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THE GATEKEEPERS: EXECUTIVE LAWYERS AND THE EXECUTIVE POWER IN COMPARATIVE CONSTITUTIONAL LAW

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INTRODUCTION

As the constitutional centrality of the executive has become more pronounced, the influence of its legal advisors in the constitutional order has similarly grown. With a growth in the capacity and power of the executive branch—through the political party system, rise of the administrative state, predominance over foreign affairs, and increased use of emergency powers—concerns that these extensive powers are subject to law and bound by constitutional rules and norms has taken on increased salience in constitutional democracies. Legislatures and courts play an obvious role in subjecting these powers to external scrutiny. However, executive lawyers are at the front-line of advising whether executive actions or policy proposals are in accordance with constitutional norms. They are, in many ways, the Gatekeepers, deciding in the first instance how law shapes policy and the powers of the executive, but this role is heretofore unexplored in the literature on comparative constitutional law.

Across many divergent constitutional orders, the executive branch cites constitutional or legal advice tendered by its legal advisors as reasons for action or inaction. This is so despite there usually being little or no express constitutional role for such advisors. They are often the first—and often the *only*—institutional actors to address controversial and pressing constitutional questions. Yet their actions tend to be largely unregulated by constitutional or even statutory rules, and their impact on constitutional systems has not been fully considered from a comparative or theoretical perspective.[1] We have previously explored in this Journal extreme cases of secretive and opaque pre-enactment review by legal advisors coming to undermine the goals of political constitutionalism and potentially the institution of judicial review.[2] Here, we

[1] Some excellent system-specific work has been done on the role of the apex executive legal advisors and how their work can be structured by the executive to suit their ends. We draw on some of this work from the United States; for example, Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 818 (2017).
[2] See David Kenny and Conor Casey, *Shadow Constitutional Review: the Dark Side of Pre-Enactment Review in Ireland and Japan* 18 INT'L J. CONST. L. 51 (2020).

further this comparative exploration by looking more broadly at the role of these highly influential constitutional actors.

Drawing on several constitutional democracies as illustrative comparative examples, this article considers how executive branch lawyers play an important but highly variable role in the constitutional order. They act as a Janus-faced source of constraint and empowerment, and whether their work is more likely to produce more constraint or empowerment depends on structural variables and on cultural factors. These variances can mean the difference between: legal advice being a useful and legitimate way to guide the executive; being a tool for the executive to exploit to endow itself with legalistic credibility; or being obstructive and distorting of the political branches. Though there is no 'optimal' structure for legal advisors to aspire to, we suggest that the structure and role of such advisors deserves much greater scrutiny from comparative constitutional lawyers, and from constitutional drafters: a role this important should be elaborated on and guided by constitutional text or by similar statutory rules.

Part I briefly outlines the structure of executive legal review in four similar but somewhat divergent constitutional orders – the UK, Ireland, Canada and the US – and situates it within these constitutional orders. Part II compares the work of apex executive lawyers in these jurisdictions via four crucial variables which impact upon the influence and effect of executive lawyering on the constitutional order. Executive lawyers in each system can be: (a) political or technocratic; (b) secret or public in their provision of advice; (c) "court-mimicking" (advising what courts would or may do) or "political constitutionalist" (encouraging or enabling the political branches to take interpretations specific to their role); and (d) centralised in a single office or entity or diffused amongst various executive actors. These are not binary positions, but spectra, and advisors may change their positions along them in different contexts or over time. This variability, we argue, ensures the institution of executive legal review is neither exogenous to the executive—its does not simply bind the executive to the external restraint of "the law"—nor entirely fixed, and so can potentially be structured and used in a manner most suitable to the executive.

In Part III, we look at examples in these jurisdictions that illustrate how executive legal review can have profound effects on the executive power and the constitutional order. Executive legal advice can act as a potentially powerful internal constraint on the executive in the pursuit of its policy preferences, and we see clear evidence of such advice being highly influential on

executive action. Conversely, we see evidence that it might *empower* the executive by providing legalistic credibility to executive action or inaction, even in controversial or contested cases, which — given the importance of legality to political legitimacy in most constitutional cultures — may have substantial political effect. Finally, it is possible that the constraining effect of legal advice could lead to "policy distortion", where the political branches are inhibited from taking legitimate and constitutional actions because of overly cautious legal advice. We also consider why executive legal review has these effects and the incentives behind its reliance by the political executive. Finally, we map the different possible effects to the variables outlined in Part II.

In Part IV we argue that three normative points emerge from our analysis. First, there is no 'optimal' structure for executive legal review, but that it can come in many different manifestations along the different variables we identify in Part II, each with their own difficult normative trade-offs which involve inescapably political choices. Second, given their importance, constitutional design should consider very careful the possible consequences of structural choices around legal advice, and comparative constitutional law should pay a great deal more attention to this phenomenon in an attempt to map and better understand the culture around legal advice and its effects. The basis for appointing executive lawyers; codification of their precise role & purpose in constitution and statute; and the ethics and norms which govern their work: these all-merit close attention. Finally, we argue there is at least one normatively desirable feature that executive legal review should have – some minimum level of transparency that can enable robust scrutiny of advice. Without this, it is difficult to even know the influence the advisor might have and is likely to insulate the advice from any contest of debate, which is not a desirable trait for constitutional democracies.

