 37–38.

245. WILSON, *supra* note 109, at 264.

246. See Lund, *supra* note 214, at 440, 496–98.

247. See Savage, *supra* note 8.

248. See *id.* (explaining that Caroline Krass, acting head of OLC, “was asked to submit the Office of Legal Counsel’s thoughts in a less formal way to the White House, along with the views of lawyers at other agencies. After several meetings and phone calls, the rival legal analyses were submitted to Mr. Obama, who is a constitutional lawyer, and he made the decision”).

authoritative role with regard to the interpretation of, and compliance with, international law. As discussed above, however, the legal adviser's authority has diminished over the years as the White House has sought to centralize this function in the NSC and as other agencies have developed expertise on matters of international law.²⁴⁹ The legal adviser, however, can still gain the ear of the President, depending on the particular issue and the level of personal trust between them.

This highlights not only the multiple sources of legal advice, but also the absence of any singular mechanism for resolving legal disputes between agencies. Although counsel and policy makers often resolve their differences through OLC, negotiation within the NSC, or various informal processes, there is no necessary manner in which advice on international law must be sought or implemented when legal advisors disagree. Even the mechanisms that do exist, such as through NSC or OLC, can be easily bypassed by White House officials and other policy makers if they choose to do so.

Of course, the President can always overcome coordination failures. The executive branch benefits from having a unitary and powerful head who directs foreign policy and in theory can ultimately decide questions of international law.²⁵⁰ The ability of the President to bypass squabbling between agencies and formulate his own position with regard to international law retains the possibility of strong unitary action.

Practically speaking, however, the President cannot formulate independent legal policy on every question of international law. He must rely on the many advisors within the executive branch who analyze these questions and he cannot fully control the type of legal advice he receives. Lawyers within the executive branch may have ideological views of law and policy that conflict with the President's perspective, or that serve a narrower agency interest, or that elevate the importance of inter-

249. See SCHARF & WILLIAMS, *supra* note 11, at 71; Koh, *supra* note 145.

250. See THE FEDERALIST NO. 70, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential . . . to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy."); see also ZEGART, *supra* note 156, at 30 ("Though the framers may not have intended it, foreign policy has become the president's turf. It is the executive who bears chief responsibility for U.S. decisions in the international arena, and who has developed the capacity to exercise that responsibility within the American political system.").

national law over other interests. The President may be asked to resolve the most high-profile disputes over the applicability of international law or he may take a particular interest in some issues. Other consequential decisions, however, may not rise to the level of presidential or centralized decision making.

Furthermore, even on matters in which the President has made a final resolution, he cannot always guarantee its full execution. Agencies may continue to pursue divergent policies despite White House decision. The rifts over legal policy are a subset of a broader category of foreign policy disputes. For example, with the recent popular uprising in Egypt, President Obama found his Secretary of State and envoy to Egypt carrying a different message than the one he wanted to send.²⁵¹ The Secretary of State adopted a more traditional foreign policy view, focusing on stability in the region, whereas the President eventually supported the protesters and the push for democracy.²⁵² Likewise, on intervention in Libya, various administration officials expressed different perspectives on its advisability and relation to the national interest. Charlie Savage, the *New York Times* reporter who has uncovered a number of executive branch disputes, has quipped that perhaps his reporting serves an interagency coordination function.²⁵³

Agencies and legal advisors have a vested interest in their preferred policies and legal interpretations and often have agendas independent of the President. The President's decision to go in one direction will not necessarily eliminate resistance within his administration. Even if the political leadership at the agencies falls into line with the President, as may be expected, there may be counsel who remain faithful to their agency culture or mission. Career attorneys in powerful agencies such as the Departments of State and Defense may persist in championing perspectives at odds with the President by appealing to Congress, the media, or nongovernmental organizations.²⁵⁴ Even speculation about dissenting perspectives can undermine public confidence in the President's decision. In these instances, the President may pursue one course while his

251. See, e.g., Helene Cooper et al., *In U.S. Signals to Egypt, Obama Straddled a Rift*, N.Y. TIMES, Feb. 13, 2011, at A1.

252. *Id.*

253. See Keith Gerver, *Liveblogging Session 7: Keynote Address of New York Times Reporter Charlie Savage*, LAWFARE: HARD NATIONAL SECURITY CHOICES (Sept. 17, 2011, 5:46 PM) <http://www.lawfareblog.com/2011/09/liveblogging-session-7-keynote-address-of-new-york-times-reporter-charlie-savage>.

254. See Yoo, *supra* note 4, at 2287, 2299–300.

subordinates continue to advance another or leak dissenting legal perspectives. Although the unitary structure of our executive branch is designed to minimize such occurrences, the sheer size and scope of the federal bureaucracy make it difficult for the President to fully coordinate the efforts of his subordinates.

Existing coordination mechanisms have not succeeded in establishing a clear hierarchy of authority. The President may at any time simply interpret the law, but short of this, there remain a number of offices and agencies that lay claim to controlling international law interpretation. Depending on the particular individuals as well as other political dynamics between the agencies and the White House, one or another office may manage to gain the ear of the White House.

B. INSTABILITY ENCOURAGES COMPETITION

The lack of coordination results in unpredictability about the pathways of international legal interpretation. Faced with a shifting landscape in which there is always the possibility of imposing a different legal viewpoint, agencies will have an incentive to press their perspectives. Rational agencies will respond to this institutional instability by competing for control over international policy and legal interpretation. Because agency heads do not know in any particular circumstance what interpretation or policy will be chosen, it is rational for them to expend political capital for the adoption of their preferred alternative.

