

THE RULE OF RECOGNITION AND PRESIDENTIAL POWER

Austin Piatt

ABSTRACT—Professor H.L.A. Hart’s theory of the rule of recognition, introduced in 1961, asserts that every legal system requires a rule of recognition to tell society what the law is. Though much scholarship has been dedicated to analyzing America’s theoretical rule of recognition, Hart’s theory has not yet been applied to the numerous actions and operations of America’s Executive Branch. The rule of recognition should be able to tell us which executive actions have the authority of law. Yet, when we try to make sense of various recent orders, memos, guidance documents, and letters emanating from the White House and administrative agencies, the rule of recognition falls short of its purpose.

This Note is the first to apply Hart’s theory to a sample of Executive Branch actions—including executive orders, “Dear Colleague” letters, and even Twitter—and derive lessons about Hart’s work from that application. By taking the rule of recognition out of the realm of theory and applying it to our modern reality, this Note raises important questions about our government and Hart’s theory. Is there something wrong with Executive Branch actions? Is there something wrong with Hart’s theory? Maybe it is failing to settle uncertainty as it was proffered to do. Or maybe this real-world application gives us reason to question Hart’s fundamental thesis. Addressing these questions will not only deepen our understanding of the law’s philosophical underpinnings but will also bolster our understanding of various government actions in the real world.

AUTHOR—J.D., 2022, Northwestern Pritzker School of Law; B.A., 2017, Washington and Lee University. My gratitude goes to Professor Joshua Kleinfeld for helping bring this idea to life and for his invaluable guidance. I am also deeply grateful to my peers on the *Northwestern University Law Review* staff, especially Javier Andujar, Sarah Bazir, Megan Cahillane, Amelia Dahl, Alexandra Dakich, Alexandra Li, Lauren McBride, and Kathryn Speckels, who provided important feedback on this Note. Lastly, to my wife, thank you for your love and support.

NORTHWESTERN UNIVERSITY LAW REVIEW

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INTRODUCTION

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.¹

America awoke to these tweets from President Trump on July 26, 2017. Trump hit “Tweet” at 6:55 AM, and by 7:00 AM, Washington was scrambling to figure out if the President had just enacted a new policy through Twitter. In an article aptly entitled *How to Spark Panic and Confusion in Three Tweets: Do Impulsive Twitter Messages from the President Count as Formal Policy Action?*, journalist Matt Thompson wrote, “In the instant, no one knew whether the tweets themselves had the weight of policy.”² The issue was not settled until the next day, when the Joint Chiefs of Staff issued a statement: “There will be no modifications to the current policy until the President’s direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance.”³ Only then did people realize the federal government would not

¹ Matt Thompson, *How to Spark Panic and Confusion in Three Tweets: Do Impulsive Twitter Messages from the President Count as Formal Policy Action?*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/donald-trump-tweets-transgender-military-service-ban/579655/> [https://perma.cc/4WU2-CPMW].

² *Id.*

³ Phil Stewart & Idrees Ali, *‘We Will Continue to Treat All of Our Personnel with Respect’: General Says No Moves on Trans Ban Yet*, INSIDER (July 27, 2017, 10:09 AM), <https://www.businessinsider.com/we-will-continue-to-treat-all-of-our-personnel-with-respect-general-says-no-moves-on-trans-ban-yet-2017-7> [https://perma.cc/DN8Z-2XD5].

treat these tweets as an order. But a whirlwind of uncertainty had already shaken our legal and political systems.⁴

This episode brought to the foreground a question lurking in the background of our legal system: how can we tell when a government action has the authority of law? Political theorists increasingly ask this question given the rise in executive action in the twenty-first century.⁵ The President and administrative agencies frequently promulgate new policies and rules,⁶ including signing statements, executive orders, legal memoranda, Office of Legal Counsel guidance, administrative agency advisory documents, “Dear Colleague” letters, proclamations, administrative orders, presidential directives, letters on tariffs and international trade, and executive agreements. Which of these, if any, have legal effect?

H.L.A. Hart’s “rule of recognition” might provide an answer. Hart, who has been described as the “premier legal philosopher”⁷ of the twentieth century for his contributions to legal theory generally and legal positivism specifically,⁸ offered an answer as early as 1961 by giving us the rule of recognition.⁹ Any developed legal system, Hart reasoned, will have a rule that allows that system to say what the law is.¹⁰ So how does one know when

⁴ Thomas Gibbons-Neff, *Pentagon Has Made No Change Yet to Its Transgender Policy, Says Highest-Ranking Officer in U.S. Military*, WASH. POST (July 27, 2017, 9:00 PM), <https://www.washingtonpost.com/news/checkpoint/wp/2017/07/27/pentagon-has-made-no-change-yet-to-its-transgender-policy-says-highest-ranking-officer-in-u-s-military/> [https://perma.cc/9TJY-HZKW] (“The lack of clear direction from officials left the status of thousands of active transgender service members in limbo, one day after President Trump’s sudden announcement on Twitter.”).

⁵ See, e.g., Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1968 (2015) (“By the end of the twentieth century and accelerating at the beginning of the twenty-first, the President and the vastly expanded executive branch have become the most powerful engine of government.”); Melina T. Oliverio, Comment, *The Role of the Executive in Rulemaking: An Exploration of Executive Action in United States Immigration Law*, 70 ADMIN. L. REV. 715, 716 (2018) (asserting that the “use of executive action has become increasingly common”).

⁶ See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 270 (2019) (“[M]ost significant policymaking comes from agency action rather than legislation.”); Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 35 (2019) (asserting that “[t]he current party system” has become so polarized that “[e]xecutive actions replace legislation as the means of moving a policy program forward”).

⁷ George A. Martinez, *Foreword: A Symposium on the Jurisprudence of H.L.A. Hart*, 52 SMU L. REV. 25, 25 (1999); see also Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 168 (2004) (describing Hart as one of two “dominant figures in twentieth-century legal philosophy,” with the other being Hans Kelsen).

⁸ “Legal positivism, in contrast with (traditional) natural law theory, is about the possibility and the value of a descriptive, morally neutral theory of law.” Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 904 (1999). Under legal positivism’s “separation thesis,” morality and law always remain separate—i.e., law is not necessarily contingent on morality. See Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 5–6 (2011).

⁹ See H.L.A. HART, *THE CONCEPT OF LAW* 92–94 & *passim* (2d ed. 1994).

¹⁰ *Id.* at 97.

a government has made a new law? In one legal system, the rule of recognition might be that whenever the elected legislature passes a bill by a majority vote, that bill shall be a law. In another legal system, the rule of recognition might be that whenever the king speaks from the throne, his words shall be law. In short, the rule of recognition allows a society to identify certain government pronouncements as “law” and give them binding authority. Without the rule of recognition, the people governed by a legal system might be uncertain about whether, for example, a report counts as law if an elected committee issued it but did not vote on it—or whether the king’s tweets have the force of law.

This Note is the first to apply Hart’s theory to the actions of the modern Executive Branch. Though scholars have already done much work to understand the rule of recognition,¹¹ more is needed to understand Hart’s work as applied to today’s reality. This Note takes up that task, examining the extent to which Hart’s theory maps onto the real world by analyzing policy actions within the U.S. Executive Branch. These examples uncover uncertainties and weaknesses in Hart’s theory of the rule of recognition that lie dormant unless one attempts to put it into practice.¹²

What does applying this theory to reality demonstrate about Hart’s theory? This main question can be divided into three smaller inquiries: First, is the rule of recognition theory fundamentally flawed in the sense that it can

¹¹ See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 621–22 (1987) (offering “a fairly comprehensive account of how one might try to state a rule of recognition for someplace in this country”); Norman P. Ho, *Internationalizing and Historicizing Hart’s Theory of Law*, 10 WASH. U. JURIS. REV. 183, 185 (2017) (applying Hart’s theory “to non-Western as well as premodern legal cultures”); Stephen V. Carey, Comment, *What Is the Rule of Recognition in the United States?*, 157 U. PA. L. REV. 1161, 1163 (2009) (bringing Hart’s theory out “of a purely theoretical debate” and applying it to the overall U.S. legal system); Douglas E. Edlin, *The Rule of Recognition and the Rule of Law: Departmentalism and Constitutional Development in the United States and the United Kingdom*, 64 AM. J. COMP. L. 371, 373–74 (2016); Matthew D. Adler, *Constitutional Fidelity, the Rule of Recognition, and the Communitarian Turn in Contemporary Positivism*, 75 FORDHAM L. REV. 1671, 1675 (2006); David Gray Carlson, *Legal Positivism and Russell’s Paradox*, 5 WASH. U. JURIS. REV. 257, 259 (2013); Anthony J. Sebok, *Is the Rule of Recognition a Rule?*, 72 NOTRE DAME L. REV. 1539, 1552–55 (1997); Jules L. Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL’Y 703, 703 (1991).

¹² My goal is to add to the discourse started by Professor Kent Greenawalt when he said it “was not until I had struggled with these matters for some time that I realized more was involved than applying Hart’s basic theory to an extremely complicated legal reality.” When we explore this complicated reality, Professor Greenawalt argues, we discover that “[a]spects of that reality proved recalcitrant in the face of Hart’s categories; the conceptual possibilities and relationships among standards proved richer than one would gather from *The Concept of Law*.” Greenawalt, *supra* note 11, at 622.

Furthermore, this Note aims to answer two questions posed by Professor F. Patrick Hubbard: First, does Hart’s rule of recognition “provide a framework for increasing our understanding of American constitutional law?” Second, “does the consideration of the first question provide insights into the utility of Hart’s ‘rule of recognition’?” F. Patrick Hubbard, *Power to the People: The Takings Clause, Hart’s Rule of Recognition, and Populist Law-Making*, 50 U. LOUISVILLE L. REV. 87, 88 (2011).

no longer identify what is law? The examples of executive action in this Note reveal that the theory is not so flawed as to render it useless, but it needs revision. Second, does the rule of recognition fail to resolve the uncertainty about which government actions have the force of law? If the rule of recognition fails to resolve uncertainty in the Executive Branch, then government officials will likely resort to normative and moral reasoning to determine whether they should follow it. Using moral reasoning to decide what is a valid law, however, is antithetical to legal positivism, for legal positivists like Hart separate questions of law from questions of morality.¹³ So the third question is, if government officials use moral reasoning to ascertain whether an executive action is law, then what do these observations tell us about legal positivism?

Part I reviews Hart's theory of the rule of recognition, and then posits a hypothetical legal system meant to show how Hart's theory may not have adequately anticipated the complexities of modern American government. Part II applies Hart's theory to reality through illustrative examples of executive actions that create uncertainty about which actions bear legal authority. These observations bolster the assertion that our modern legal system is far more complex than Hart envisioned. Part III examines what this means for our Executive Branch, ultimately concluding that the uncertainty surrounding many executive actions is dangerous to our constitutional democracy. Part IV explores what these examples from the Executive Branch reveal about Hart's theory, the rule of recognition, and the central claim of legal positivism. At bottom, Hart's theory appreciates at a rudimentary level, but does not fully explain, legal systems as complex as the United States'. Moreover, the uncertainty accompanying Executive Branch action challenges democratic decision-making and the rule of law.