PART I – STRUCTURE OF EXECUTIVE LEGAL REVIEW IN FOUR SYSTEMS

To ground an analysis of the role of executive legal advisors in providing advice, we will focus on four illustrative comparative examples. In order to have some broad similarities to anchor our comparison, we have chosen four English-speaking jurisdictions that share certain similarities and certain core differences: the United States, Canada, Ireland and the United Kingdom. Each of these jurisdictions has a government lawyer in the form of an Attorney General (AG) that derives its roots from the historical role of the Attorney General in the English legal system as legal advisor to the Crown and one of the most important Law Officers.

Each legal system has taken this role in a different direction, and the provision of constitutional advice in each place has distinctive features.

The jurisdictions are also more broadly comparable. Ireland, Canada and the UK all have some close variation of the Westminster parliamentary system, albeit with different constitutional structures around this: Ireland with a written constitution and strong form judicial review; Canada with a written Constitution and Charter of Rights and at least quasi-strong form review;[3] and the UK with a uncodified constitution, a codified set of statutory rights, and weak form judicial review. The US has diverged somewhat further from the Westminster model, with a strong Presidential system and a written constitution with strong form judicial review. All four have at least predominantly common law legal systems. These similarities anchor the comparison and render the differences in approach to constitutional advice by legal advisors interesting and instructive. There are many other examples from diverse jurisdictions that have interesting variations on executive legal advisors and are worthy of detailed comparative study.[4] At this juncture, however, the similarity in the origins of these traditions, and their varied outcomes, provides an interesting comparison and a starting point for future work. We also restrict our focus to the work of apex legal advisors — those who provide advice to the political executive on the most salient issues, and do not focus in detail on the work of civil servant lawyers who handle the day-to-day legal work of the administrative state which might not attract the attention of the political executive.

United States

A core function of the President of the United States is to take care the laws are faithfully executed.[5] Interpretation of the law is essential to its execution, and so the President acts as both law-interpreter and law-enforcer, making countless decisions implicating questions of constitutionality and legality.[6] Every President from Washington has received legal advice from executive branch lawyers.[7] There is no explicit constitutional basis for executive lawyers, but there is a statutory basis: the Judiciary Act 1789 provides that the US Attorney General

[3] See *See* J.L. Hiebert, *Is It Too Late to Rehabilitate Canada's Notwithstanding Clause?* 23 SC. L. REV. 169 (2004).
[4] In particular, Councils of State/Conseils d'etat systems would make for fascinating counterparts to an Attorney General model, and to systems that combine this with some form of advisory or pre-enactment judicial review such as Ireland or Canada. In addition, Japan's cabinet legislation bureau provides an interesting and generally under-explored example of influential constitutional advice.
[5] Art. II of the United States Constitution.
[6] See Dawn E. *Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power* 4 UCLA L. Rev. 1560, 1564 (2007)
[7] Arthur H. Garrison, *The Opinions of the Attorney General and the Office of Legal Counsel: How and Why They Are Significant* 76 ALB. L. REV. 217, 220 (2012).

shall be head of the Justice Department and *inter alia* 'give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments'. The AG serves at the pleasure of the President.

The expansion of the federal government following the New Deal made it less plausible for Attorneys General, who also head the Department of Justice, to personally discharge their statutory function to provide legal advice to the executive branch. Since 1950, this function has been delegated to the Office of Legal Counsel (OLC). The core function of the OLC is to act as a source of legal advice to the Presidency and other executive departments when requested. Sometimes this responsibility is shared with the White House Counsel's Office (WHC), part of the President's White House staff. The WHC act as the President's personal legal adviser, providing advice and assistance on issues as diverse as judicial nominations, conflicts of interest and ethical issues, and managing contact with Congress to advance the president's legislative agenda.[8]

United Kingdom

At the apex of government legal advisors stand the Attorney General for England and Wales, (**'AG'**) Solicitor General for England and Wales, (who both advise the UK and Welsh governments)[9] and the Advocate General for Scotland (who advises the UK government on Scots law). This group of senior lawyers is collectively known as '*the Law Officers'*[10], whose main function is to serve as legal advisors to the Crown via her Prime Minister and Cabinet.[11] The Law Officers are, by convention, members of government but not members of cabinet[12] and traditionally only attended its meetings on a case-by-case basis if need for advice arose.[13] However, recent AG's have reported there is now an 'expectation' the AG will attend every cabinet meeting.[14]

[8] Trevor Morrison, *Constitutional Alarmism* 124 HARV. L. REV. 1709, 1732 (2011).
[9] The AG of England and Wales also holds the Office of Advocate General for Northern Ireland and advises the UK government on Northern Irish law.
[10] JLJ Edwards, THE ATTORNEY GENERAL, POLITICS, AND THE PUBLIC INTEREST 1-11 (1984).
[11] Their advice-giving role is seen as complementary to the work of the Lord Chancellor in securing compliance with the rule of law. Since the Constitutional Reform Act 2005 the Lord Chancellor's role in the cabinet has been to safeguard the independence of the judiciary and the rule of law on a more systemic level. *See* House of Lords Constitution Committee, *The Lord Chancellor: Sixth Report* (December 2014) paras 69-81.
[12] The AG has not been a member of cabinet since 1928. Edwards, *supra* note 10, 310-318.
[13] Elwyn Jones, *The Office of Attorney-General*, 27 CAMB. L. REV. 43, 47 (1969).
[14] Conor McCormick and Graeme Cowie, 'The Law Officers: A Constitutional and Functional Overview' *House of Commons Library Briefing Paper* (May 2020), 49.