Bureaucratic politics are especially important in foreign affairs because there are fewer domestic interest groups and legislative tools for addressing these issues are often ineffective or difficult for Congress to mobilize.²⁵⁵ Executive branch agencies therefore control more decision making in this area, at least at the outset. Bureaucratic competition is especially prevalent with respect to foreign affairs and national security because a number of different agencies have overlapping jurisdiction—the State Department, the Department of Defense, the Department of Homeland Security, and intelligence agencies all have a stake in foreign matters and the interpretation of international law. The shared area is greater in foreign affairs and national security than in domestic affairs: “Their activities inherently overlap and intersect. Diplomatic negotiations have serious

255. Daniel W. Drezner, *Ideas, Bureaucratic Politics, and the Crafting of Foreign Policy*, 44 AM. J. POL. SCI. 733, 735 (2000).

consequences for military action and vice versa. Intelligence is intimately connected to grand strategy, military power, and diplomacy. To do their jobs, national security officials must concern themselves with other agencies.”²⁵⁶

Moreover, competition in this area tends to be exaggerated because of the perceived or actual indeterminacy of international law. New types of warfare and evolving technological capacity raise difficult questions in areas in which there is little or no state practice and few relevant judicial decisions, allowing for a range of legitimate interpretations. In this context, agencies may compete to define the range of what is legally permissible, but also what course of action is moral, militarily possible, diplomatically feasible, and politically desirable.

C. PRESIDENT’S ADVANTAGE?

Given all of the attempts at coordination, one might assume that the President would prefer greater control over the bureaucracy. Indeed, a system in which there is only imperfect coordination and ongoing competition has significant costs. It can result in instability and uncertainty and the possibility that dissenting views will persist within the agencies, making it difficult for the President to implement his chosen policies. Domestically, bureaucratic competition may allow for flexibility, but also the possibility of confusion and the opportunity for powerful agency interests to proceed in a manner contrary to the President’s directives. Overseas, displays of intra-governmental disputes may make it difficult for the President to credibly commit to compliance on behalf of the United States.

Although this process can be viewed as a “failure” of coordination, a disaggregated system of agency competition could offer some benefits to the President. The persistence—and indeed acceleration—of disaggregation in the executive branch (in the form of new agencies)²⁵⁷ suggests that it provides some advantages to the President. Many of the agencies are initiated or created by the President and these are more closely subject

256. ZEGART, *supra* note 156, at 37.

257. See, e.g., Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified in scattered sections of 50 U.S.C.) (creating the Department of National Intelligence); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified in scattered sections of 6 U.S.C.) (creating the Department of Homeland Security).

to White House control.²⁵⁸ Agency competition over international law interpretation and policy provides the President with analysis from a diverse range of perspectives that may take into account the diplomatic, strategic, military, and intelligence consequences resulting from particular courses of action. Maintaining competition and flexibility in international law interpretation can serve the President's interests by providing more information and keeping open a wider range of policy alternatives.²⁵⁹

The agencies are well designed to represent their particular interests. Separation of interests and perspectives may allow ambition to counteract ambition within the different agencies in the executive branch.²⁶⁰ Unanimity being impossible and perhaps undesirable, it may be better to allow competing positions to have it out in the inter-agency process.

On important issues, the President can have a full hearing from agencies with different perspectives, providing him with more information about the implications and consequences of a foreign policy or military decision. Moreover, agencies represent different constituencies and interests, helping the President to remain democratically accountable. The executive power rests ultimately with the President, but he may best be able to exercise this power by allowing his advisors to represent their particular perspectives.

If Presidents wanted to assert only their constitutional prerogatives, they could rely on close legal and political advi-

258. William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1096 (2002) (describing how many agencies are designed and created by the President unilaterally and that "presidents exercise significantly more control over those agencies that they create through a unilateral directive than those agencies that congress and the president establish through legislation").

259. See WILSON, *supra* note 109, at 274 (noting that there may be some benefits of agency duplication and overlap and that redundancy can be useful because overlapping agencies "can lead to more flexible responses and generate alternatives"); ZEGART, *supra* note 156, at 8 (explaining that "national security organizations are not rationally designed to serve the national interest—and for perfectly rational reasons").

260. See THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) ("This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.").

sors within the White House, but they generally do not, because they want to know all of the political, diplomatic, and strategic possibilities consistent with the law. The White House generally does not allow for the permanent supremacy of one agency over the others. For example, even if OLC has presumptive authority to settle executive branch disputes, the office can be bypassed if the White House declines to get a formal opinion or the President determines to follow the legal analysis of another agency. This uncertainty creates a strong incentive for the agencies to represent their perspectives robustly in competition with others. By contrast, if the President always relied on a singular source for advice about international law, other agencies would eventually expend resources in a different direction.

Ongoing agency competition ensures that a variety of different approaches may be assessed as compliant with international law. This flexibility provides the President a wider range of alternatives when dealing with other nations. Where possible, the President can decide on policy, not legal grounds. Ongoing competition may present a process for formulating the best, most considered state interests. In addition, such competition may sometimes be useful to the President because it allows him to find a legal rationale for his favored policy. Presidents often interpret the law in light of their particular interests, which may be simply part of the President's authority to execute the laws.²⁶¹

Yet there are costs to an institutional lack of coordination: such a system makes it harder to impose a unitary will at the end of a fractured process with strongly developed interests. Lack of centralized control may make it difficult for the President to work with Congress or to credibly engage with foreign countries. Whether this system ultimately serves national interests or even the President's interests is beyond the scope of

261. Commentators disagree about whether this is a natural and acceptable consequence of the President's authority or whether Presidents at times use this authority inappropriately to frustrate the authority of Congress. Compare Eric Posner, *Stop Complaining About Harold Koh's Interpretation of the War Powers Act*, THE NEW REPUBLIC (July 1, 2011), <http://www.tnr.com/article/politics/91166/harold-koh-war-powers-john-yoo-libya> (noting that the executive practice of interpreting statutes in line with presidential authority is part of historical practice and the status quo), with Bruce Ackerman, *Obama's Unconstitutional War*, FOREIGN POL'Y (Mar. 24, 2011), http://www.foreignpolicy.com/articles/2011/03/24/obama_s_unconstitutional_war (arguing that by unilaterally going to war against Libya, President Obama is "breaking new ground in its construction of an imperial presidency—an executive who increasingly acts independently of Congress at home and abroad").

this Article. The dynamic of inconsistent coordination and ongoing competition, however, has consequences for the development of international law and the possibility of systemic compliance by states, as discussed in the next Part.