I. THE RULE OF RECOGNITION

This Part lays the foundation for applying the rule of recognition to our modern legal system by first explaining Hart's theory and then expanding

¹³ This is known as the "separation thesis." See Edward A. Purcell Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1460 (2014) (stating that the separation thesis "means that the two realms of 'law' and 'morals' are different, and that confusion is avoided and 'law' more precisely identified when analysts treat 'law' as distinct from 'morals'"); H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 28 (1982) (showing that Jeremy Bentham insisted "on a precise and so far as possible a morally neutral vocabulary for use in the discussion of law and politics"). Explained differently, legal positivists separate what the law is from what the law should be. See HART, *supra* note 9, at 185–86 ("Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."). Whereas natural law proponents argue that an immoral law is not law at all, legal positivists like Hart would assert that it certainly is law and the debate about its morality is a separate discussion.

into areas Hart left unaddressed. The purpose is to establish what Hart did and did not anticipate in presenting his theory of the rule of recognition.

A. *Hart's Theory and the Problem of Uncertainty*

In his most famous and influential book, *The Concept of Law*, H.L.A. Hart established his theory of law as a union of primary and secondary rules.¹⁴ Primary rules govern conduct and behavior, and typically consist of lists of “thou shalt,” “thou shalt not,” and similar rules.¹⁵ Secondary rules, by contrast, govern primary rules by establishing systems for creating new primary rules and adjudicating existing ones.¹⁶

To understand this important innovation in the explanation of legal systems, Hart asks us to imagine a primitive society that only relies on primary rules to guide people’s conduct.¹⁷ According to Hart, these rules, such as “no killing other people,” or “no stealing crops,” are insufficient to structure society’s conduct, for primary rules without secondary rules produce three inevitable deficiencies—inefficiency, static character, and uncertainty.¹⁸

Inefficiency manifests when it is impossible to determine if one of the primary rules has been violated, rendering the legal system unworkable. If one member of the community accuses another of stealing, then how does the group resolve this dispute? The society must adopt a *rule of adjudication*, which will establish the methods for resolving disputes over the primary rules.¹⁹ This could take the form of a magistrate administering judicial rulings or even trial by combat for more daring communities.

The problem of static character is when society is unable to adapt the primary rules as new situations arise. Say, for example, someone in the village is attacked and she kills her assailant in self-defense. The community must consider whether to alter the primary rule of “no killing” to add a self-defense exception. To do so, a *rule of change* must be adopted so that the community has mechanisms for amending its primary rules.²⁰ This might take the form of a council or a direct vote by the villagers.

Lastly, the deficiency of uncertainty comes about when society cannot tell whether certain government actions have the effect of law. This

¹⁴ HART, *supra* note 9, at 94.

¹⁵ *Id.* at 94.

¹⁶ *Id.*

¹⁷ HART, *supra* note 9, at 91 (“It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind.”).

¹⁸ HART, *supra* note 9, at 92–94.

¹⁹ *Id.* at 96–97.

²⁰ *Id.* at 95–96.

deficiency undermines the entire system, because even with rulemaking and adjudicatory bodies, it remains unclear how the community will know when those bodies have wielded their authority to decide or change the law. Do the magistrate's opinions during a dinner discussion have binding effect? Can the council amend a law if only one-third of its members voted for the change? Thus, the rule of recognition is a necessary concomitant to the rule of change and rule of adjudication—if we do not know what the law is, it matters not whether we have processes by which we can modify it or adjudicate disputes.

To solve this problem, which is arguably the gravest problem facing the community²¹ (besides rival tribes, famine, and pestilence, of course), the people must adopt a *rule of recognition* establishing the rules for when a law will be recognized as authoritative.²² The rule serves as an uncertainty-settling device. For example, the village's rule of recognition might present the rule "whenever a majority of the council votes in the affirmative for a new law or a change in existing law, that law shall be enacted and binding." Hart viewed the rule of recognition as the most important secondary rule for any legal system: "[W]here a secondary rule of recognition is accepted and used for the identification of primary rules of obligation . . . this situation . . . deserves, if anything does, to be called the foundations of a legal system."²³

Functionally, the rule of recognition serves a dual role in Hart's theory. First, it resolves the uncertainty described above. Second, and more important, the rule of recognition is central to the system of law because it declares what the law *is*. Without the rule of recognition, there is no commonly-agreed-upon law,²⁴ so disputes will persist over what the law is, even after the rules of adjudication and change have been implemented.²⁵ Furthermore, the rule of recognition is essential to Hart's theory of legal positivism.²⁶ Positivists argue that because law is not based on morality or normative custom, every legal system needs an amoral method of identifying

²¹ See *id.* at 92 (explaining that "if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative").

²² *Id.* at 94.

²³ *Id.* at 100.

²⁴ See Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?* 8 (Yale L. Sch. Pub. L. & Legal Theory Rsch. Paper Series, Rsch. Paper No. 181, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304645 [<https://perma.cc/Q388-LXHA>].

²⁵ See HART, *supra* note 9, at 92.

²⁶ See *supra* note 8.

the law as law. Key to the legal positivist view, the rule of recognition is foundational because it establishes the validity of all other rules.²⁷

B. The Rule of Recognition in the Modern Context

As Hart describes it, the rule of recognition appears powerfully simple. All a society needs to do to empower its people to discern valid laws is establish rules for how it will determine what a law is. This apparent simplicity, however, falls away in modern contexts. Returning to our small village, imagine the village continues to grow, and the Council of Elders finds itself buried beneath an avalanche of complaints and requests, most of them regarding agriculture. The Elders then pass a statute that says, “We hereby create an Agriculture Committee which shall be composed of ten citizens from the village selected annually by the Council of Elders and shall be charged with ensuring that the village’s farming conditions remain healthy and bountiful.” Interpreting this charge, the Agriculture Committee takes it upon itself to ban certain nutrient-sapping plants, penalizing anyone found violating this rule. Rather than override this action with a clarifying statute, the Elders acquiesce (perhaps out of inertia or perhaps out of the inability to act due to village politics), allowing the Committee to continue issuing various regulations and penalties.

Essentially, a body external to the Council of Elders has issued a primary rule that directly impacts the villagers’ behavior. What does the rule of recognition tell us about these actions? Perhaps the village recognizes these actions as “law,” or it categorizes them as something different, maybe as regulations, but still functionally equivalent to law because they are binding on the villagers. It is unclear whether the villagers are free to disregard the Committee if their society’s established rule of recognition does not recognize committee pronouncements as law.

These questions did not escape Hart, for he expected the legal system to grow in complexity proportionally to society. He states that legally authoritative materials need not be rigidly limited to laws passed by a legislature or a king. That is because in any complex legal system there will be a variety of sources of law, so “the rule of recognition is correspondingly more complex.”²⁸ Hart seems to have anticipated something similar to the Elders forming an Agriculture Committee, for he explains that the validity of the Committee’s rules can be traced back to the validity of the Council of

²⁷ HART, *supra* note 9, at 111–12; *see also id.* at 103 (“To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition . . .”); SHAPIRO, *supra* note 24, at 10 (explaining that “the rule of recognition secures the existence of all primary rules,” because “[a]s long as a rule bears the characteristics of legality set out in the rule of recognition, it exists and is legally valid”).

²⁸ HART, *supra* note 9, at 101.

Elders. So, if the Agriculture Committee passes a new “law,” is that “law” valid? Hart answers, “Yes: because it was made in exercise of the powers conferred, and in accordance with the procedure specified, by a statutory order made by” a government official, “this first stage [of] statutory order provides the criteria in terms of which the validity of the by-law is assessed.”²⁹

In the hypothetical village, Hart would direct us to refer to the Council’s edict that created and empowered the Agriculture Committee.³⁰ Assuming the statute delegated sufficient power to the Committee, the Committee’s “law” satisfies the rule of recognition. If, on the other hand, the statute only gave the Agriculture Committee the power to conduct studies and report back to the Elders, the Committee’s attempts to directly regulate growing and harvesting would be invalid. They would not be authorized by any law which itself was valid under the rule of recognition.

Most importantly, Hart explained that for “the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers.”³¹ If, after the Committee issues its harvesting regulations, officials or private persons begin following them, Hart would likely say these regulations pass muster under the rule of recognition, for they have been *shown* to be valid.³² Put simply, the rule of recognition’s “existence is secured simply because of its acceptance and practice.”³³ Therefore, there are two minimum conditions for a legal system: First, the people obey primary rules, which have been deemed valid by the rule of recognition. Second, the people accept the rule of recognition.³⁴ In assessing whether the Agriculture Committee’s actions are law, Hart would suggest that the people following the rules show them to be valid.

To test this, let’s imagine that the village continues to grow and develop, and the villagers decide to elect a mayor. The Elders decide the

²⁹ *Id.* at 107. Hart discusses the validity of such bylaws when he explains the role of the “Oxfordshire County Council.” *Id.* at 106–07.

³⁰ *See id.* at 107.

³¹ HART, *supra* note 9, at 101.

³² *See* Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 *FORDHAM L. REV.* 1171, 1171 (2006) (stating that “[t]o use the rule is to conform one’s own conduct to the relevant pattern, and to accept the rule is to adopt the attitude that the pattern is a required standard both for oneself and for everyone else in the group”).

³³ Shapiro, *supra* note 24, at 5 (elaborating that the “rule of recognition validates, but is not itself validated”).

³⁴ HART, *supra* note 9, at 116–17; *see also* Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 *WM. & MARY L. REV.* 1115, 1128 (2012) (describing the rule of recognition as “an ultimate criterion of legal validity *that is accepted as such by contemporary officials within the system*; other laws are valid by derivation from the rule of recognition” (emphasis added)).

mayor should oversee the Agriculture Committee, as well as other newly created committees, such as the Butcher Committee, Baker Committee, and Candlestick-Maker Committee. The mayor soon begins issuing orders about how the committees will execute the statutes. The committees and officials comply with these orders and even begin circulating internal letters detailing how to implement the policies. Last, imagine that a group of curmudgeons, who are sticklers for formalism in government, take to the town square to speak against the validity of the mayor's actions. They even challenge the validity of the committees' authority to generate their own primary rules.

This is America in 2022. As seen from the village, the rule of recognition exists to resolve uncertainty and is central to any legal system.³⁵ But given the myriad "laws" emanating from the modern Executive Branch, we now have pressing questions of uncertainty that need to be resolved for the rule of recognition to function properly in the United States. Moving away from our hypothetical village and examining how the rule of recognition functions in the present-day United States, the next Part surveys potential sources of "law" in the Executive Branch and uncovers various examples of uncertainty. This yields insights into both the current state of our Executive Branch and Hart's theory of the rule of recognition.