The apex position of the Law Officers has no statutory basis as such, but over the years, the Cabinet Office's *Ministerial Code* has specified that they must be consulted if: the legal consequences of action by the government have important policy repercussions; if a department legal advisor is unsure of the legality or constitutionality of legislation; the *vires* of subordinate legislation is in dispute; where two or more departmental advisors are in disagreement.[15] There is thus no legally grounded central control over the provision of legal advice,[16] but a firm convention that the AG's advice be sought out in certain serious circumstances and accepted as authoritative when provided.[17] This makes them a quasi-centralized source for legal advice for all government departments, helping to co-ordinate executive legal policy with respect to the most thorny and sensitive issues.[18]

Ireland

Unlike his US and UK counterparts, the Irish Attorney General is given constitutional status via Article 30 of the Irish Constitution. Article 30 provides that the AG is 'the adviser of the Government in matters of law and legal opinion'.[19] The Attorney is the legal adviser of the *government* and its various departments, and not the parliament or the president.[20] At the same time, the AG operates with a greater degree of formal independence from government than the UK, as the Constitution expressly provides the Attorney General 'shall not be a member of the Government',[21] although the AG attends cabinet meetings. Any policy containing 'any substantive constitutional or legal dimension' must be brought to the Attorney General's Office for consultation before being brought to Cabinet for discussion. The Office remains involved in an advisory capacity throughout the formulation of policy and the drafting and passage of legislation by government.

Canada

The Attorney General in Canada is the chief law officer of the Crown, but it is not an independent office, nor one that sits even notionally apart from Cabinet by virtue of delegation. It is, instead, a fused role that is held by the cabinet minister who serves as Minister of Justice.

[15] *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (Cabinet Office, London, 2001) para 22.
[16] Edwards, *supra* note 10, 192.
[17] Cabinet Office, *Ministerial Code* (January 2018) para 2.10.
[18] *Id.*
[19] *See* Article 30.1. & 30.4 (1937). The Constitution also makes the Attorney General responsible for prosecution of crimes in the name of the People, but this has been delegated by law to a dedicated Director of Public Prosecutions. Prosecution of Offences Act 1974. *See* James Casey, THE IRISH LAW OFFICERS (1996).
[20] David Gwynn Morgan, *Mary Robinson's Presidency: Relations with the Government* 34 IR. JUR. 256, 259 (1999).
[21] Article 30.1

This is laid out in s 2 of the Department of Justice Act which states that the Minister of Justice is 'ex officio Her Majesty's Attorney General of Canada'.[22] The AG is responsible for, *inter alia*, the provision of advice on 'all matters of law' referred to the AG by the Crown. This in addition to the powers of the Minister for oversight of justice policy and the justice system, and all the traditional roles and responsibilities of the English Attorney General, including the litigating on behalf of the Crown.[23] (The office of Solicitor General also existed until 2005, when it was reorganised into the role of Minster of Public Safety.) This brief obviously encompasses the provision of constitutional advice of many sorts to the executive, including the Constitution Acts of 1867 and 1982, as well as the Charter of Rights. In addition to these function, the Attorney General has statutory reporting duties to parliament in respect of the Charter, which is discussed below.

Vagueness in definition of roles

A common feature amongst each system is the largely conventional and uncodified nature of the role of executive legal advisors. These jurisdictions do not lay down in detail, in law or the constitution, the structures or processes around executive legal advice. The OLC and WHC are not mentioned anywhere the text of the US Constitution, and their functions & role are largely a matter of political practice. The same is true of the Canadian Attorney General, which also has only scant statutory elaboration. The UK AG's role in the constitutional order lacks a statutory basis, and is largely a matter of long-standing custom and convention. The Irish Constitution mentions the AG, but there is nothing in the constitutional text or in statute to suggest how this role should be carried out.

There are several possible reasons for this. First, these offices and roles derive from the English Attorney General, which developed in the English constitutional tradition of gradual evolution of uncodified conventions, and so may have continued in that vein. Secondly, these roles are perhaps conceived as similar to lawyers in private practice — simply giving legal advice — and it might be thought neither necessary nor possible to detail what this entails or to mandate certain processes around it. Thirdly, the powers and functions of the executive are often underspecified in these systems in many respects; the role of legal advisors is only one example, and likely a symptom of this.[24]

[22] Previously the case under the Ministry of Justice Act 1868.
[23] Andrew Flavelle Martin, *The Attorney General's Forgotten Role As Legal Advisor To The Legislature* 52 U.B.C L. REV. 201, 203 (2019).
[24] Paul Craig and Adam Tomkins (eds) THE EXECUTIVE AND PUBLIC LAW 4 (2006).

There is an absence of a clear rule in any of these jurisdictions as to the *status* of this legal advice: to what extent is the executive *bound* to legal advice? This has largely developed as a matter of practice, and due to the fact that the provision of legal advice is often not transparent, it can be hard to know. However, it seems from available evidence that each system has deeply embedded the work of executive lawyers into policy making, and it seems to be very rare that the executive will advance a own legal or constitutional interpretation that runs contrary to its advisor's guidance. This, itself, raises the question of how independent this advice is in practice, which will be discussed below.