IV. CONSEQUENCES OF PUBLIC CHOICE ANALYSIS

The public choice perspective presented in this Article identifies the incentives and interests of government officials responsible for the interpretation of international law. Moreover, it suggests that these interests will often diverge and as an institutional matter the executive lacks consistent mechanisms for coordinating interests. In this environment of uncertainty, agencies will continue to compete for control of central decision making about questions of international law.

This Part explains three different consequences that follow from this analysis. First, it highlights the limitations of unitary state actor theories for predicting compliance with international law. The executive branch provides the best possibility for unitary-state action. Yet even in this branch the failure to coordinate interpretation and the existence of ongoing competition between agencies undermine the assumption of the state as a unitary actor. The public choice analysis may be complementary, however, to rational choice theories by providing an account of how states formulate their interests and objectives with regard to international law compliance.

Second, agency competition will encourage exploiting the indeterminacy of international law. This is a consequence of the type of domestic actors involved, their incentives and preferences, and how they work within the institutions of the executive branch. As discussed above, inconsistent coordination between different agency interests results in instability that creates incentives for competition between agency officials for control over the interpretation of international law.²⁶² States as well as sub-state actors may prefer to retain flexibility and ambiguity in international law, because this will allow officials to present a wide range of policy alternatives as compliant with international law. Instead of developing habits of compliance, as other liberal or disaggregated theories predict, government officials may internalize a habit of flexible or instrumental compliance—they will figure out how to make their preferred policies compliant with international law.

262. See *supra* Part III.B.

Finally, the public choice account may provide another explanation for why international law does not exhibit the clarity and enforcement often considered an aspiration for international law. Greater clarity in international law, both treaties and customary international law, would limit the range of “lawful” options available to agency officials competing for control of international legal interpretation. The ongoing disagreement about the meaning and application of international law in some contexts may make it difficult to assert a fixed meaning of international law. Whether this dynamic observed in the United States will impact the development of international law will depend in part on whether other states exhibit similar bureaucratic competition and strategic uses of international law.

Liberal theories that focus on domestic preferences predict that a shift to non-state actors will further the development and compliance with international law by states. By contrast, the public choice model looks at both domestic preferences and institutional coordination mechanisms and predicts that sub-state actors will have strong incentives to keep international law relatively indeterminate and flexible. Efforts to make international law more law-like or “hard” will face resistance, not only among states, but also among sub-state actors.

A. LIMITATIONS OF UNITARY STATE THEORIES

As explained in Part I, many of the predominant theories of international law model the state as a unitary actor and seek to explain international law compliance by reference to the behavior of this institutional “individual.” Unitary-state models have longstanding appeal in part because they simplify national complexity to explain why states comply with international law. Pulling apart the incentives and interests of legal departments in the executive branch highlights some of the limitations of unitary state models. Public choice demonstrates that even in the unitary executive branch, there is no consistent or predictable method for coordinating divergent interests between agencies.

These conclusions do not have to lead to radical state skepticism, nor do they discount the idea that the state can behave as if a unitary entity. Indeed, for many purposes, the state interacts with the international community as a singular entity. States wage war, sign treaties, make trade agreements, and engage in diplomacy. Unitariness captures an important aspect

of the state's legal personality in international law.²⁶³ Yet unitary theories have difficulty explaining how states formulate their interests and goals, which in turn diminishes their ability to make predictions about international law compliance. The public choice critique notes the incompleteness of unitary accounts and their thinness when pressed about how to understand state interests and state behavior with respect to international law.

Unitary-state theories do not deny that the state is an aggregation of various individuals and entities—they model the state “as if” it were a unitary actor for the purpose of making predictions about state behavior.²⁶⁴ They suggest that the simplified unitary-state model has more explanatory power.²⁶⁵

263. Most theorists presenting disaggregated analysis recognize the ongoing importance of the unitary state. *See, e.g.*, SLAUGHTER, *supra* note 64, at 19 (“States can be disaggregated for many purposes and in many contexts and still be completely unitary actors when necessary, such as in decisions to go to war. And even their component parts still represent national interests in various ways.”).

264. *See* GOLDSMITH & POSNER, *supra* note 13, at 7 (“[W]e do not claim that the axioms of rational choice accurately represent the decision-making process of a ‘state’ in all its complexity Rather, we use rational choice theory pragmatically as a tool to organize our ideas and intuitions and to clarify assumptions.”); WALTZ, *supra* note 25, at 93–94 (explaining that realists take states as the unit of international relations not because they are the only actors, but because they are the major ones); Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1918 (2003); Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. S285, S291 (2002) (“Those who treat states as unitary assume either that the state aggregates all domestic preferences—of individuals, interest groups, and various intergovernmental actors—and acts as if it were a single actor or that state decision making is in fact channeled through a single or small group of crucial individuals who make important decisions.”).