II. THE U.S. RULE OF RECOGNITION APPLIED TO THE EXECUTIVE BRANCH

This Part argues that we do not have a settled rule of recognition for many Executive Branch actions. America's legal system is complex, to say the least.³⁶ Many actions deriving from Article II of the Constitution—including actions taken by the President, executive officers, and administrative agencies—do not fit neatly into any rule of recognition. For example, Congress has not declared war for decades. Yet the Pentagon and even Congress have accepted that we are engaged in a "war on terror" that has been ongoing since 2001.³⁷ Further complicating the rule of recognition is the fact that "law" in the U.S. legal system cannot be defined solely by

³⁵ See Shapiro, *supra* note 24, at 8 ("[O]ne role that the rule of recognition plays in all legal systems [is] the resolution of normative uncertainty. According to Hart, the rule of recognition resolves doubts and disagreements within a group about which primary rules to follow. It does this by picking out properties of primary rules the possession of which mark them as binding.").

³⁶ See Greenawalt, *supra* note 11, at 622 (explaining that analyzing the U.S. rule of recognition "certainly dispels any illusion that the rule of recognition for the United States can be reduced to any simple statement, such as 'The federal Constitution is our rule of recognition'").

³⁷ See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2070 (2005).

reference to the Constitution.³⁸ Consistent with Hart's theory, limiting the U.S. rule of recognition to the Constitution precludes the rule from being shown through observing official behavior.³⁹ The following Section explores actions taken by the President and administrative agencies, attempting to make sense of their validity as law. These phenomena highlight uncertainties about what constitutes law in our modern system of government.

A. *The President*

In the U.S. legal system, the executive wields a vast toolkit of presidential prerogatives, such as signing statements, executive orders, vetoes, pardons, wartime orders, Office of Legal Counsel memoranda, administrative agency advisory documents, and "Dear Colleague" letters. Some of these actions trace their roots to enumerated constitutional provisions. For example, vetoes, pardons, and the Commander-in-Chief power are all explicitly permitted by the Constitution's text,⁴⁰ so the rule of recognition is easily applied to these acts. Though the use of these powers has sometimes been controversial, they rarely produce the uncertainty that can result from executive actions not explicitly authorized by the Constitution. On the other hand, many executive actions fall outside the President's enumerated powers. While each claims a tenuous connection to authority deriving from the Constitution or a statute, this Note contends that our rule of recognition does not know what to make of them.

1. *Executive Orders*

Let's start with one of the most widely used executive actions: presidential orders. The written instruments at a President's disposal include

³⁸ Professor Matthew Adler has asked whether the rule of recognition in the United States is the Constitution. He states that the "text of the 1787 Constitution (including the amending clause), and whatever is validated as law by that text (including both amendments to the original text and subordinate law, e.g., statutes enacted pursuant to Article I or judicial directives issued pursuant to Article III), is law." He notes that while such a "statement would need much refinement because it does not allow for nontextual sources of constitutional law, or address interpretive standards," it still "helps clarify what Hart meant by the rule of recognition, and what that might be in the U.S. context." Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 731 (2006). Likewise, Professor Alice Ristroph argues there is reason to be skeptical of a single rule of recognition given the frequent interpretative disputes over constitutional rules. Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENT. 431, 451 (2009).

³⁹ See Edlin, *supra* note 11, at 373–74 (reasoning that a legal system's rule of recognition "will often encompass the nation's constitution," but "it cannot be equated with the constitution"); Hubbard, *supra* note 12, at 113 (arguing that the United States' rule of recognition must be something broader than the Constitution because the Constitution must be supplemented by the vast array of "rules" that have gained validity not explicitly through the Constitution but because "they have been accepted by officials and, at a minimum, acquiesced to by citizens").

⁴⁰ U.S. CONST. art. I, § 7, cl. 2–3 (vetoes); *id.* art. II, § 2, cl. 1 (pardons and Commander-in-Chief power).

presidential memoranda, proclamations, homeland-security presidential directives, letters on tariffs and international trade, administrative orders, executive agreements with foreign nations, signing statements, and executive orders.⁴¹ At first blush, executive orders and proclamations seem more official than the others in that both must be published in Title 3 of the Code of Federal Regulations,⁴² but the other written instruments are followed even if not published. I will not focus on the differences between them, for the distinction is more in form than in substance,⁴³ and the courts treat all relatively the same.⁴⁴ Moreover, it is widely accepted that it makes no difference whether the President is acting under implied or express authority, for both will be given the same effect.⁴⁵

Every president throughout history has used executive orders in one form or another.⁴⁶ In recent times, such orders have grown more frequent. George Washington issued eight executive orders, which seems quaint compared to the presidents of the past half-century—Donald Trump: 220, Barack Obama: 276, George W. Bush: 291, Bill Clinton: 364, George H.W. Bush: 166, Ronald Reagan: 381, Jimmy Carter: 320.⁴⁷ Franklin Roosevelt holds the record at 3,721.⁴⁸ President Biden also set a record by signing

⁴¹ See VIVIAN S. CHU & TODD GARVEY, CONG. RSCH. SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 1 & n.2 (2014), <https://sgp.fas.org/crs/misc/RS20846.pdf> [<https://perma.cc/9EJ3-M4SM>]; John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 352–62 (2010).

⁴² 44 U.S.C. § 1505(a).

⁴³ CHU & GARVEY, *supra* note 41, at 2 (explaining that the “distinction between these instruments—executive orders, presidential memoranda, and proclamations—seems to be more a matter of form than of substance, given that all three may be employed to direct and govern the actions of government officials and agencies” (citing STAFF OF H. COMM. ON GOV’T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957)).

⁴⁴ *Id.* at 2 (“[I]f issued under a legitimate claim of authority and made public, a presidential directive could have the force and effect of law, ‘of which all courts are bound to take notice, and to which all courts are bound to give effect.’” (quoting *Armstrong v. United States*, 80 U.S. 154, 156 (1871))).

⁴⁵ See, e.g., Duncan, *supra* note 41, at 338 (“[E]xecutive orders issued based on implied authority have the same effect as those issued pursuant to express authority.”).

⁴⁶ See CHU & GARVEY, *supra* note 41, at 2 (“Despite the amorphous nature of the authority to issue executive orders, presidential memoranda, and proclamations, these instruments have been employed by every President since the inception of the Republic.”); see also Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1763–69 (2019) (detailing how “presidents have relied on executive orders and other written directives throughout our nation’s history”); Duncan, *supra* note 41, at 339–45 (showing how executive orders have been used since Washington’s presidency).

⁴⁷ *Executive Orders*, AM. PRESIDENCY PROJECT (June 16, 2022), <http://www.presidency.ucsb.edu/data/orders.php> [<https://perma.cc/F24Q-AYTR>]; *Executive Orders*, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders> [<https://perma.cc/2BBG-32BJ>].

⁴⁸ *Id.* For a discussion of Roosevelt’s use of executive orders, see generally Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 28–29 (2002).

twenty-eight executive orders in his first two weeks in office,⁴⁹ and he signed roughly fifty more in his first year in office.⁵⁰ So it is not that executive orders lack a strong basis in history; the uncertainty they create comes from whether they have a constitutional source.⁵¹

There exists no formal definition of executive orders, contributing to the uncertainty they create.⁵² Courts and scholars have identified three potential sources of authority for executive orders: the Constitution, statutory authorization, and the inherent powers of the President, with the last being the most controversial.⁵³ The Congressional Research Service explains that “the President’s ability to use executive orders as a means of implementing presidential power has been established as a matter of law and practice.”⁵⁴ But this is not the end of the story, for an executive order must derive authority from “power vested in the President by the U.S. Constitution or delegated to the President by Congress.”⁵⁵

Congressional acquiescence has also been proffered as a post hoc source of authority, and judicial deference has further legitimized the practice.⁵⁶ Only twice has the Supreme Court overturned an executive order: in *Youngstown Sheet & Tube Co. v. Sawyer*⁵⁷ and in *Chamber of Commerce v. Reich*.⁵⁸ Furthermore, the Supreme Court blessed executive orders in

⁴⁹ Tamara Keith, *With 28 Executive Orders Signed, President Biden Is Off to a Record Start*, NPR (Feb. 3, 2021, 5:00 AM), <https://www.npr.org/2021/02/03/963380189/with-28-executive-orders-signed-president-biden-is-off-to-a-record-start> [<https://perma.cc/3PPQ-BABM>].

⁵⁰ See *Executive Orders*, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders> [<https://perma.cc/3SCA-DM72>].

⁵¹ See CHU & GARVEY, *supra* note 41, i (“The U.S. Constitution does not define these presidential instruments and does not explicitly vest the President with the authority to issue them. Nonetheless, such orders are accepted as an inherent aspect of presidential power. Moreover, if they are based on appropriate authority, they have the force and effect of law.”).

⁵² See WILLIAM F. FUNK & RICHARD H. SEAMON, *ADMINISTRATIVE LAW* 65 (3d ed. 2009); Duncan, *supra* note 41, at 337 (“The troubling aspect of executive orders is that they bypass traditional administrative law processes, which otherwise would provide for openness, discussion, and judicial review. In fact, executive orders commonly bypass avenues of review.”).

⁵³ For a detailed consideration of these three sources, see Duncan, *supra* note 41, at 366–74. See also CHU & GARVEY, *supra* note 41, at 1–3.

⁵⁴ CHU & GARVEY, *supra* note 41, at 1.

⁵⁵ *Id.*

⁵⁶ Duncan, *supra* note 41, at 374–76.

⁵⁷ 343 U.S. 579, 583, 589 (1952) (striking down Executive Order 10,340, through which President Truman attempted to seize and operate the nation’s steel mills). For the text of the executive order, see Exec. Order No. 10,340, 17 Fed. Reg. 3,139 (Apr. 10, 1952).

⁵⁸ 74 F.3d 1322, 1324 (D.C. Cir. 1996) (striking down Executive Order 12,954, which authorized the Secretary of Labor to disqualify employers who hired permanent replacement workers during lawful strikes from certain federal contracts). For the text of the executive order, see Exec. Order. No. 12,954, 60 Fed. Reg. 13,023 (Mar. 10, 1995).

Jenkins v. Collard, when it held that a president’s proclamation “has the force of public law” and that courts must recognize it as such.⁵⁹

Executive orders have been described as “instant law” and “steeped in controversy.”⁶⁰ Consequently, there is uncertainty surrounding the legitimacy of executive orders that lack explicit statutory or constitutionally derived authorization. When this happens, executive orders arguably fall outside the realm of our rule of recognition and land in what Justice Jackson termed a “zone of twilight.”⁶¹ And controversy is particularly likely when the White House engages in legislative, rather than executive, activities.⁶² These blurred actions obscure the separation of powers prescribed in the structure of our Constitution. As noted above, the uncertainty surrounding executive orders could simply be inherent in the fact that the Constitution provides no express language governing their existence or scope.⁶³

This uncertainty is compounded by the dearth of legal doctrine clarifying the scope and effect of executive orders.⁶⁴ Furthermore, the Supreme Court has held that the word “agency” in the Administrative Procedure Act (APA) does not refer to the President, so the APA does not apply to executive orders.⁶⁵ Despite little doctrine to guide judges, litigation challenging executive orders has still reached the courts. In his first year in office, President Trump faced nearly a dozen court battles over his executive actions.⁶⁶ Currently, some speculate that the Supreme Court will wade into the debate over nationwide injunctions,⁶⁷ which are often used to halt

⁵⁹ 145 U.S. 546, 560–61 (1892) (citing *Jones v. United States*, 137 U.S. 202, 212, 215 (1890)).