PART II – VARIABLES OF EXECUTIVE LAWYERING

The work of executive lawyers seems to have at least four crucial variables. Executive lawyers in each system can be: (a) political or technocratic; (b) secret or public in their provision of advice; (c) "court-mimicking" (advising what courts would or may do) or "political constitutionalist" (encouraging or enabling the political branches to take interpretations specific to their role); and (d) centralised in a single office or entity or diffused amongst various executive actors. There are not binaries but rather ends of a spectrum: the practices of executive legal advisors may sit between these notional poles and move along this spectrum. This variability, we argue, means that this practice can be structured and used in a manner most suitable to the executive. As we will discuss in more detail in Parts III and IV, these variables greatly affect the influence and effect of executive lawyering on the wider constitutional order.

(a) Political or Technocratic Appointment

The first variable is the degree to which executive lawyers are, or are said to be, political or technocratic: is this a political role, which would involve substantial political judgment on the law, or a technocratic legal role that relies on solely legal considerations? In all four jurisdictions, we see some hedging between these positions in a manner that can be confusing: political appointments are the norm, but even in the most politically enmeshed system, a belief in (or at least a rhetoric of) detached legal judgment prevails. The question of the independence of the advice in practice is considered elsewhere.

The UK Law Officers are, by convention, not members of the cabinet to which they give advice. However, as the UK AG is invariably a member of a political party, MP, a Minister of government, and increasingly attends cabinet meetings as a matter of expectation, it would be

'highly disingenuous' to view the office-holder as having nothing to do with politics. Rather, the UK AG is an inescapably 'highly political animal'.[25] The Law Officers are supported in their work by a small staff of career civil service legal and administrative assistants.

The leadership of the US OLC and WHC are both dominated by political lawyers appointed by the President.[26] The individuals who fill these posts typically have impeccable professional credentials, but political connections are also important, and the legal views of leading lawyers in the OLC will typically correspond to those of the incumbent president.[27] These attorneys are assisted in turn by recent graduates from elite law schools who serve as attorney-advisors for a period of two or three years. While the OLC retains several career lawyers which provide it an element of institutional continuity, given the explicitly political bent of appointment, the leadership of both it and the WHC regularly fluctuates, altering with every change in administration.

The Canadian Attorney General, also being the Minister of Justice, is a politician of some eminence, who will almost always have a background or qualification in the law. As with any other Ministry, the appointment is presumably made on the basis of political considerations and an assessment of political acumen. The AG's position at Cabinet is in no way independent of his or her status as Minister; the entitlement to attend Cabinet is solely by virtue of the Ministry.[28] Given the fusion of these offices, there is no pretence of any formal political independence for the office.

The Irish AG has almost always been a lawyer in private practice of long standing and some professional eminence. However, the AG also generally has been a member of, or has had some political affiliation with, one of the political parties in government.[29] Although not formally a member of government, the Irish AG enjoys a close relationship with the executive, attending all Cabinet meetings, and serving at the pleasure of the Taoiseach (Prime Minister). In a break from the Westminster tradition, the AG is not usually a member of parliament. Although the AG is a political appointment, the Office's staff are independent, permanent civil servants, recruited from the ranks of practicing lawyers, to support the discharge the duties of the AG

[25] *Id.*, at 69.
[26] Renan, *supra* note, 1 at 829.
[27] Bruce Ackerman, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 105 (2010).
[28] *See* James B. Kelly and Matthew A. Hennigar, *The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights* 10 INT'L J. CONST. L. 35, 46 (2010).
[29] Casey, *supra* note 19, 305.

role. Prominent barristers in private practice are also employed on an individual basis to write opinions and give detailed advice on certain discrete points of law.[30]

All of these systems blend, to different degrees, the political and technocratic aspects of executive legal advice. All systems have some significant political component to the appointments process, at least at their apex. Yet even Canada, where the advisor is a full cabinet Minister, Kelly and Hennigar note that when the role of the Attorney General has proven controversial in the past, all sides have stated the AG should provide impartial and independent advice, and argued only about the means by which this should be achieved.[31] The UK AG is also an explicitly political appointee, given he remains a member of a political party, an elected MP, and Minister of the government, but is said to be independent of that government in pursuing an impartial assessment of its policies against what the law requires. The overt politics of the US appointments system, and the ideological loyalty to an incumbent President's constitutional views, is offset by the elite professional credentials of the appointees to the OLC and WHC. The Irish system perhaps purports to be the least political: Ireland's Attorney General, drawn from a circle of elite practitioners, is taken to be providing technocratic, independent advice. Any loose political affiliations are generally not considered relevant.

The focus on technocratic competence in all jurisdictions is noteworthy and suggests a belief in (or a desire to perpetuate a belief in) a division of law and politics to a significant degree. All jurisdiction also appear to have some division of labour between ordinary day-to-day legal issues, which are more likely to be dealt with by civil servant lawyers appointed solely on the basis of technocratic competence, and issues of high political salience, which are likely to be dealt with by lawyers whose appointment has a basis in political sympathy with the executive.[32]

(b) Advice secret or public

The second axis of variability is the extent to which executive legal advisors publish their advice, either to parliament or to the public. Here we again see some variability and some tension: there tends to be a level of secrecy around the provision of advice, which is

[30] *See* David Kenny and Conor Casey, *A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency* 42 D.U.L.J. 89-118, 94 (2019).
[31] Kelly and Hennigar, *supra* note 28, at 46-48.
[32] See, in respect of Canada, Vanessa MacDonnell, *The civil servant's role in the implementation of constitutional rights* 13 INT'L J. CONST. L. 383 (2015).

unsurprising given that these legal cultures have some ethic of secrecy in respect of legal advice and the workings of the executive. However, we see significant variation in this, and also some acknowledgement of the particular considerations around government legal advice in moves towards mechanisms of accountability/disclosure.