265. *See* Posner, *supra* note 74, at 833 (“[I]t seems plausible that the best understanding of international law must come from disaggregating the state. However, it is a common error to think that a more complex and realistic methodology is always better. Too much methodological complexity renders prediction-making impossible. . . . The way that states make decisions may be interesting or important, but it is of little help for predicting such things as whether states go to war or comply with international law.”); *see also* WENDT, *supra* note 47, at 221 (“In sum, concrete individuals play an essential role in state action, instantiating and carrying it forward in time, but state action is no more reducible to those individuals than their action is reducible to neurons in the brain.”); Richard A. Posner, *Some Economics of International Law: Comment on Conference Papers*, 31 J. LEGAL STUD. S321, S321 (2002) (“Among the radically simplifying assumptions that I employ is that nations in their relations with each other, whether commercial or noncommercial, or even belligerent, behave much like individuals in their commercial relations. This is not as wild an assumption as it may seem”).

Theorists who posit with a unitary state have generally assumed the existence of mechanisms for coordinating state interests, but have provided scant account of how such mechanisms might operate given the expansive and diverse bureaucratic state and the competing centers for international law interpretation.

The public choice analysis suggests that given the existing structure of decision making amongst sub-state actors, the possibility of the state behaving even “as if” a unitary actor is highly tenuous. Even focusing only on the executive branch, which presents the best possibility for unitary behavior, the unitary model has serious limitations, and the disaggregation becomes even more acute when considering the role of Congress, the courts, and private organizations. An evaluation of the behavior of legal departments within the executive branch reveals a diversity and complexity of inputs, as well as evidence of ongoing competition between conflicting viewpoints, that does not easily allow for a simple unified state model for international law compliance.

Unitary theories of international law compliance run against basic understandings of domestic political behavior—both constitutional and administrative—yet do not provide an explanation of how political behavior and bureaucratic processes may differ with regard to decisions about international law. One cannot preclude the possibility that there may be mechanisms by which a well-ordered state can behave as a unitary entity and pursue rational or moral goals, but the public choice analysis of these processes in the United States raises serious doubts about this possibility.²⁶⁶ At a minimum, proponents of unitary theories have not explained how one can model a unitary state interest in these circumstances.

The public choice model of international law compliance points out the limitations of unitary theories; however, it is more compatible with some theories than others, an unsurprising result given the diversity of unitary theories, which span a wide range of approaches to state behavior in international law.

For example, public choice turns up little support for institutional cosmopolitanism, which assumes that the state has

266. This Article has focused on the United States, but it might be that other liberal democracies have developed more centralized processes for dealing with divergent perspectives and interests with regard to international law. Again, comparative research would help draw more general conclusions.

moral obligations to comply with certain norms of international law.²⁶⁷ Such global responsibilities for human well-being assume that states can act with concern for these higher goals. Yet in the sub-state process of decision making, who has the incentive or interest to raise moral concerns of global responsibility? The State Department at times expresses a moral or conscience-based approach to international law, but it balances this with pragmatic, diplomatic imperatives. Undoubtedly there may be officials in the executive branch who believe the state should pursue certain forms of global welfare or who are committed to a generally cosmopolitan and expansive view of international law. These individuals and perhaps also some nongovernmental organizations may sometimes shape international policy, but nothing in the actual operation of how the state negotiates competing interests of international law suggests that sub-state actors *systematically* or even regularly pursue such interests.

Scholars and advocates can argue that a state and its officials *should* pursue cosmopolitan interests, but such normative arguments must be distinguished from predictions that states can and will pursue global objectives because of their institutional capacities. This institutional capacity must depend, in part, on the individuals running the institutions. Modeling the state as a unitary entity that will shoulder cosmopolitan responsibilities ignores the gritty reality of the process of international law decision making—in which global responsibility, if present at all, will be one of a number of interests and agendas competing for the attention of centralized decision makers in the White House. The incentives of policy makers and lawyers tend to favor more pragmatic, instrumental uses of international law that maintain flexibility for agencies as well as the White House.

By contrast, the public choice analysis of international law compliance may be complementary to rational choice theories, such as Goldsmith and Posner's theory that state compliance with international law can usually be explained by rational or pragmatic reasons, rather than simply by a propensity to comply with international law.²⁶⁸ The public choice analysis ex-

267. See *supra* Part I.B.

268. See GUZMAN, *supra* note 35, at 21 ("Once the domestic political process plays itself out, however, the state may pursue those policy goals on the international stage in a rational and unitary way. From this perspective, the liberal model serves as an input for the institutionalist model."); ERIC A. POSNER,

amines sub-state behavior, considering the incentives, interests, and agendas of executive branch agencies and their lawyers. These interests reflect the rational calculation of actors within the bureaucracy based on the many factors discussed above. It suggests that agency officials responsible for interpreting and applying international law will respond, like all agency officials, to the incentives they face. In this case, pervasive competition for control of international policymaking creates strong incentives to treat international law instrumentally.

Domestic bureaucratic processes help the President determine what constitutes a state interest, which the state then pursues in international relations. Furthermore, if such disaggregation is purposeful or serves important benefits, a unitary interest may develop after consideration of competing legal interpretations. By explaining the interests and incentives of lawyers who help shape the development of state interests, disaggregated public choice insights may be compatible with the conclusions that Goldsmith and Posner reach about rational state behavior.

Public choice may serve as a complement to rational choice theory precisely because one of the difficulties with the rational choice model is that it does not provide much information about how a “state” identifies or formulates its interests.²⁶⁹ Goldsmith and Posner address the complexity of state interests by pegging these to the “preferences of the state’s political leadership.”²⁷⁰ They acknowledge, “[t]his assumption is a simplification and is far from perfect. But it is parsimonious, and it’s appropriate because a state’s political leadership, influenced by numerous inputs, determines state actions related to international law.”²⁷¹ Moreover, they observe, “institutions that translate individual preferences into particular policies are always imperfect, potentially derailed by corruption, incompetence, or purposeful hurdles (like separation of powers), and sometimes captured by interest groups.”²⁷² Although they recognize that there might be problems with the collective rationality of states, Goldsmith

THE PERILS OF GLOBAL LEGALISM 78 (2009) (noting some value to disaggregating states because the “biggest problem with the unitary state model is that defining a state ‘interest’ in the abstract, without any reference to the desires of citizens, interest groups, and elected officials, seems fruitless”).