⁶⁰ *What Is an Executive Order?*, AM. BAR ASS’N (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order- [https://perma.cc/8AY3-7C68].

⁶¹ See *Youngstown*, 343 U.S. at 637.

⁶² See *Duncan*, *supra* note 41, at 411.

⁶³ See Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 269–70 (2001); CHU & GARVEY, *supra* note 41, at 2.

⁶⁴ See *Manheim & Watts*, *supra* note 46, at 1747 (arguing that current judicial precedents do not “provide anything close to a well-developed or coherent legal framework for courts to follow when reviewing presidential orders”). The Ninth Circuit has stated, “In contrast to the many established principles for interpreting legislation, there appear to be few such principles to apply in interpreting executive orders.” *City and Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1238 (9th Cir. 2018).

⁶⁵ *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (reasoning that the actions of the President are not challengeable under the APA because the statute limits review to “final agency action” and the President is not an agency).

⁶⁶ See *Manheim & Watts*, *supra* note 46, at 1783, 1784 tbl.1.

⁶⁷ Frank J. Thompson, *Will the Supreme Court Weaken Lower-Court Checks on Biden’s Executive Power?*, BROOKINGS (Feb. 1, 2021), <https://www.brookings.edu/blog/fixgov/2021/02/01/will-the-supreme-court-weaken-lower-court-checks-on-bidens-executive-power/> [https://perma.cc/WZRS-GY9H].

executive actions. Despite a shortage of legal doctrine, litigation challenging executive action shows no signs of stopping.

The rule of recognition theory seems to require us to categorize executive orders as either “law” or “not law,” which is difficult. But there is an alternative view that reconciles executive orders with the theory: viewing orders as rules clarifying preexisting law for executive officers, rather than laws themselves. Under this view, when issuing an executive order, the President is not declaring a new law, but is merely specifying the enforcement or implementation of an existing one which has already been legitimized by the rule of recognition after going through bicameralism and presentment (if it is a statute from Congress) or notice and comment (if it is a rule from an administrative agency). One might be tricked into this view, thinking executive orders are only orders to the Executive Branch, as their name implies. But executive orders in fact can be binding orders on the American people.⁶⁸ For example, after FDR issued a proclamation in 1934 making it illegal for private actors to sell arms to Bolivia or Paraguay,⁶⁹ the government indicted a U.S. company for violating this proclamation.⁷⁰ Or consider how in 1971, President Nixon imposed a \$5,000 fine for noncompliance with a proclamation that froze prices and wages for private businesses.⁷¹ In Hart’s words, executive orders can be primary rules.

How might we resolve uncertainty about the validity of executive orders? In Hart’s theory, government officials’ compliance with potential sources of law legitimizes those sources under the rule of recognition. In effect, artificial certainty ossifies around these actions through the government and the people’s acquiescence. Legislative acquiescence is a post hoc justification for executive action,⁷² and it is further supported by Executive Branch acquiescence as more officials carry out executive actions. In effect, when the President promulgates a constitutionally or statutorily questionable executive order, but agency officials carry it out nonetheless, it has survived the scrutiny of Hart’s theory and been recognized as law.

Executive and legislative acquiescence might be partially explained through actions during crises. In our democratic government, Congress and the President are ultimately beholden to the people. Because the people are biased toward action, not deliberation, in turbulent times the Legislative and Executive Branches may skip procedure in favor of action.⁷³ As Professor

⁶⁸ See Manheim & Watts, *supra* note 46, at 1764–65.

⁶⁹ Proclamation No. 2,087, 48 Stat. 1744 (1934).

⁷⁰ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 311 (1936).

⁷¹ See Executive Order No. 11,615, 36 Fed. Reg. 15,729 (Aug. 15, 1971).

⁷² Duncan, *supra* note 41, at 374.

⁷³ See *id.* at 411.

John Duncan Jr. explains, in times of peace and economic security the people believe decisive action is unnecessary, for there are no exigencies to justify it.⁷⁴ But if the people perceive immediate threats, they will demand speedy, decisive responses. In these circumstances, the President “may have more than the force of law behind him. He may very well have the force of the nation (the people) behind him as well.”⁷⁵ The people’s desire for swift action in crisis may drive legislators to acquiesce to expansive executive orders, legitimizing such actions as law.

2. *Signing Statements*

Presidential signing statements⁷⁶ also produce uncertainty, evoking scrutiny from scholars.⁷⁷ Scrutiny intensified with President George W. Bush’s frequent use of signing statements to signal constitutional concerns with legislation.⁷⁸ Although signing statements likely do not create as much uncertainty as executive orders—because unlike with executive orders, the President does not presume to create primary rules in a signing

⁷⁴ *Id.* at 407–08.

⁷⁵ *Id.*

⁷⁶ For an overview of signing statements, see TODD GARVEY, CONG. RSCH. SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 1–16 (2012). For a history of signing statements, see Faith Joseph Jackson, *The Constitutionality of Presidential Signing Statements: A Note on H.R. 5993 – The Presidential Signing Statements Act of 2008*, 35 J. LEGIS. 1, 3–5 (2009), and Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801, 1805–08 (2016).

⁷⁷ See, e.g., Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 518 (2005) (noting that signing statements are “not specifically constrained by any law or policy” and thus are “an excellent device to get around the Congress”); PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 132–42 (2009) (describing signing statements as “faux law”); Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 191–92 (2007) (discussing multiple scholars’ constitutional critiques of signing statements).

⁷⁸ See Charlie Savage, *Bush Challenges Hundreds of Laws*, BOS. GLOBE (Apr. 30, 2006), http://archive.boston.com/news/nation/washington/articles/2006/04/30/bush_challenges_hundreds_of_laws/ [<https://perma.cc/D3L5-CDH2>] (noting legal scholars’ concerns that Bush’s signing statements signaled a “concerted effort to expand his power at the expense of Congress”); see also CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 229–30 (2007) (noting the “outcry” from Congress over Bush’s use of signing statements).

statement—debate continues.⁷⁹ And this debate has gone beyond heady scholastic disputes.⁸⁰

A recent example of uncertainty is President Trump’s signing statement regarding the 2019 National Defense Authorization Act (NDAA),⁸¹ which is the most important piece of legislation dealing with national security authorized each year by Congress. The White House expressed constitutional concerns with over fifty sections of the NDAA, explaining their conflict with the President’s understanding of his constitutional role and implying that the White House need not obey them.⁸²

Similarly, President Biden’s signing statement regarding the 2022 NDAA sparked another controversy.⁸³ Forty-two organizations wrote a letter to the White House challenging the President’s use of the signing statement to assert his alleged authority to withhold national security information from Congress.⁸⁴ Several provisions of the Act mandate the Executive Branch to report such information.⁸⁵ Signing statements are an example of Congress

⁷⁹ Compare Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT 307, 310–12 (2006), and Yoo, *supra* note 76, at 1834, and Keith E. Whittington, *Much Ado About Nothing: Signing Statements, Vetoes, and Presidential Constitutional Interpretation*, 58 WM. & MARY L. REV. 1751, 1771, 1790–91 (2017) (all arguing that signing statements are legal and useful for the President to express views about the constitutionality of various bills), with Jackson, *supra* note 76, at 16 (arguing that the abusive use of signing statements is constitutionally questionable).

⁸⁰ The American Bar Association created a Task Force on Presidential Signing Statements and Separation of Powers Doctrine in 2006, which unanimously concluded that the President should stop using signing statements to express that he will not enforce a law. AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE: RECOMMENDATION 1 (2006), <https://balkin.blogspot.com/aba.signing.statments.report.pdf> [<https://perma.cc/M8C5-VCGL>]; see also Jackson, *supra* note 76, at 12.

⁸¹ Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019, 2018 DAILY COMP. PRES. DOC. 1 (Aug. 13, 2018), <https://www.govinfo.gov/content/pkg/DCPD-201800533/pdf/DCPD-201800533.pdf> [<https://perma.cc/S5TY-K7E8>].

⁸² See Charlie Savage, *Trump Claims Power to Bypass Limits Set by Congress in Defense Bill*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/politics/trump-signing-statements.html> [<https://perma.cc/Q2SF-6ZJQ>]; see also Charles Tiefer, *Trump Power Grab in Defense Bill Signing Statement on Russia and Other Subjects*, FORBES (Aug. 19, 2018, 11:24 AM), <https://www.forbes.com/sites/charlestiefer/2018/08/19/trump-power-grab-in-defense-bill-signing-statement-on-russia-and-other-subjects/?sh=1406417a5059> [<https://perma.cc/EYS9-YSMZ>].

⁸³ Statement by the President on S. 1605, the National Defense Authorization Act for Fiscal Year 2022, 2021 DAILY COMP. PRES. DOC. 1 (Dec. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/27/statement-by-the-president-on-s-1605-the-national-defense-authorization-act-for-fiscal-year-2022/> [<https://perma.cc/2M7C-FXLH>].

⁸⁴ Letter from Undersigned Organizations to Joseph Biden Jr., President of the United States (Feb. 10, 2022), https://demandprogress.org/wp-content/uploads/2022/02/Org-Letter-on-NDAA-Signing-Statement-Letter-2_10_22.pdf [<https://perma.cc/5FMC-NWQ9>].

⁸⁵ See Cavan Kharrazian, *42 Orgs Challenge Biden’s NDAA Signing Statement*, DEMAND PROGRESS (Feb. 11, 2022), <https://demandprogress.org/42-orgs-challenge-bidens-ndaa-signing->

directing the President through legislation, but then the Executive insisting that he does not need to listen to them. The rule of recognition cannot account for two equally legitimate parts of the government asserting conflicting obligations over each other.

3. *Office of Legal Counsel*

Another source of uncertainty is Department of Justice memoranda, particularly from the Office of Legal Counsel (OLC). The Office of Legal Counsel advises the President and other executive agencies on legal matters.⁸⁶ Although this advisory authority is technically delegated to the Attorney General,⁸⁷ the Attorney General in turn delegates it to the Assistant Attorney General, who heads OLC.⁸⁸ As discussed above, presidential directives can take a variety of forms and accomplish a wide range of policies. The Obama Administration unilaterally suspended the deportation of undocumented immigrants who arrived in the United States as children,⁸⁹ and authorized a drone strike on U.S. citizen Anwar al-Awlaki.⁹⁰ President Trump unilaterally restricted travel and immigration from certain countries⁹¹ and directed the Treasury Department not to punitively tax religious organizations that speak on political issues.⁹² OLC analyzed all of these actions and blessed them as legitimate.⁹³

Despite its explicitly advisory role, OLC legal guidance is treated like binding authority. For example, consider the influence that a DOJ memorandum concluding that a sitting president could not be indicted exerted on the Mueller Report. Since OLC released this memorandum in

statement/ [https://perma.cc/NM3W-4JFG]. This example hints at the transparency problems that can persist when uncertainty exists around reporting requirement laws.

⁸⁶ *Office of Legal Counsel*, U.S. DEP'T OF JUST., https://www.justice.gov/olc [https://perma.cc/ZS95-P4JD].

⁸⁷ 28 U.S.C. §§ 511–513.