Intense confidentiality pervades the provision of executive legal advice in the UK. Although as a Government Minister the AG is accountable and responsible to parliament, there is a strong constitutional convention against disclosure of AG's advice.[33] This convention is contained in the *Ministerial Code* and generally respected. However, legal advice has been disclosed in exceptional circumstances,[34] including advice concerning the legal implications of the proposed UK-EU Withdrawal Agreement in early 2019. The government has also published summary versions of legal advice it has received on several occasions concerning the use of armed force abroad. Such disclosures are the exception, not the rule, and remain the discretion of the executive.

The advice of the Irish Attorney General is very rarely published, and its secrecy is the most extreme of the jurisdictions examined here. A convention to this effect grew up from the earliest days of Irish independence and has become even stronger in recent years such that publication is almost unheard of, with even summary versions of AG's advice a vanishing rare political occurrence. The *fact* of the advice – that the AG has advised that some policy is constitutional or not – is often disclosed if the policy is politically controversial and questioned in parliament. This attitude fits with a general inclination towards secrecy in the Irish public service.[35]

Canada does not have any tradition of disclosure of the Attorney General's legal advice. This advice is subject to legal privilege, but this of course could be waived. Unlike the other jurisdictions considered here, the AG is a full Minister and sits in Cabinet by virtue of that role. Canada has a principle of cabinet confidentiality,[36] which allows members of cabinet to freely express themselves. Revealing the AG/Minister's views on constitutional matters could be thought to compromise this confidentiality to some degree. As a result, the nature of the advice

[33] K.A. Kyriakides, *The Advisory Functions of the Attorney-General* 1 HERT. L. J. 73, 76 (2003).
[34] Ben Yong, *Government Lawyers and the Provision of Legal Advice within Whitehall* (The Constitution Unit, 2013) 62.
[35] Casey, *supra* note 19, 142-143.
[36] See *Babcock v Canada* (2002) SCC 57.

and its influence are 'difficult to assess'.[37] However, in respect of rights matters, there has been a separate duty on the AG: to report to parliament any inconsistency she finds between a government legislative proposal and the Charter of Rights. Section 4.1 of the Department of Justice Act provides that the Minister shall examine every Bill introduced by government 'to ascertain whether any of the provisions thereof are inconsistent with' the Charter and 'report any such inconsistency to the House of Commons'.[38] This creates something like a duty of disclosure in the event that the government proceeds with a proposal that the AG believes to be incompatible. In practice, however, *no* statements of inconsistency have ever been made, even when laws have explicitly reversed a Supreme Court ruling, leading Kelly and Hennigar to describe it as 'broken'.[39] The failure can be put down the executive's interpretation—upheld by the courts—that this duty exist only where the AG believes there to be no argument 'of a serious and professional nature' for a Charter-consistent interpretation of the legislation.[40] A new practice has developed in recent years to address the limitations of this reporting procedure: the Charter Statement, discussed in Part IV.

The US system exhibits, by contrast, relative transparency. Many OLC opinions are published and OLC best practice guidelines explicitly dedicate the office to publication of their important opinions where possible.[41] However, not all opinions are made public, as much of OLC's work is confidential, implicating classified information or national security concerns.[42] Indeed, some OLC's most controversial opinions are withheld, such as infamous memos concerning the legality of 'enhanced interrogation' authored during the Bush Presidency. These were not disclosed until the Obama administration. Another controversial example was the heavy redaction of an OLC opinion sanctioning the legality of drone strikes against enemy combatants—including US citizens—abroad.[43] Ultimately, the President decides whether and when to release a sensitive legal opinion, and the extent of disclosure.[44]

In each system, the executive exercises high-levels of informational control over the disclosure of legal advice to external political actors. Non-disclosure limits the ability of parliament or

[37] Janet Hiebert, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE? 8 (2002).
[38] There is a similar duty in s 3(1) of the *Bill of Rights*, and the Statutory Instruments Act.
[39] Kelly and Hennigar, *supra* note 28, at 38.
[40] *Schmidt v Attorney General of Canada* 2016 FC 269 at para. 134; see also 2018 FCA 55. *See* Martin, *supra* note 23.
[41] Office of Legal Counsel, 'Memorandum for Attorneys of the Office: Best Practice for OLC Legal Advice and Written Opinions' (July 16, 2010) 5-6.
[42] Bradley Lipton, *A Call for Institutional Reform of the Office of Legal Counsel* 4 HARV. L. & POL. REV. 249 (2010).
[43] Anonymous, *Developments In the Law: Presidential Authority* 125 HARV. L. REV. 2057, 2105 (2012)
[44] Renan, *supra* note 1, at 852.

the public to mount constitutional or legality-based critiques of the executive's agenda and policy positions that are grounded in this advice, making it a useful tool of executive governance.

(c) "Court-mimicking" or "political constitutionalist" advice

A third significant variable is the nature of legal advice, and its framing. There seem to be at least two distinct approaches, although again some elision is possible. First, the advisor can focus on judicial interpretation and application of the constitutional document and centre their advice on this, attempting, insofar as possible, to mimic, predict, or pre-empt the actions of courts reviewing legislation or executive action for constitutionality. This generally entails the assumption that the judiciary are the most appropriate agents of constitutional interpretation. Secondly, the advice can adopt a distinctive perspective on the constitution, based on the particular position, powers and responsibilities of the branches of government being advised. This could be because the courts have not comprehensively identified all relevant points of law; because the courts will defer to the other branches' view of the constitution in particular respects; or because of a view that the constitution *can and should* be interpreted independently by the political branches in a manner distinct from judicial interpretation. The secrecy surrounding the provision of legal advice makes it difficult to know for sure what practice prevails the jurisdiction under consideration, but it is possible to get some sense of this.