269. See Posner, *supra* note 74, at 835.

270. GOLDSMITH & POSNER, *supra* note 13, at 6.

271. *Id.*

272. *Id.* at 7.

and Posner dismiss these concerns by noting that states develop institutions “that ensure that governments choose generally consistent policies over time—policies that at a broad level can be said to reflect the state’s interest.”²⁷³ Posner has explained that domestic processes are ultimately unhelpful for predicting state behavior.²⁷⁴

Rational choice theory naturally raises the question of where state preferences come from and how they are formed.²⁷⁵ Although the theory recognizes that the state has many different interests including security, prosperity, and international stability, to name just a few, it does not provide an account of how those interests are prioritized or balanced.²⁷⁶ In addition, one factor that Goldsmith and Posner take little notice of is the possibility of the state being undermined by its own institutions. The public choice analysis demonstrates that even if leaders formulate unitary preferences, they cannot always fulfill them because expansive and powerful bureaucracies may continue to operate either outside the White House or even at times in direct conflict with centralized policies.

The public choice approach provides more detail about the interaction and competition of many different sub-state individuals and entities. The outcome of such processes may remain uncertain because of the difficulty of coordination. A state may comply with international law when in its self-interest—but figuring out the state’s interest will often require a closer look at domestic factors, including those discussed in this Article.

Public choice gives us a different way of understanding even significant unitary action. It looks behind the state to see how agencies provide inputs for interpreting international law and formulating state policy. Moreover, if coordinating institutions are purposefully disaggregated, designed to ensure ongoing competition and uncertainty, this may affect how we con-

273. *Id.* at 8.

274. Posner, *supra* note 74, at 833.

275. See Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1429 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

276. *Id.* at 1439 (“[A]ll rationalist analyses leave open critical questions about the nature of the international system and the role of human agency, ideas, and preferences within it. Where do actors come from? How do they know what moves (in game-theoretic terms) are available to them? Where do their preferences come from? Rationalists ignore these issues for the purpose of simplicity, but in doing so they run the danger of assuming away some of the most important questions about the international system.”).

ceptualize state interests. Institutions may be designed less for consistency and more for maximizing flexibility and responsiveness to particular circumstances. Unitariness suggests a sort of stability in the methods of interest formation, but public choice analysis posits that interest formation occurs through a constant process of competition and negotiation that may be less stable than unitary theories predict.

B. EXPLOITING THE INDETERMINACY OF INTERNATIONAL LAW

In addition to highlighting some of the limitations of unitary state theories, the public choice analysis in this Article offers several predictions about the use and development of international law.²⁷⁷ Disaggregated theories, like unitary ones, reach different conclusions about the development of international law and the likelihood of compliance. The prevailing liberal or disaggregated theories predict that a shift to domestic, non-state actors will result in greater precision and more compliance with international law. Yet they do not explain how the transnational efforts of *non-state* actors will lead to greater *state* compliance. The non-state and sub-state activity they describe may indicate an increase in international cooperation, but this increase has no necessary connection to compliance with international law.

By contrast, the public choice model focuses on decision-makers who affect state choices about international law compliance—it looks at the “they” behind the “it”. An analysis of agency interests and incentives predicts that government officials will define compliance in instrumental terms that exploit the indeterminacy of international law. Officials will strategically use imprecision and uncertainty in international law to provide flexible interpretations that meet the needs of particular circumstances.

1. Competition Creates Incentives for Flexible Interpretation

The public choice analysis explains that agencies and their legal counsel often have different perspectives and interests

277. One of the criticisms of disaggregated theories is that they fail to provide any predictions and cannot generate a theory of compliance with international law. “The problem with disaggregating the state is that greater accuracy is purchased at the price of complexity.” POSNER, *supra* note 268, at 41; *see also* GUZMAN, *supra* note 35, at 19 (“It is difficult, and perhaps impossible, to construct a general, tractable, and predictive liberal theory of policymaking in a single state, let alone one that also captures the interactions of many states.”).

and interpret international law in accordance with these. Importantly, it also explains that in the absence of effective and predictable coordination mechanisms, agencies will compete to control international law interpretation. Competition between agencies creates pressure to interpret international law opportunistically in the light most favorable to an agency's preferred outcome. The public choice account predicts that agencies will strategically manipulate the indeterminacy of international law to advance their favored policy outcomes particularly with respect to high-stakes issues and new circumstances. Moreover, it will often be rational for officials to seek out more soft law agreements and regardless of the degree of legalization, to press on points of uncertainty.²⁷⁸

As discussed above, international law has varying degrees of softness.²⁷⁹ Such law exists on a continuum of legal obligation—some forms of international law have binding domestic effect, whereas others may create international, but not domestic obligation. Moreover, international law exists on a continuum of precision—some international law agreements may be precise and admit little interpretation, whereas other agreements have much more general terms.²⁸⁰ Even though some traditional principles of international law may be settled, disputes occur in areas of indeterminacy, whether as to the content of international law or its application in particular circumstances. Given this indeterminacy, government officials often have a wide range of potential interpretations.

The range of possible interpretations is not without limit—officials must ensure that their proposals comport with some plausible or defensible interpretation of international law. In practice, however, this will often allow for a legitimate range of disagreements over the application of law to specific circumstances. With the recent example of the Geneva Conventions, for instance, different agencies pressed for applicability or non-applicability of the Conventions to al Qaeda and Taliban fighters based in part on the law, its status as customary international law, and also the political and diplomatic consequences

278. See Abbott & Snidal, *supra* note 102, at 440 (discussing some of the public choice benefits of soft law).

279. *Id.* at 421.