⁸⁸ 28 C.F.R. § 0.25(a).

⁸⁹ Press Release, Off. of the Press Sec'y, White House, Remarks by the President on Immigration (June 15, 2012, 2:09 PM), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/2PYA-6NRU].

⁹⁰ Conor Friedersdorf, *How Team Obama Justifies the Killing of a 16-Year-Old American*, ATLANTIC (Oct. 24, 2012), https://www.theatlantic.com/politics/archive/2012/10/how-team-obama-justifies-the-killing-of-a-16-year-old-american/264028 [https://perma.cc/HL3E-GDD4].

⁹¹ See Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

⁹² See Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

⁹³ See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html [https://perma.cc/8S2X-V5DV] (discussing OLC's memorandum justifying the al-Awlaki strike); see also Adoree Kim, *The Partiality Norm: Systematic Deference in the Office of Legal Counsel*, 103 CORNELL L. REV. 757, 758 (2018) (compiling these examples and relating them to OLC).

1973 and updated it in 2000,⁹⁴ whether a president can be indicted has been extensively debated.⁹⁵ Many believe Robert Mueller stopped short of saying President Trump committed the crime of obstruction of justice because this OLC guidance was treated as authoritative.⁹⁶

If, according to Hart's theory, what constitutes law can be discerned both by reference to secondary rules and by observing the behavior of officials within the legal system, Mueller's apparent decision to follow this OLC guidance implicitly treats the memorandum as law. One scholar admits that the "bindingness of the Attorney General's (or, in the modern era, OLC's) legal advice has long been uncertain," but this is not a problem "because by longstanding tradition the advice is *treated* as binding."⁹⁷ Professor Morrison describes this practice of treating OLC opinions as binding as something OLC is eager to create for itself: "OLC protects that tradition today by generally refusing to provide advice if there is any doubt about whether the requesting entity will follow it. This guards against 'advice-shopping by entities willing to abide only by advice they like.'"⁹⁸ OLC fosters acceptance of its opinions so that it is not ignored,⁹⁹ and directly plays into Hart's definition of the rule of recognition as accepting as law that which is accepted by government officials.

⁹⁴ A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 222 (2000).

⁹⁵ See, e.g., W. Burlette Carter, *Can a Sitting President Be Federally Prosecuted? The Founders' Answer*, 62 HOW. L.J. 331, 337–39 (2019) (discussing differing legal arguments for whether a sitting President may or may not be constitutionally prosecuted); Keith King, *Indicting the President: Can a Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417, 417 (2001) (noting that "the issue of whether the President may be indicted while in office remains unclear").

⁹⁶ Fred Barbash, *Justice Department Opinions Take On the Force of Law — But Are Not, in Fact, the Law*, WASH. POST (May 31, 2019), https://www.washingtonpost.com/world/national-security/justice-department-opinions-take-on-the-force-of-law--but-are-not-in-fact-the-law/2019/05/30/f4efe222-8280-11e9-933d-7501070ee669_story.html [https://perma.cc/FC3Z-MYM4] (explaining that Robert Mueller asserted that the prohibition on indicting presidents for federal crimes is a "long-standing department policy"); see also Ranae Reints, *Why Couldn't Mueller Indict Trump? This DOJ Policy Prevented Him*, FORTUNE (May 30, 2019, 5:37 AM), <https://fortune.com/2019/05/30/indict-a-sitting-president-doj-policy/> [https://perma.cc/TS4Q-U3J4] (reporting that Mueller said indicting President Trump was "not an option we could consider").

⁹⁷ Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1464 (2010).

⁹⁸ *Id.* (quoting Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 711 (2005)).

⁹⁹ *Id.* at 1464–65 (explaining that creating an atmosphere of acceptance around OLC opinions "helps ensure that OLC's answers matter. An agency displeased with OLC's advice cannot simply ignore the advice. The agency might construe any ambiguity in OLC's advice to its liking, and in some cases might even ask OLC to reconsider its advice. But the settled practice of treating OLC's advice as binding ensures it is not simply ignored.").

There is also uncertainty regarding the President's flexibility to accept or ignore OLC advice, including whether the President could disregard an OLC opinion purely on policy grounds or if they would have to justify the rejection by stating that OLC erred in its legal analysis.¹⁰⁰ Either way, if the President disagreed with OLC's legal guidance for policy reasons, they could pretextually disagree on legal grounds to pursue their policy goals. On top of all this, OLC legal opinions are not always public, rendering the process opaque and allowing presidents to hide behind an excuse without the broader legal community analyzing the opinion's legal reasoning.¹⁰¹

Overall, many presidential actions have the force of law despite fitting uneasily within our constitutional system. The rule of recognition is meant to provide clarity. Yet these examples illustrate the difficulties of reconciling many of these actions with a coherent conception of the U.S. rule of recognition.

B. *Administrative Agencies*

Administrative agencies, which have come to exercise increasing amounts of executive power since the New Deal,¹⁰² create further legal uncertainty. The advent of muscular administrative agencies has caused legal scholars and courts to grapple with the constitutional implications of agency authority,¹⁰³ but no scholars have sought to make sense of agency actions

¹⁰⁰ See *id.* at 1466 (“Although his oath of office obliges him to uphold the Constitution, it is not obvious he would violate that oath by pursuing policies that he thinks are plausibly constitutional even if he has not concluded they fit his best view of the law. It is not clear, in other words, that the President’s oath commits him to seeking and adhering to a single best view of the law, as opposed to any reasonable or plausible view held in good faith.”).

¹⁰¹ Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 515, 517 (1993). See *id.* at 517–20 for an example of confidential OLC opinions having a real effect on Haitian refugee policy.

¹⁰² Maimon Schwarzschild, *Points of Crisis or, Is It All Over?*, 56 SAN DIEGO L. REV. 1069, 1079 (2019) (“The growing power of administrative agencies in the United States is fairly well known. Federal administrative agencies began on a modest scale in the late nineteenth century, grew somewhat during the Progressive Era in the early twentieth century, and expanded dramatically in the 1930s under the New Deal; their powers have expanded further since the 1960s.”); see also Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 124–27 (2016).

¹⁰³ Compare *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (defending the modern administrative state against charges of unconstitutional delegations of power), and Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1700 (2019) (asserting that agencies have played an important role in our constitutional order since the founding), with *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (questioning whether the modern nondelegation doctrine prevents all unconstitutional delegations of legislative power), and Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (arguing that the post-New Deal administrative state is unconstitutional).

through Hart's rule of recognition. The following is an attempt to do just that.

1. The Administrative Procedure Act and Other Agency Regulations

Any discussion of administrative agency action must begin with what some call the constitution of administrative law:¹⁰⁴ the Administrative Procedure Act.¹⁰⁵ The U.S. rule of recognition, whether it be the Constitution or otherwise, can likely account for a large portion of agency action through the APA, which provides a statutory basis for agency rules and decisions.¹⁰⁶ But even the Supreme Court has struggled to make sense of agency actions that fall outside the typical APA process. For example, the Court has declined to give *Chevron* deference to agency interpretations where there is “no indication that Congress intended such a ruling to carry the force of law.”¹⁰⁷ This inquiry invokes Hart's theory because whether an action carries the force of law is the exact question the rule of recognition is intended to answer. The Court initially extended deference to agency actions that went through APA notice-and-comment rulemaking or formal adjudication.¹⁰⁸ But even when the agency circumvents APA-prescribed processes, the Court sometimes still defers to the agency, further complicating the picture of which agency actions carry the force of law.¹⁰⁹

Through the APA and organic statutes, agencies exercise legislatively delegated power. In this regard, the APA makes agencies analogous to Hart's Oxfordshire Country Council,¹¹⁰ which has valid primary rulemaking authority granted by Parliament. But there are still many agency actions not contemplated by the APA that seemingly wield the same authority. As then-Professor Elena Kagan remarked after her tenure in the Clinton Administration, the President's aggressive control of agencies “makes

¹⁰⁴ See, e.g., Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 931–33 (2016).

¹⁰⁵ 5 U.S.C. §§ 551–559 (1968).

¹⁰⁶ For a contrary argument, Professor Michael Ray Harris uses the example of the modern administrative state to demonstrate that the rule of recognition in the United States is not simply the Constitution. Though it has strong derivative support from the Constitution, the administrative state lacks the express constitutional legitimacy of Article I's ability to make law. Michael Ray Harris, *Environmental Deliberative Democracy and the Search for Administrative Legitimacy: A Legal Positivism Approach*, 44 U. MICH. J.L. REFORM 343, 367–70 (2011).

¹⁰⁷ *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

¹⁰⁸ *Id.* at 230 n.12 (listing the cases in which the Court gave notice-and-comment rulemaking and formal adjudications *Chevron* deference).

¹⁰⁹ See *Barnhart v. Walton*, 535 U.S. 212, 222, 225 (2002) (explaining that the “presence or absence of notice-and-comment rulemaking” is not “dispositive” and holding that an agency action still receives deference despite not going through notice-and-comment rulemaking based on a multifactor test showing that the interpretation had the force of law).

¹¹⁰ See *supra* note 29 and accompanying text.

presidential intervention in regulatory matters ever more routine and agency acceptance of this intervention ever more ready.”¹¹¹ These observations about the effects of active presidential control have turned out to be true.

Consider the fact that the DACA¹¹² controversy was initiated by an executive memorandum from the Department of Homeland Security (DHS).¹¹³ President Obama publicly announced the new program and certainly supported it, but he never signed an executive order to set this in motion; it all came from DHS.¹¹⁴ DAPA¹¹⁵ came about the same way—DHS issued a new memorandum implementing DAPA the same day Barack Obama announced his plan for immigration on television.¹¹⁶ The Founders likely did not envision such swift, unilateral policymaking by executive agencies. As Professors Lisa Manheim and Kathryn A. Watts explain, the uncertainty surrounding DACA and DAPA’s legitimacy even extended to coverage of the announcement, as news outlets mistakenly thought President

¹¹¹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2299 (2001).

¹¹² Deferred Action for Childhood Arrivals. For a thorough explanation of DACA, see Naomi Cobb, *Deferred Action for Childhood Arrivals (DACA): A Non-Legislative Means to an End That Misses the Bull’s-Eye*, 15 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 651, 652 (2013) (explaining that “DACA is a non-legislative policy directive by the Department of Homeland Security (DHS) guiding its departments” to defer action “against certain young people,” which “essentially means that the government will defer commencing removal proceedings and will temporarily terminate removal proceedings that have already begun for those individuals, which meet the criteria established in the memorandum.”). See also *Deferred Action for Childhood Arrivals: A Q&A Guide*, AM. IMMIGR. COUNCIL (Aug. 17, 2012), <https://www.americanimmigrationcouncil.org/research/deferred-action-childhood-arrivals-qa-guide> [<https://perma.cc/449J-KPBW>]. See generally Alicia Triche, *Who Is a Dreamer? The Criteria, History, and Legal Authority of “Deferred Action for Childhood Arrivals,”* FED. LAW., June 2013, at 20.

¹¹³ Memorandum from Janet Napolitano, Sec’y of Homeland Sec., U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/8U86-X7EF>]; see Manheim & Watts, *supra* note 46, at 1753–54.