Given the secrecy surrounding executive legal advice in the UK, it is hard to be definitive about the substantive norms governing its provision. Walker notes it is unclear whether the AG's constitutional duty is to give the most authoritative interpretation of the law, regardless of the government's position, or to choose from a range of *plausible* interpretations of the law that which is most conducive to the government's policy interests.[45] The self-professed ideal pursued by the Law Officers is to offer impartial detached advice in the manner of counsel's advice to any client: to give an objective analysis of the law as he sees it.[46] However, government legal advisors also seek to combine the professional detachment of the trained lawyer with a desire to share in the common goal of implementing policy objectives.[47] As one former holder of the office put it, although the Law Officer must strive to act in an impartial

[45] Neil Walker, *The Antinomies of the Law Officers* in Sunkin Maurice and Sebastian Payne (eds.), THE NATURE OF THE CROWN 159 (1999); Conor Casey, *The Law Officers: The Relationship Between Executive Lawyers and Executive Power in Ireland and the United Kingdom*, *in* CONSTITUTIONS UNDER PRESSURE: THE BREXIT CHALLENGE FOR IRELAND AND THE UK (Oran Doyle, Aileen McHarg, Jo Murkins eds., 2021).
[46] Jones, *supra* note 13, at 50.
[47] Edwards, *supra* note 10, 185.

and quasi-judicial manner which discharging his functions, they are inescapably political to some degree.[48] While the ideal pursued is detached and impartial assessment of what the law requires, the dual political and legal role of the AG creates potential for conflict of interest, particularly over controversial issues of interest to the government.[49] Jowell has argued that this fusion results in an inherent tension between the AG's political and legal roles and 'inevitably lends itself to charges of political bias in legal decisions'.[50] In short, while the AG's work strives to be (or to appear) court-mimicking, ideological considerations may play more heavily into formation of its advice than this allows.

The substantive norms underpinning executive review in Ireland are also shrouded in secrecy, making it similarly unclear precisely what standard the AG applies when assessing constitutionality. It appears, however, that it is heavily focused on the judiciary, and court-mimicking. Conversely, there is no evidence that the AG tries to consider issues of constitutionality in a less tactical, broader way, or encourages the government to form independent or distinct constitutional interpretations by virtue of its institutional role.[51] Nor is there evidence of highly partisan advice. Ireland is relatively uncritical in its political acceptance of judicial supremacy over constitutional interpretation and belief in the autonomy of legal reasoning from politics.[52] Moreover, the AG has virtually always been a practicing barrister of some standing; his advisory counsel staff have been practicing lawyers of several years; and practicing barristers are regularly brought in to assist with constitutional advice. Being more immersed in the courts, and less in politics, might produce a court-centric mode of advice rather than one that facilitates politics or sees politics as an independent locus of constitutional interpretation.

Again, the general practice for the Canadian AG not to publish his or her advice means that we cannot know for sure what approach is adopted. What evidence exists suggests that the 'viability of the policy in terms of judicial review' and 'risk-assessment' of invalidation form a core part of the process.[53] Moreover, a two-stage approach to limitations—considering first infringement and then limitation/justification—has been adopted, mirroring the Supreme

[48] Jones, *supra* note 13, at 69.
[49] Edwards, *supra* note 10, 61.
[50] Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant *Memorial Annual Lecture* (17 October 2006) 11.
[51] Kenny and Casey, *supra* note 30.
[52] Eoin Daly, *Reappraising judicial supremacy in the Irish constitutional tradition*, in Hickey, Cahillane and Gallen (eds), JUDGES, POLITICS AND THE IRISH CONSTITUTION (2017).
[53] Hiebert, *supra* note 37, 8.

Court's approach to the s 1 limitations clause and proportionality. There is some evidence, however, that it allows for independent interpretations of the Charter that do not match, and even contradict, the courts'. This might follow from the political nature of the AG, making it more likely that advice would prioritise the executive's view of the constitution. Kelly and Hennigar note several instances of 'dialogic' laws have been instances of override by stealth: that the legislature (on the initiative of the government) have defied Charter rulings of courts and enacted laws to circumvent these rulings and/or persuade the courts to change their minds on the interpretation of the Charter. This is done in ordinary law, 'without recourse to the recognized weak-form mechanisms within the Canadian legal system'.[54] This suggests at least some Attorneys General adopting or endorsing constitutional interpretations contrary to the courts'. Hiebert argues that this sort of approach is appropriate, and merely 'Charter proofing' by 'imitating' judicial reasoning would be a 'serious mistake', coming at the cost of distinctive executive and parliamentary views on the proper scope and meaning of Charter rights.[55]

The OLC in the US emphasises the need for its attorneys to observe robust detachment from political pressure, and strong attachment to professional integrity and lawyerly craft.[56] However, former staff and the Office's best practice guidelines make it clear the substantive norms governing its advice-giving self-consciously differ from a court. One former head described advice from the OLC as neither like advice from a private attorney nor like a politically neutral ruling from a court, but something 'inevitably, uncomfortably, in between'.[57] An OLC attorney 'help the President find legal ways to achieve his ends, especially in connection with national security'.[58] The OLC is therefore caught between defining the limits of executive action in a relatively detached manner and the President's desire to operationalize policy choices.[59] Whether the OLC strikes the right balance between facilitating presidential action without straying into partisan advice giving has proved immensely controversial. Ackerman, for example, argues that the relative absence of career lawyers in the OLC means the office is weak in institutional memory, packed with staff that combine mastery of technical legal craft with a strong belief in presidential power. This results in the OLC justifying robust uses of executive power.[60]