280. See Abbott et al., *supra* note 104, at 405 (discussing legalization along dimensions of obligation, precision, and delegation; noting the “remarkable variety” of forms of international legalization; and explaining that “a binary characterization sacrifices the continuous nature of the dimensions of legalization”).

that would follow from the President's decision.²⁸¹ The legal analysis related to the type and degree of obligation faced by the United States as well as the precision of the standard to be applied. Agency counsel then filtered the legal questions through a variety of diplomatic, security, and military considerations and consequences.²⁸² Similarly, with regard to the Libya intervention, Koh gave a narrow statutory interpretation of "hostilities" in the War Powers Resolution, despite the fact that many argued the term should be read in light of international norms, which provided a definition of hostilities that clearly covered the armed conflict in Libya.²⁸³

As discussed above, agencies must compete with respect to issues in areas of overlapping jurisdiction. In the ongoing process of negotiation, agencies might use plausible interpretations of international law to attempt to defeat other agency proposals.²⁸⁴ According to a traditional empire-building account of agency behavior, agencies may say "no" to the proposed actions of other agencies in order to bolster their importance. They may do this to thwart the action of other agencies, and/or to advance their preferred policies. Moreover, in the process of agency negotiation and compromise, alternatives that violate international law will be less likely to advance to the next level. There is little incentive for any particular bureaucrat or agency to advance a proposal that conflicts with or raises a question about international law. When many agencies compete to advance their own agenda, lack of compliance with international law provides opponents an easy impediment to competing policy proposals.

Although failure to comply with international law may not necessarily block a proposal, it makes it more difficult for that proposal to get through the process. This dynamic provides an incentive for agencies to present their policies as compliant with international law. Compliance with international law does not have to depend on a unitary or centralized perception that

281. GOLDSMITH, *supra* note 1, at 102–20; YOO, *supra* note 1, at 18–47; Memorandum for Alberto R. Gonzales, *supra* note 2.

282. See, e.g., Memorandum from Colin L. Powell, *supra* note 3.

283. Mary Ellen O'Connell, *U.S. Strains Credibility on Its Libya Role*, CNN OPINION (June 21, 2011), <http://www.cnn.com/2011/OPINION/06/21/oconnell.libya.military>.

284. See Nathan A. Sales, *Self Restraint and National Security*, 6 J. NAT'L SEC. L. & POL'Y (forthcoming 2012) (analyzing why agencies may over-enforce international law in the national security field).

such compliance is within the national interest. It may be simply that compliance with international law is *efficacious* on a domestic level. Advocating for international law compliance may be a strategic tactic—the domestic regulatory process may be easier to navigate if one’s proposals arguably comport with international law.

In high-stakes issues, agencies may have even greater incentives to bend international law interpretation to serve their interests. High-stakes issues include national security, the conduct of war, diplomacy, and any other issue important enough to attract White House attention. When an issue rises to the level of White House decision making, the agency dynamic may be somewhat different because the agencies are not only negotiating amongst themselves, but must also convince the President or other key decision-makers to adopt a particular interpretation or proposal.

Agencies will sometimes strive to provide advice congenial to the President and White House, by placing great weight on the constitutional authority of the President and interpreting the requirements of international law in this light. This approach, often an institutional position of OLC but also adopted by other agencies, allows the widest scope for the President’s policy assessment. Other agencies, such as the State Department or Department of Defense have different missions and cultures and may selectively interpret the requirements of international law more strictly in the contexts where this helps their objectives. For example, these agencies argued for the applicability of the Geneva Conventions to al Qaeda and Taliban fighters after September 11, 2001, based on legal interpretation, but also policy concerns about diplomatic stability and the treatment of American soldiers. Yet when seeking a legal justification for intervention in Libya without congressional authorization, the State Department legal advisor provided an interpretation of “hostilities” under the War Powers Resolution that supported the White House’s interests in Libya, but was at odds with the Department of Justice. Agencies at different times in and different circumstances provide the President and White House with advice that supports their foreign policy objectives.

In the competitive process to direct presidential policy making, largely waged between political appointees within the White House and in high-level agency positions, the actual terms of international law “compliance” may be defined down

in favor of presidential authority or pragmatic considerations of international policy. Government actors have incentives to use international law to their personal or agency advantage. In this environment, executive branch interpretations of international law will rarely remain fixed, but will vary depending on politics and the needs of changing circumstances.

Agencies that fail in the competition for centralized control may persist in maintaining their own view of international law. Indeed, a commitment to international law compliance can provide a legal justification for what are, after all, acts of insubordination, refusing to follow presidential direction or for undermining presidential decisions. For example, after President Bush announced his policy about the applicability of the Geneva Conventions, a memorandum explaining the State Department's alternative legal analysis was leaked.²⁸⁵ Similarly, some officials in the Obama Administration have discussed internal executive branch disputes between the State Department and the Department of Defense with the *New York Times*.²⁸⁶ Agencies may use international law as a justification for preserving their own course, citing fidelity to international law as a reason for failing to follow the President.

These views may or may not be "better" interpretations of international law, but they will aggravate the indeterminacy of international law. If two (or more) agencies within the executive branch maintain competing interpretations of international law, this furthers the perception and reality of the indeterminacy of international law. Such competition is likely to persist given the different perspectives of executive agencies and the incentives for sticking to one's position in a system with imperfect coordination.

2. An Institutional Preference for Soft Law

Repeated use of international law for political, strategic, and instrumental ends may create habits of flexible or instru-

285. Memorandum from Colin L. Powell, *supra* note 3; *see also* YOO, *supra* note 1, at 39; Barry et al., *supra* note 169.