¹¹⁴ Manheim & Watts, *supra* note 46, at 1753–54.

¹¹⁵ Deferred Action for Parents of Americans and Lawful Permanent Residents. DAPA would have expanded DACA’s eligibility standards to parents and adults, whereas before it only covered children. But a nationwide injunction stopped DAPA from ever going into effect. See Olga Y. Kuchins, *Out of the Shadows: Deferred Action for Childhood Arrivals, Deferred Action to Parents of Americans and Lawful Permanent Residents, and Executive Prosecutorial Discretion in Immigration Law*, 43 HASTINGS CONST. L.Q. 705, 712–13 (2016); see also *2014 Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 15, 2015), <http://www.uscis.gov/immigrationaction> [<https://perma.cc/92T4-NZF4>] (explaining that President Obama announced DAPA after immigration advocates pushed for further change and expansion of DACA); *Immigration Action*, U.S. DEP’T OF HOMELAND SEC. (Nov. 10, 2021), <http://www.dhs.gov/immigration-action> [<https://perma.cc/4AQA-HRKT>] (describing planned eligibility expansion for DACA and DAPA).

¹¹⁶ See Press Release, Off. of the Press Sec’y, White House, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<http://perma.cc/S6XA-AU3C>]; Manheim & Watts, *supra* note 46, at 1758.

Obama had issued DAPA as an executive order.¹¹⁷ Then the Trump Administration attempted to rescind DACA through two additional DHS memoranda, the first one by Elaine Duke¹¹⁸ and the second by Kirstjen M. Nielsen.¹¹⁹ Did this require any action from Congress or even the President to establish or overturn a sweeping federal program? The answer: no. In rescinding DACA, the only action from President Trump was a tweet.¹²⁰

Two recent—and controversial—examples regarding the uncertain power of administrative agencies dealt with two COVID-19-related regulations, one issued by the Centers for Disease Control and Prevention (CDC)¹²¹ and the other promulgated by the Department of Labor’s Occupational Safety and Health Administration (OSHA).¹²² In both cases, the Supreme Court’s per curiam opinions expressed noticeable skepticism about the agencies’ claimed scope of authority. In the CDC case, when the congressionally enacted nationwide moratorium on evictions expired without renewal, the CDC promulgated a new one sua sponte.¹²³ The Court struck down this regulation, reasoning that “it is a stretch to maintain that [the statute] gives the CDC the authority to impose this eviction moratorium,” and “[e]ven if the text were ambiguous, the sheer scope of the

¹¹⁷ Manheim & Watts, *supra* note 46, at 1758 (citing *How Will Obama’s Executive Order Affect Cache Valley’s Immigrant Families, Students?*, HERALD JOURNAL (Nov. 29, 2014), https://www.hjnews.com/allaccess/how-will-obamas-executive-order-affect-cache-valley-s-immigrant-families-students/article_5955d14e-7832-11e4-812a-4f26993a2ab7.html [<https://perma.cc/A4KP-9AJD>]); *President Takes Executive Action on Immigration; Implores Congress to Pass Bill*, LAW FIRM NEWSWIRE (Dec. 30, 2014), <https://www.lawfirmnewswire.com/2014/12/president-takes-executive-action-on-immigration-implores-congress-to-pass-bill/> [<https://perma.cc/2EQE-Q7RR>]; *see also* Jennifer Rubin, *The GOP Should Look to the Heartland*, WASH. POST (Nov. 24, 2014, 12:15 PM), [<http://perma.cc/MX4T-VGUA>]; H. Roy Kaplan, *Sorting Fears from Facts About Hispanic Migrants*, TAMPA BAY TIMES (Dec. 27, 2014), <https://www.tampabay.com/opinion/columns/column-sorting-fears-from-facts-about-hispanic-migrants/2211579> [<http://perma.cc/J8XL-4E6N>] (“President Barack Obama’s executive order on immigration was greeted with mixed reactions.”).

¹¹⁸ Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs. et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<http://perma.cc/GVQ5-BAEC>].

¹¹⁹ Memorandum from Kirstjen M. Nielsen, Sec’y, U.S. Dep’t of Homeland Sec. (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [<https://perma.cc/K2T8-7SAU>].

¹²⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 5:38 PM), <https://twitter.com/realDonaldTrump/status/905228667336499200> [<http://perma.cc/KNJ2-5SPY>] (“Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can’t, I will revisit this issue!”).

¹²¹ Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

¹²² COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

¹²³ *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021).

CDC’s claimed authority . . . counsel[s] against the Government’s interpretation.”¹²⁴

The Court responded similarly to the OSHA emergency rule, which would have required “all employers with at least 100 employees ‘to ensure their workforces [were] fully vaccinated or show a negative test at least once a week’” and would have applied to roughly 84 million employees.¹²⁵ The debate between the majority and the dissent essentially turned on Hart’s question about the Oxfordshire Country Council¹²⁶: Had Congress delegated this power to the agency? Concluding that a vaccine mandate fell outside the scope of addressing occupational safety and hazards, the Court struck down the regulation.¹²⁷

These two examples showcase a three-step dance between the three branches of government as they struggle to determine the appropriate reach and authority of administrative agencies. First Congress acts or does not act, then the Executive Branch responds accordingly through agency action, and finally the Supreme Court determines whether that action is valid. Regardless of one’s views on the merits of these decisions, it is far from incontrovertible to say that uncertainty does not exist in each of these three steps.¹²⁸

¹²⁴ *Id.* at 2488–89.

¹²⁵ *NFIB v. OSHA*, 142 S. Ct. 661, 663 (2022) (per curiam) (quoting Remarks on the COVID-19 Response and National Vaccination Efforts, 2021 DAILY COMP. PRES. DOC. 775 (Sept. 9, 2021), <https://www.govinfo.gov/content/pkg/DCPD-202100725/pdf/DCPD-202100725.pdf> [<https://perma.cc/DVM9-3PDW>]).

¹²⁶ See *supra* note 29 and accompanying text.

¹²⁷ *NFIB*, 142 S. Ct. at 665 (“The question, then, is whether the Act plainly authorizes the Secretary’s mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.”).

¹²⁸ See, e.g., Scott Bomboy, *Current Constitutional Issues Related to Vaccine Mandates*, NAT’L CONST. CTR.: CONST. DAILY (Aug. 6, 2021), <https://constitutioncenter.org/blog/current-constitutional-issues-related-to-vaccine-mandates> [<https://perma.cc/73U5-Q5GC>] (detailing the controversy around a federal vaccine-mandate policy); Christina Pazzanese, *How Far Can Biden Go?*, HARV. GAZETTE (July 30, 2021), <https://news.harvard.edu/gazette/story/2021/07/what-can-a-president-mandate-during-a-crisis/> [<https://perma.cc/UD54-2ZER>] (examining the limits of presidential power in a crisis). Compare David B. Rivkin Jr. & Andrew M. Grossman, *The Vaccine Mandate Case May Mark the End of the ‘Work-Around’ Era*, WALL ST. J. (Jan. 6, 2022, 6:52 PM), <https://www.wsj.com/articles/end-of-work-arounds-biden-executive-order-vaccine-mandate-covid-omicron-supreme-court-11641505106> [<https://perma.cc/HDT6-7V96>] (arguing that the Executive Branch violates separation of powers by imposing a vaccine mandate), with Kimberly Wehle, *The Vaccine-Mandate Case Is About So Much More than Vaccine Mandates*, ATLANTIC (Jan. 7, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/scotus-vaccine-mandate-case-executive-branch-power/621156/> [<https://perma.cc/3M2L-PWQH>] (asserting that the Executive Branch does have the authority to impose a vaccine mandate).

2. “Dear Colleague” Letters

Agencies continue to set policy well outside the walls of Congress in the form of “Dear Colleague” letters. The Obama Administration’s 2011 letter from the Department of Education (DOE) establishing new standards and procedures for universities to follow when handling sexual assault allegations is one of the most notable epistolary policymaking examples.¹²⁹ After it was issued, uncertainty arose in the legal system over whether the letter could legitimately promulgate new policy, and members of Congress criticized the administration’s response as unconvincing.¹³⁰ Despite having five years to come up with a reason, DOE justified the policy in a single paragraph from the head of DOE’s Office for Civil Rights (OCR), stating that the “2011 letter merely ‘reminded’ colleges and universities of a requirement to use the preponderance of evidence standard” in sexual assault cases brought before the universities.¹³¹ The government official asserted that this was just a reminder because the preponderance standard had already been established in “two unpublished letters [to] individual universities.”¹³² Adding to the uncertainty, OCR did not follow up with more detailed guidance until 2014.¹³³

No section of Hart’s work addressed what his theory would make of a letter from an administrative agency promulgating a new policy with authority based on two previous letters sent to private actors that were not available to the public. So the question remains: is this law? Despite widespread criticism of OCR’s letter,¹³⁴ officials and universities began

¹²⁹ Letter from Russlynn Ali, Assistant Sec’y, Off. for Civ. Rts., U.S. Dep’t of Educ., to Colleagues (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/C9P7-KJFT>].

¹³⁰ See Letter from Senator James Lankford to John B. King Jr., Acting Sec’y, U.S. Dep’t of Educ. (Jan. 7, 2016), <https://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf> [<https://perma.cc/N4JC-G3M9>].

¹³¹ K.C. Johnson & Stuart Taylor, *The Path to Obama’s “Dear Colleague” Letter*, WASH. POST (Jan. 31, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/> [<https://perma.cc/47UG-WYSF>].

¹³² *Id.* Not to mention that these unpublished letters raise the same issue: How can we tell whether they can legitimately promulgate new policy? See also Peter Schmidt, *Education Dept. Defends Its Approach to Title IX in Face of Senate Pressure*, CHRON. HIGHER EDUC. (Feb. 19, 2016), <https://www.chronicle.com/article/education-dept-defends-its-approach-to-title-ix-in-face-of-senate-pressure/> [<https://perma.cc/GT8P-2J3P>].

¹³³ OFF. FOR CIV. RTS., U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/GJ48-YMP4>].

¹³⁴ See e.g., Walter Olson, *Reining In Government by Dear Colleague Letter: An Update*, CATO INST.: CATO AT LIBERTY (July 16, 2019, 3:38 PM), <https://www.cato.org/blog/restraining-government-dear-colleague-letter-update> [<https://perma.cc/TJH8-9HJ>] (criticizing how these letters “grab new powers

complying. OCR was conducting “hundreds of investigations of prominent colleges, and [issuing] scores of legally binding resolution agreements.”¹³⁵ Once compliance with the letter became widespread, Hart’s theory accepted this DOE Dear Colleague letter as law.¹³⁶ Yet this result seems intuitively unsatisfactory.¹³⁷

* * *

I offer these admittedly inexhaustive examples to highlight the vast array of “law” emanating from the Executive Branch. If the rule of recognition holds weight in reality, then it must be able to make sense of these various sources of primary rules. It seems dissatisfying to say that we must accept all of these executive actions as law so long as the officials we observe acquiesce to them. Perhaps Hart would simply answer, “yes, that is what we must do.” But that seems incomplete. Instead, we should dig deeper into what the realities of our modern legal world mean for our government and the rule of recognition. At the very least, four questions should be raised. First, do these observations reveal something wrong with the operations of our Executive Branch? There is a strong argument that they do. Second, do these observations reveal a flaw in Hart’s theory? If not a flaw, they show that the theory needs to be reformed in some ways. Third, do these

and ban new things in the guise of interpreting existing law”); Stuart Taylor Jr. & K.C. Johnson, *The New Standard for Campus Sexual Assault: Guilty Until Proven Innocent*, NAT’L REV. (Dec. 30, 2015), <https://www.nationalreview.com/2015/12/campus-rape-courts-republicans-resisting/> [<https://perma.cc/BWQ3-48SV>] (critiquing the OCR’s letter as containing “attacks on due process” and as a form of “bureaucratic tyranny”).