[54] Kelly and Hennigar, *supra* note 28, at 37-8.
[55] Hiebert, *supra* note 37, 54-55.
[56] Ackerman, *supra* note 27, 103.
[57] Jack Goldsmith, THE TERROR PRESIDENCY 35 (2009).
[58] *Id.*, 38.
[59] Griffin B. Bell & Ronald J. Ostrow, TAKING CARE OF THE LAW 185 (1982).
[60] Ackerman, *supra* note 27, 97.

Taken together, these systems demonstrate the breadth of variety of the norms which can govern provision of executive legal advice. They also show distinct attitudes on what government adherence to the rule of law requires, with the meaning and nature of such a commitment differing between jurisdictions. On one extreme, seemingly illustrated by Ireland, advice can be highly formalist and court-mimicking, based on probabilistic assessment—having regard to the prevailing law and outlook of the courts—of an executive measure being invalidated or condemned by the courts on constitutional or legal grounds. On the other pole, as embodied by the OLC, advice can offer independent, institutionally-specific viewpoints of the Constitution cultivated by the political branches. The UK and Canada fall somewhere in between, although it is hard to know precisely where.

(d) Centralised or diffused legal advice

The final relevant variable is the extent to which advice is centralised in the chief legal advisor or delegated to other parts of the executive, and how this is done. If the chief advisor is more likely to be politically influenced that civil service legal advisors at departmental/ministerial level, then centralisation will tend to increase executive influence.

Ireland, unsurprisingly for a small country, has a high degree of centralisation. Any policy proposal with major constitutional or legal implications will come to the Attorney General's Office. The most recent former AG has thus described the office as a sort of 'hub' for governmental business, with almost everything major government initiative coming before it.[61] Where more detailed legal advice is needed, this is sought before the circulation of a formal policy memo government. Where it is not obtained, the policy may not be allowed to go to Cabinet. In the ordinary course of things, all policymaking and law-making is subject to the influence of the AG.

The structure of the process of legal advice giving to the executive in the United Kingdom is characterized by both pluralism and centralisation.[62] A majority of government departments rely on either their internal legal advisers or the Government Legal Department (GLD) - which has a large staff and is headed by the Treasury Solicitor – for first instance legal advice.[63]

[61] Anne Marie-Hardiman, *The Lawyer at the Centre* 22 BAR. REV. 124-126 (2017).
[62] Jones, *supra* note 13, at 46.
[63] Barry K Winetrobe, *Legal Advice and Representation for Parliament* in Dawn Oliver and Gavin Drewry (eds.) THE LAW AND PARLIAMENT 95 (1998).

However, as noted above advice is centralised in the sense that the Law Officers help to co-ordinate government legal policy concerning the most important issues.[64] Law Officers must be consulted in several scenarios: if the legal consequences of action by the government has important policy repercussions; if a department legal advisor is unsure of the legality or constitutionality of legislation; if the *vires* of subordinate legislation is in question; or where two or more department advisors are in disagreement.[65] As such, we can say that the provision of advice on critical constitutional matters is highly centralised even though the provision of legal advice in general is more diffuse.

The Canadian system, similarly, is partly centralised and partly diffused. The AG with the help of Justice Department lawyers is responsible for the provision of major legal advice, especially when it comes to Charter issues. Hiebert notes that this was the source of tension in the early years of the Charter, as the other departments may have come to resent the increased influence of Justice lawyers in the policymaking process.[66] However, this process eventually led to a new bureaucratic culture that was far more conscious of rights issues, which we might take to mean that judgment on Charter questions on some level was diffused to the departments. MacDonnell, on the other hand, has argued that civil servants can and should do more in this respect, that they should view 'rights implementation' as a major constitutional function that they exercise.[67] Thus, though there is some diffusion, it is limited, and a large degree of centralisation remains.

The structure of the process of legal advice giving to the President in the United States is also characterized by a measure of pluralism and diffusion and can vary between administrations. Obviously given the large scale of the federal government, day-to-day legal questions are dealt with by internal legal advisors in federal agencies and departments.[68] But there is also a diffusion at the apex level, insofar as there are several potential advisors amongst whom the president can choose. It is ultimately up to the president to take care that the laws are faithfully executed. As there is no statutory or constitutional requirement he seek out and bind himself to *anyone's* legal advice, the President is entitled to adopt a judgment about whether a course of

[64] S.C. Silkin, *The Function and Position of the Attorney-General in the United Kingdom* 12 BRAC. L. J. 29, 34 (1978)
[65] *See Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (Cabinet Office, London, 2001) para. 22; *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers* (Cabinet Office, 2005) para. 6.22-6.44; *Ministerial Code* (Cabinet Office, 2018) para. 2.10-2.13.
[66] Hiebert, *supra* note 37, 9.
[67] MacDonnell, *supra* note 32, at 385.
[68] David Fontana, *Executive Branch Legalisms* 126 HARV. L. REV. FOR. 21 (2012).

action is lawful or constitutional.[69] The president could opt for a highly formalized OLC-led approach, or for a more informal arrangement, which might allow the president to shop for the most useful advice (say from the OLC or the White House Counsel) for the task at hand.[70] Should disagreement arise between these offices, the president can, and on occasion has, opted to follow a preferred legal opinion provided by the WHC.[71]

As with the other variables explored, each system highlights the discretion available to the executive to structure the provision of legal advice. In Ireland, we see a near complete centralisation of advice and an absence of institutional competitors for provision of legal advice for important political issues. The UK and Canada mix centralization and diffusion to different degrees, still exhibiting a high degree of centralisation on constitutional issues. The US presents the most diffused model.