286. *See* Savage, *supra* note 8; Savage, *supra* note 9. Administration leaks may be authorized or unauthorized and sometimes even high-level administration officials may be unaware of authorization. For example, Vice President Dick Cheney has recounted how he expressed his concern over a leak to President George W. Bush only to be informed by Steve Hadley that Hadley had been the source and spoke to the reporter "at the instruction of the President." *See* DICK CHENEY, *IN MY TIME: A PERSONAL AND POLITICAL MEMOIR* 456 (2011).

mental compliance. The predictions that follow from public choice analysis thus run against disaggregated theories that posit a shift to sub-state actors will lead to an increase in international law compliance. For example, Harold Koh has argued international law is enforced by a “transnational legal process” that involves both government officials and other non-state actors.²⁸⁷ In particular, he observes that through interaction with other nations and experience with international affairs, government officials will develop a “habit” of compliance with international law.²⁸⁸ This occurs in part because a “state’s violation of international law creates inevitable frictions and contradictions that hinder its ongoing participation within the transnational legal process.”²⁸⁹ Similarly, Anne-Marie Slaughter identifies a process of networking between officials in different states that eventually leads to the formation of norms and greater compliance with international law both by non-state actors and by states.²⁹⁰

By contrast, the public choice account predicts that as government officials work through the requirements of international law in the process of formulating state policy, they will treat international law instrumentally, rather than as a moral imperative or legal obligation. Competition creates incentives to keep the terms of international law flexible—this undercuts the idea that government actors internalize a norm of international law compliance. They may aim for “compliance” with international law, but such compliance may be simply a commitment to the form of international law, rather than to its substance. Thus, the “institutional habit”²⁹¹ that Koh describes may be a commitment to “compliance” that allows the government actor to interpret international law with the maximum latitude depending on the circumstances. Indeed, Koh’s recent interpretation of the War Powers Resolution, by ignoring international law altogether, perhaps confirms this tendency among government officials.²⁹²

Compliance here does not mean that government officials will follow international law because of a moral obligation or

287. See Koh, *supra* note 69, at 194 (emphasis omitted).

288. *Id.* at 203–05.

289. *Id.* at 203.

290. SLAUGHTER, *supra* note 64, at 178.

291. Koh, *supra* note 71, at 655.

292. See Koh, ASC BLOG, *supra* note 149 (explaining that an executive branch lawyer’s legal analysis may differ from a law professor’s).

when such compliance is against their other interests.²⁹³ Rather it may mean simply that these officials will interpret international law to fit with other interests. Moral considerations or a belief in the value of international law may drive some individuals, but there is little evidence that such legalistic-moralistic feeling can be attributed to large numbers of policymakers. Ordinary experience suggests such feelings, to the extent they exist, must compete with other agency imperatives such as furthering the agency's mission or influencing White House decision making. Political calculations will invariably affect how officials define and choose between lawful options. An instrumental commitment to compliance with international law fully accords with the rational interests of both substate actors as well as the "state" as a unitary entity.

C. SUSTAINING THE FLEXIBILITY OF INTERNATIONAL LAW

The public choice analysis predicts that agencies and government officials will use the actual or perceived indeterminacy of international law strategically in order to advance their agendas. In the American executive branch, this ongoing process expands the range of compliant behavior, which reinforces the flexibility and ambiguity of international law. If government officials in other countries face a similar type of competition and incentive structure, these structural forces may provide one explanation for the persistence of indeterminacy and flexibility in international law.

The public choice analysis of international law compliance thus reaches a different conclusion about the development of international law from other disaggregated theories. These theories predict that disaggregation will allow for the development of global norms and standards that are more concrete and that states will be more likely to adhere to such norms through the actions of sub-state actors.²⁹⁴ In this view, minimizing the role of the "state" allows individuals within government and outside of it to pursue global norms and cooperation.

The general view is that disaggregation will lead to more legalization. For example, Anne-Marie Slaughter expresses optimism that the existence of disaggregated government net-

293. See GOLDSMITH & POSNER, *supra* note 13, at 105 (explaining that "routine bureaucratic compliance is based on an aggregate cost-benefit analysis, and is not the same thing as a general willingness or habit of complying with international law against the state's interest").

294. See, e.g., SLAUGHTER, *supra* note 64, at 169.

works between nations will lead to the creation and enforcement of more concrete international norms and greater cooperation across nations.²⁹⁵ Slaughter also posits that government networks will “improve compliance with international law” in part by using the enforcement mechanisms of national government institutions to help the work of supranational institutions.²⁹⁶ Similarly, Kal Raustiala suggests that transnational networks will enhance compliance through information-sharing and the export of ideas and technology, all of which improve cooperation between nations.²⁹⁷

These theories are based in part on the idea that substate actors will cooperate with their counterparts in other countries, particularly with regard to regulatory activities that are largely controlled by agencies in a decentralized fashion. If bureaucrats internalize norms of international law, as Koh suggests, the more disaggregated the decision making, the more likely these individuals can promote international law compliance. Moreover, these theorists suggest that disaggregation increases the possibilities of international law, including bolstering supranational organizations and enforcement efforts.

But it is important to properly describe the phenomenon observed by these liberal theorists. What Koh, Slaughter and Raustiala describe is largely the proliferation of cooperation between regulators and other officials that often do not take the form of binding obligations.²⁹⁸ Slaughter’s transgovernmental networks “negotiate, implement, and diffuse norms that are often precise and elaborate, and may be politically powerful

295. *Id.* That optimism is also expressed in the concept of a “new world order” that encompasses “a system of global governance that institutionalizes cooperation and sufficiently contains conflict such that all nations and their peoples may achieve greater peace and prosperity, improve their stewardship of the earth, and reach minimum standards of human dignity.” *Id.* at 15.