¹³⁵ R. Shep Melnick, *Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/> [<https://perma.cc/2PAR-7WAG>]; see also Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR (Nov. 25, 2016), <https://www.wbur.org/edify/2016/11/25/title-ix-obama-trump> [<https://perma.cc/R9DP-VQ72>] (“American higher education has gotten the message that the White House and the Department of Education were sending — and a lot has changed.”).

¹³⁶ It should be noted that the Trump administration moved away from this policy, but then the Biden administration restored it through yet another Dear Colleague letter. See Seth B. Orkand & Kathleen E. Dion, *President Directs Department of Education to Begin Dismantling Trump-Era Title IX Sexual Misconduct Regulations*, NAT’L L. REV. (Mar. 9, 2021), <https://www.natlawreview.com/article/president-directs-department-education-to-begin-dismantling-trump-era-title-ix> [<https://perma.cc/MS8R-E7CD>].

¹³⁷ A full exploration is beyond the scope of this Note, but if Dear Colleague letters are an obscure and questionable source of law, then SEC “no-action” letters may be as well. These are letters from SEC staff offering guidance on how securities law would apply in specific cases. See *No Action Letters*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/fast-answers/answersnoactionhtm.html> [<https://perma.cc/GYD7-EXN9>]. No-action letters often have the effect of law, as “regulated entities tend to treat them as blanket permission for the industry to take the action described in the letter.” Paul S. Atkins, *Speech by SEC Commissioner: Charles Hamilton Houston Lecture*, U.S. SEC. & EXCH. COMM’N (Apr. 4, 2005), <https://www.sec.gov/news/speech/spch040405psa.htm> [<https://perma.cc/KYS8-SXLN>].

observations reveal that the rule of recognition is failing to resolve uncertainty? At a minimum, it is not providing as clear a picture of what the law is as Hart may claim. And fourth, do these observations give us reason to question the separation thesis of legal positivism? There is robust reasoning that might give legal positivists pause on this question.

III. DANGEROUS UNCERTAINTY IN THE EXECUTIVE BRANCH

Perhaps these observations about the Executive Branch reveal no flaws in Hart's theory. Perhaps they simply expose problems with the operation and actions of our Executive Branch. Hart may argue that the rule of recognition is working—we observe official behavior to identify primary rules when they arise out of statutory or constitutionally uncertain origins. According to Hart, the disputes that exist over many executive actions are academic or normative discussions that do not bear upon the validity of the law because these executive actions are legitimized when the public and government officials accept them.¹³⁸ In reality, there is no uncertainty—law is being identified as it is created, and the rule of recognition is therefore doing its job. If this is the case, then perhaps the dissatisfaction should not be aimed at Hart's theory but instead should be aimed at the actions of the Executive Branch. If the rule of recognition is working to identify the law, then any problems with what “law” is should be taken up with the President. This Part now shifts focus to what these observations reveal about potential problems within the Executive Branch.

The primary problem with modern Executive Branch actions is that the separation of powers outlined in our Constitution does not allow complete legitimation by acquiescence. If law is created simply by observing official behavior, then this renders the Constitution's bicameralism and presentment requirements utterly superfluous and unleashes government action beyond the bounds of the Constitution's enumerated powers. James Madison told the people of New York before they voted to ratify the Constitution that one of the document's virtues was the separation of powers, for “[t]here can be no liberty, where the Legislative and Executive powers are united in the same person, or body of magistrates.”¹³⁹ Madison also expected the Legislature to be a “vortex” that swept all into its power if left unchecked.¹⁴⁰

Madison was right to predict a vortex, but he was wrong about its source. The Executive Branch has proven to be the branch that has pulled

¹³⁸ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 626–29 (1958).

¹³⁹ THE FEDERALIST NO. 47, at 299 (Clinton Rossiter ed., 1961).

¹⁴⁰ See THE FEDERALIST NO. 48, at 306 (Clinton Rossiter ed., 1961) (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”).

everything into its power. The above examples show that through congressional delegation, acquiescence, or some other form of legislative drift, the Executive Branch has been allowed to issue an increasing number of primary rules. Though our Constitution gives the President the ability to *execute* primary rules, it is another thing entirely for the President, cabinet officials, and even administrative agency staff to *create* primary rules. As discussed, Hart might accept these unilateral rules as law, so the problem must lie in how our legal system has allowed this transformation to happen.

It is not a foregone conclusion that the shift in policymaking from Congress to agencies, often under the guise of interpreting the law, is necessarily a problem.¹⁴¹ It might simply be an inevitable byproduct of an increasingly complex society relying on a swift and nimble Executive Branch to do more legislating. While the Framers certainly contemplated the President's energy,¹⁴² whether they intended for this energy to generate such far-reaching policymaking is controversial.¹⁴³

It is worth a few words to tease out the implications these executive actions have for democracy, transparency, and accountability.¹⁴⁴ Something is lost from a democratic standpoint when an executive action that affects millions of people is legitimized through society observing official behavior.¹⁴⁵ This is especially true when the decision-making and

¹⁴¹ See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (arguing that it is consistent with the Constitution's separation of powers that it is "'emphatically the province and duty' of the executive department . . . 'to say what the law is'" (emphasis omitted) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

¹⁴² See THE FEDERALIST NO. 70, at 421 (Clinton Rossiter ed., 1961) ("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 steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.").

¹⁴³ Compare Heidi Kitrosser, *Rethinking Presidential Supremacy*, 57 WAYNE L. REV. 227, 232 (2011) (asserting that "it was equally crucial to the Founders to ensure that the destructive potential of [the President's energy] would be checked"), and Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547, 548-49 (2007) (arguing against the view that Hamilton's words in Federalist No. 70 are a basis for expansive executive power), with Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006) (arguing for expansive executive power based in part on the energy of the President). For an overview of this debate, see generally Sotirios A. Barber & James E. Fleming, *Constitutional Theory and the Future of the Unitary Executive*, 59 EMORY L.J. 459 (2009).

¹⁴⁴ Though a whole paper could be written about this topic and its many nuances, I only explore some of the surface-level implications here.

¹⁴⁵ See Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 83 (2012) ("Throughout American history, it has been well understood that democracies die behind closed doors, and that to be held accountable and to perform well,

implementation processes behind these actions are almost completely obscure compared to the transparency required of Congress.¹⁴⁶ The primary, and perhaps only, legitimating source in a democracy should be the vote of the people and the actions of their representatives, because elected representatives must respond to the electorate or else they can be held accountable at the ballot box.¹⁴⁷ When unelected agency officials or White House lawyers are the ones “making law” according to Hart’s theory, robust accountability and transparency safeguards deteriorate.¹⁴⁸

Perhaps Hart’s theory is solid, and the numerous executive actions discussed above are all “law” for practical purposes. If so, then the dissatisfaction is with the problems in our current legal system and perhaps they call for a return to clear separation of powers. but it is beyond the scope of this Note to propose a solution to this problem. The next Part argues that while reforms are needed to restore our separation of powers, there remain criticisms of Hart’s theory worth considering.

IV. WHAT THESE OBSERVATIONS TELL US ABOUT HART’S THEORY

Although flaws in our legal system may stem in part from a distortion of power between the branches, the above examples still reveal flaws in the viability of Hart’s theory. To see why, consider our village again. Assume

government must be visible to the public.” (internal quotation marks omitted) (first quoting *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002); and then quoting Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 619 (2010)).

¹⁴⁶ See Robert L. Glicksman, *Shattered Government*, 62 ARIZ. L. REV. 573, 575 (2020) (“Accountable governance is particularly important when public policy decisions are made by administrative agencies composed of appointed, rather than elected, officials.”). Professor Glicksman’s assertion touches upon a multifaceted debate that has been ongoing for decades. See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671 (1975) (expressing concern over the “exercise of power over private interests by officials not otherwise formally accountable”); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005) (disagreeing with “the idea that elected officials—legislators and the chief executive—are accountable to the people, while officials who obtained their position by appointment or examination are not”). For my present purposes, it is enough to highlight the potential implications of the differences in accountability and transparency between Congress and administrative agencies.

¹⁴⁷ See Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385, 410–11 (2013) (arguing that legislatures “have the incentive to make compromises that advance the greatest good for the greatest number” or else the “electorate kicks them out,” while agencies, on the other hand, have much more “obscure” incentives that likely include “maximiz[ing] their own job security or even the chance for employment with the entities they regulate” and “short-term political advancement”).

¹⁴⁸ Some have argued that transparency is essential to the administrative state’s legitimacy. See Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 100 (2011) (“Open government and equal access to decisionmaking processes are cornerstones that ensure an accountable and democratically legitimate Fourth Branch.”).

the Agriculture Committee never issued guidance on the planting and harvesting of a new fast-growing breed of squash. Instead, an individual farmer who wants to grow this super squash submits an inquiry to the Committee, which, being extremely busy, delegates it to a low-level staffer. The staffer writes a letter stating that the current regulations allow the farmer to grow the squash. Word quickly spreads amongst the farming community, and the entire industry begins growing the super squash. Once the Committee accepts this transition to super-squash, Hart's theory forces us to conclude that this staffer promulgated a "law."

If a theory is so broad that it accepts even this action as a "law," this raises questions about whether that theory is viable. The above scenario reduces our legal system to one of custom-based behavioral observation—to tell what the law is, simply observe official behavior. Where government actions are accepted by society, that is the law. A system of law-by-observation strays dangerously far from the sophisticated concept of legal systems being a union of primary and secondary rules. The problem all of these questions pose for Hart's theory is that such a system does not need secondary rules.¹⁴⁹ There is no need for rules of adjudication, change, and recognition when observing official behavior will suffice to adjudicate, transform, and settle the law. Accordingly, the main question is: what do these real-world situations suggest about Hart's theory of the rule of recognition? First, do they reveal that the rule of recognition is fundamentally flawed? Second, is the rule of recognition failing to serve as an uncertainty-settling device? And third, what does this all mean for legal positivism? While it is beyond the scope of this Note to provide a conclusive answer to each of these inquiries, this Note aims to establish that each merits full consideration in future scholarship.

If Hart's theory is too simple to map onto our complicated legal system, is it therefore fundamentally flawed? Not quite. An examination of the current rule of recognition in the United States reveals two propositions. First, there is not one singular rule of recognition as Hart might argue, but rather multiple. Second and relatedly, multiple communities determine what the law is, not any single community.