296. *Id.* at 183 (“[G]overnment networks also improve compliance with international law. Indeed, vertical government networks exist essentially for that purpose, to use personal relationships to harness the power of national government institutions in the service of their counterpart supranational institutions. This approach strengthens compliance by backing enforcement efforts with genuine coercive authority—at least as much as is typically exercised by a domestic court or regulatory agency.”).

297. Raustiala, *supra* note 67, at 80–83.

298. See POSNER, *supra* note 268, at 41 (explaining that Koh and Slaughter do not always focus on compliance with international law by states, but generally consider the importance of “international cooperation” between individuals and entities other than states).

though not binding as a matter of [international law].”²⁹⁹ The focus here is on disaggregation of international activity to include sub-state actors—this identifies the external transnational work between government actors in different countries. Domestic agencies serve as international actors in their own right.³⁰⁰ From this proliferation of international norms, Slaughter and others predict that international law will become more precise and that there will be greater state compliance with international law norms.

Yet it is not clear how the proliferation of international cooperation necessarily leads to harder forms of legalization or greater compliance by states. There appears to be an intuition that more working together across borders will lead to the solidification of international law regimes, tighter international law obligations, and more compliance, but the mechanism of how this occurs remains unspecified. Indeed, one could just as easily predict that if non-state actors achieve their goals through soft legalization there may be little incentive to struggle to achieve harder forms of international legalization.³⁰¹

Unlike disaggregated theories focused on transnational cooperation, public choice analysis in this Article focuses on internal disaggregation in the American executive branch—the government officials who analyze and interpret international law. It couples this with institutional factors, such as the availability of coordination mechanisms. Given the often divergent agency interests and imperfect institutional coordination, governmental officials can benefit from ambiguity and flexibility in international law. Bureaucratic competition to control centralized decision making creates powerful incentives for keeping international legal agreements and customary international law flexible and open-ended.³⁰² Greater clarity in international law, both treaties and customary international law, would limit the range of policy alternatives in compliance with international law.

299. Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 27.

300. See SLAUGHTER, *supra* note 64, at 31–35; see also Abbott, *supra* note 299, at 27; Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 L. & CONTEMP. PROBS. 195, 210 & n.50 (2004) (noting that the disaggregated activity is conducted by “the agent of the state as agent”).

301. See Abbott & Snidal, *supra* note 102, at 456 (“[S]tates and nonstate actors can achieve many of their goals through soft legalization that is more easily attained or even preferable.”).

302. See *supra* note 132.

These sub-state actors, the ones who will negotiate, draft, and enforce international law norms, have an incentive to retain the flexibility and ambiguity in international law. They may at times benefit from regulatory cooperation with their foreign counterparts or even from more precise norms. Yet most agency actors and legal counsel can benefit over time by retaining interpretive flexibility because they do not know whether and how international law will limit future activities. Having a wide range of compliant alternatives allows officials to tailor legal analysis to meet policy objectives.

A comparative study of international law compliance in other countries would allow us to predict whether this internal competition and incentives for flexibility are pervasive in nations that formulate the terms of international law. If the bureaucracies of other states have similar incentives to maintain the flexibility of international law, this would suggest a significant difficulty with generating harder—more precise, more binding—forms of international law. It may be that other countries are different, or not as structurally disaggregated as the United States, but most liberal democracies also have elaborate and diverse bureaucracies that might compete over the meaning and interpretation of international law. The few available accounts of this suggest that this might be the case.³⁰³ If public choice yielded similar observations in other countries, this would help explain what we see in the world—many states and government officials call for greater specificity and enforcement of international law, but at the same time enter into agreements that allow for interpretive flexibility.³⁰⁴

The public choice account provides evidence of domestic competition between agencies and failures to coordinate that, at a minimum, should temper the optimism of disaggregated theories that suggest transnational networks will help develop global norms of behavior and increase compliance with international law. With regard to predicting whether states will comply with international law, the public choice analysis focuses more directly on the agencies and actors who determine questions of state compliance. It focuses on agency interests and incentives given the persistence of imperfect coordination. In this

303. See SCHARF & WILLIAMS, *supra* note 11, at 169–80; Jochen A. Frowein, *Legal Advice for Foreign Policy in Germany*, 23 WIS. INT'L L.J. 25, 25–27 (2005) (describing formation of international legal policy in Germany).

304. See GUZMAN, *supra* note 35, at 122 (arguing that many states behave this way as a means of risk avoidance and self-preservation).

manner, the public choice analysis may better predict how and in what manner the state complies with international law.

CONCLUSION

Over the past ten years, numerous legal disputes about the content and applicability of international law to the war on terror have been made public. Some statutes and judicial opinions cover these matters—but many significant questions are essentially left to the executive branch. Here agencies with different interests and perspectives often disagree, particularly as new circumstances arise and there is little state practice or precedent to guide analysis. This dynamic has been largely overlooked in theories about international law compliance. The approach of this Article has been to demonstrate how the “they” of the executive branch can function as an “it.” Although the President may make a final legal and policy determination, he does so by drawing on the advice of executive branch agencies and entities designed to provide expert opinion on such matters. These agencies, however, will interpret international law in light of their different interests, outlooks, and incentives. This provides valuable information to the President about the range of legal, political, diplomatic, and military consequences of particular options. But institutional coordination of these interests remains imperfect. The benefits of a full hearing may come at the cost of ongoing disagreement and insubordination even after the President has made a final decision.

This dynamic has consequences for international law compliance in the United States. In the competition for control over centralized decisions, agencies may use international law to suit their purposes—taking advantage of indeterminacy in international law to further their goals. The persistence of instability and lack of coordination creates incentives to use international law strategically. In the current environment difficult questions about the content and applicability of international law to the use of force will continue to arise. Analyzing the consequences of executive branch legal interpretation provides another way to understand the limits and possibilities of international law compliance in these new contexts.