First, there is no reason to think that the rule that validates a governor's executive orders is the same as the one that validates Congress's laws.¹⁵⁰ As

¹⁴⁹ See Harris, *supra* note 106, at 370 n.158 (asserting that the "notion that the administrative state is a legitimate source of primary rules would eviscerate Hart's basic understanding of the rule of recognition" because it would return us to an understanding that law is whatever the government commands it is).

¹⁵⁰ Shapiro, *supra* note 24, at 12. Professor Shapiro attributes this idea originally to Professors John Finnis and Joseph Raz.

is clear from the multiple sources of law in our complex legal system, we need multiple rules of recognition. For example, an attempt to define a unitary rule of recognition from the Constitution—say, that law is that which is passed by both houses of Congress and then either signed by the President or passed over a veto with two-thirds support—does not describe the other facets of recognition we give to the Judicial and Executive Branches.

Furthermore, not only is there more than one rule of recognition per legal system, but there are also multiple “recognitional communities”—communities whose behavior determines whether an edict is law.¹⁵¹ Some scholars have argued that law under Hart’s theory can be “group-relative,” because different groups will evaluate and validate different rules.¹⁵² One recognitional community may exist at the state level while another exists at the federal level, or one community might evaluate the Judiciary while another evaluates the Executive.¹⁵³ On this view, we should view a legal system “not as a set of laws recognized by all the primary law-applying [officials] instituted under it” but rather as a set of overlapping rules, “each recognized by one or more of the organs instituted under it.”¹⁵⁴

Applying the theory of recognitional communities to the example of Trump’s tweets reveals why we need further elaboration on Hart’s theory. There the recognitional community seemed to be the Joint Chiefs of Staff. The only reason Trump’s tweets did not create a more consequential problem was that the Joint Chiefs of Staff refuted them relatively quickly. The fact that the Joint Chiefs’ statement essentially settled the issue shows that they were seen as the authoritative recognitional community on this issue. This demonstrates the need to further develop Hart’s theory of the rule of recognition to fit more neatly with modern legal realities.

¹⁵¹ Adler, *supra* note 38, at 727 (“No single community defines the law of a given legal system. In particular, there is no canonical group whose practices are the foundation for U.S. law. Propositions about U.S. constitutional law and, derivatively, U.S. law more generally are true or false relative to the practices of a stipulated group.”).

¹⁵² *Id.* at 745. Professor Adler explains that it is “a category mistake[] to presuppose that there is a single, canonical manner of dress, eating, or sexual behavior that is ‘socially appropriate’ for a given person at a given time.” His proposal is “to extend this group-relative understanding of social ‘oughts’ from nonlegal ‘oughts’ to law itself.” *Id.*

¹⁵³ Professor Adler notes:

There is no single, canonical recognitional community for U.S. law. Rather, Supreme Court practice will ground one set of answers to the questions, one body of U.S. constitutional law (and derivatively U.S. law); presidential practice, a different body of U.S. constitutional law; state judicial practice, a different body of U.S. constitutional law; citizen practice, perhaps, yet another; noncitizen practice, perhaps, yet another.

Id. at 747–48.

¹⁵⁴ JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 192 (2d ed. 1980).

Even a theory that embraces multiple rules of recognition and recognitional communities, however, cannot fully prevent uncertainty. While some rules of recognition are more settled than others, other rules and recognitional communities may still create uncertainty and contention over what constitutes law. If we accept that the Joint Chiefs are their own recognitional community for “laws” regarding the military, they do not accept or reject a law on behalf of themselves only; they decide for the country as a whole. Had the Joint Chiefs accepted Trump’s tweet as law by beginning to implement it, dissenting voices, perhaps even protests, would have sprung into action. It is apparent how this could lead to conflict. In fact, with multiple rules of recognition, the varying recognitional communities can disagree about what is “law,” which will consequently manifest as disputes and uncertainty.

The discussion above illuminates the ongoing debates over many executive actions. These debates support the assertion that second-order uncertainty—uncertainty about who has the authority to settle first-order uncertainty—is prevalent in our legal system.¹⁵⁵ Professor Scott J. Shapiro has theorized that the main source of second-order uncertainty within a legal system is political morality; because “many people disagree about the natures of justice, equality, liberty, privacy, security and the like, they are bound to disagree about the proper form that government ought to take.”¹⁵⁶ No doubt this disagreement contributes to uncertainty regarding the Executive Branch because it reflects divided beliefs about separation of powers, legitimate authority, and liberty—all of which invoke differing conceptions of political morality.

Even within the Executive Branch, across administrations, there is debate about agencies’ legitimate authority to unilaterally promulgate new policies. For example, in 2019, the Office of Management and Budget sent a memorandum reminding all agencies to comply with the Congressional Review Act, the law governing Congress’s ability to overturn rules passed by agencies.¹⁵⁷ The first two sentences of the memo stated, “The Constitution vests all Federal legislative power in Congress. In our system of separation of powers, agencies may prescribe rules only insofar as they have statutory authority delegated to them by Congress.”¹⁵⁸ Here we have a prime example of second-order uncertainty. This memorandum shows uncertainty in the

¹⁵⁵ Shapiro, *supra* note 24, at 16.

¹⁵⁶ *Id.*

¹⁵⁷ Memorandum from Russell T. Vought, Acting Dir., Off. of Mgmt. & Budget, to Heads of Exec. Dep’ts & Agencies 1 (Apr. 11, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> [<https://perma.cc/MQ73-MN79>].

¹⁵⁸ *Id.*

Executive Branch because it was meant to respond to what was perceived as an abuse of agency power in the previous administration, demonstrating that not even the Executive Branch can decide whether certain executive actions are laws or not from administration to administration. Thus, there is reason to question whether the rule of recognition is serving its function as an uncertainty-settling device.

Still, Hart might insist that the rule of recognition works to settle uncertainty through observing official behavior. But how are officials determining which laws they must follow in the first place? Unless the rule of recognition is resolving uncertainty for them, these officials are free to decide what to follow and what not to follow. And without a command rooted in positive law about what to follow, officials may tether themselves to normative reasoning and use moral justifications to decide for themselves. Put differently, without a referent to certain positive law, government officials are forced to consider external or personal justifications when deciding whether to recognize potential sources of law.

If so, then the rule of recognition's failure to resolve uncertainty calls into question the overall thesis of legal positivism, which claims that assessments of what constitutes law must necessarily remain separate from assessments of morality.¹⁵⁹ Professor Ronald Dworkin made the argument that when judges apply law to new circumstances, judges are doing more than saying what the law is; they are in fact making policy, and taking into account value judgments.¹⁶⁰ Hart offers a response to this critique in his article *Positivism and the Separation of Law and Morals*.¹⁶¹ Hart asserts that although it may appear that extending the law to new circumstances necessarily requires considering morality, actually two separate conversations are taking place.¹⁶² The first is concerned with the law's validity; i.e., is this a law under our system? The second is concerned with the law's normativity; i.e., should this be a law? The first discussion remains

¹⁵⁹ See *supra* note 8. Though different versions of legal positivism diverge in some areas, they are all unified in accepting the "separation thesis," which insists that law and morality are distinct. See Robin West, *Three Positivisms*, 78 B.U. L. REV. 791, 792 (1998). Because law does not owe its existence to morality, there must be some way in any legal positivist system to identify what is law. This is where Hart's rule of recognition plays a crucial role.

¹⁶⁰ Though Dworkin limited this resort to moral thinking to judges, it could also be true of executive officials. See RONALD DWORIN, *LAW'S EMPIRE* 255–56 (1986) ("Hard cases arise, for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line of cases. Then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality.").

¹⁶¹ See Hart, *supra* note 138.

¹⁶² *Id.* at 627.

separate from morality, and therefore, according to Hart, legal positivism's separation thesis holds.¹⁶³

But the examples of uncertainty from the Executive Branch give us reason to suspect that even determining a law's validity involves normative considerations. If it is unclear whether the Constitution or statute allows novel uses of executive power, uncertainty ensues, and officials must ask "What do I do? Is this lawful?" In answering this question, because positive law is helplessly ambiguous or stubbornly silent on the issue, the officials might consider their own conceptions of what is valid, allowing normative considerations to creep into accepting or rejecting the regulation.¹⁶⁴

For example, what did the Joint Chiefs consider when deciding that Trump's tweet did not qualify as valid policy? There is no law directly preventing a President from announcing policy changes through social media. Hart's defenders might say they referred to existing laws detailing how the President can issue new policies. But the above examples show that the Executive Branch often acts in a zone of twilight—neither expressly prohibited from acting nor expressly permitted to act. More likely, the Joint Chiefs resorted to their normative conceptions of what counts as "law." An official's own intuitions of right and wrong will be the North Star when the rest of the world is dark. This is exactly what legal positivists hope to avoid. Once the official acts, Hart would observe her behavior and say that her actions have legitimated the law under the rule of recognition. Yet that process of legitimation might be inextricable from a moral decision.¹⁶⁵

To present an even more dramatic example, if Executive Branch lawyers pushed to continue supporting unlawful actions, some have argued that "[i]n addition to being prepared to say no . . . officials must also be prepared to resign in the extraordinary event the President persists in acting unlawfully or demands that OLC legitimize unlawful activity."¹⁶⁶ Here, resistance to "unlawful" executive action would necessarily entail considering the morally right thing to do. This is especially true if we are asking executive officials to resign rather than implement or execute

¹⁶³ See *id.* at 628–29.

¹⁶⁴ See Ristroph, *supra* note 38, at 451 (arguing that government officials "follow their own rules of recognition in good faith" when trying to determine what is law, but this "does not satisfy Hart's account of law").

¹⁶⁵ My use of the term "moral" here is intentionally capacious. It is meant to capture decision-making based on the official's policy or economic judgments, such as which policy is better for the agency or which is more efficient, for these would not be decisions based on positive law but would instead be based on the individual's judgment.

¹⁶⁶ Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1601 (2007).

“wrong” actions. Such a conclusion—that I would rather quit my job than carry out an order—must stand on moral grounds.

Hart’s separation thesis presupposes that amoral factors can sufficiently guide individuals in interpreting and implementing old laws in new situations. But as the above examples show, these amoral factors are so undefined in the context of executive actions that in these situations officials must resort to morality to determine what is law. Because the rule of recognition cannot resolve the conflict and uncertainty we see in the Executive Branch, the debate over validity becomes a debate about morality. This observation, in turn, casts doubt on the separation thesis.

CONCLUSION

In applying Hart’s rule of recognition to current legal realities, this Note sheds light on some flaws inherent in the theory. If Hart’s rule of recognition serves its purpose, it should settle uncertainty and be able to tell us which executive actions have the authority of law. Yet when we try to make sense of various executive actions, the rule of recognition falls short. These pitfalls raise important questions about our government and Hart’s theory. Perhaps there is something wrong with the actions of our Executive Branch or with Hart’s theory. Maybe the rule of recognition is failing to settle uncertainty as it is proffered to do. Or maybe it gives us reason to question legal positivism’s separation thesis. This Note uses examples from the Executive Branch to analyze these questions without offering conclusive answers, for this is intended to be part of—and by no means end—an ongoing conversation as we try to reconcile philosophical theories with legal practice.