Conclusion: Executive Legal Advice Not an Exogenous Constraint

Taking the variables together, we can see that there is a great deal of discretion in how to structure executive legal advice. Its configuration involves—consciously or inadvertently, explicitly or implicitly—considerable choices and trade-offs by the political executive. Since the role of executive lawyers is not fixed, legal advice to the executive is not, as Renan puts it, an exogenous constraint on the executive, simply binding it to the law.[72] While it can be a legalistic constraint over executive action in certain configurations, it can in others be a powerful *tool* for facilitating greater executive predominance over law and policymaking. This raises the possibility that executive legal advice could be a constitutional mechanism capable of being structured by elite political actors in a manner most suitable to them. In Part III, we explore how choices in respect of these variables can alter the effect of executive lawyers on constitutional politics.

[69] *See* generally, Morrison, *supra* note 8.
[70] Rebecca Ingber, *The Obama War Powers Legacy and The Internal Forces That Entrench Executive Power* 110 AMER. J. INT'L. L. 680, 692 (2016).
[71] A prominent recent example came during the Obama administration, when the President preferred the WHC's advice over the OLC's informal advice on the incompatibility of airstrikes carried out at the president's direction in Libya with provisions of the War Powers Resolution.
[72] Renan, *supra* note 1.

PART III – IMPACT ON EXECUTIVE POWER

Executive constitutional advice is ultimately Janus-Faced in its impact on the constitutional order. On the one hand, it can act as a potentially powerful constraint on the executive in the pursuit of its policy preferences, binding it to the law and the constitution and restraining its freedom of action. Conversely, constitutional advice can also empower the executive by providing legalistic credibility to executive action or inaction, even in controversial or contested cases, which—given the importance of legality to political legitimacy in most constitutional cultures—may have substantial political benefits. Finally, incorrect, or overly cautious advice may create serious policy distortion.

(a) Source of constraint

Reasons for constraint

Legal advice is deeply embedded in the policy-making process of each system considered here, and so the work of executive lawyers can have a real constraining effect on executive discretion, directing the executive away action it might otherwise consider more politically expedient or wise.[73] Even where the advice does not rule out certain actions/policies entirely, it may still dilute, divert, or modify them. Executive lawyers in Ireland, Canada, the UK and the US are not responsible for the actions taken following the giving of advice. They are not final or authoritative decision makers on legality or constitutionality, only advisors.[74] This raises a critically important question: why would the executive fetter its discretion through the work of executive legal advisors to the detriment of its substantive goals?

The constraining effect of legal advice appears partly linked to the importance of perceptions of legality to political legitimacy in contemporary constitutional democracies—because legality matters to 'voters, officials, political parties, interest groups, and social movements'.[75] The rhetoric of legality is a strong political and social force that limits executive authority and discretion.[76] Public revelation that an executive official took a contentious policy decision without seeking legal advice, or flying in the face of contrary legal advice, will invite political backlash[77] and intense political controversy.[78] The risk of a later judicial pronouncement of

[73] Terence Daintith and Alan Page, THE EXECUTIVE IN THE CONSTITUTION 306-307 (1999).
[74] Matthew Windsor, *Government Legal Advisers through the Ethics Looking Glass* in David Feldman (ed.) LAW IN POLITICS, POLITICS IN LAW 33 (2015).
[75] *See* Eric A. Posner and Adrian Vermeule, *Demystifying Schmitt* in Jens Meierhenrich & Oliver Simons (eds.) THE OXFORD HANDBOOK OF CARL SCHMITT (2016).
[76] Aziz Huq, *Binding the Executive (by Law or by Politics)* 79 U. CHI. L. REV. 777, 783 (2012). Yong, *supra* note 34, 94.
[77] Daintith and Page, *supra* note 73, 302.
[78] Winetrobe, *supra* note 63, at 99.

unconstitutionality or illegality of a major executive action may also carry with it similarly negative political consequences. Executive actors thus seek advice, particularly on contentious issues, to partly guard against negative political consequences of perceived illegality. Moreover, and perhaps just as significant, the normative force accorded to constitutional and legal norms in each system means that executive actors are also likely to have internalised norms around legality as a critical aspect of political morality.

This is not to suggest the executive does not ignore legal advice or attempt to manipulate/circumvent it (something discussed in detail below). Secrecy surrounding the provision and use of legal advice also makes it difficult to make definitive statements about this. However, the scarcity of documented cases where the executive has overtly acted contrary to legal advice suggests that doing so would be considered offensive to core values of political culture in each system and invite intense recrimination.

Partly because of the cultural premium placed on legality, publicly verifiable commitment to it through deference to legal advisor advice may be closely linked to justifying assertions of executive power.[79] The US and Canadian systems are interesting examples in this respect.

Culture of legality in the US and Canada

The question of whether the US OLC acts as a rubber stamp for the Presidency has sparked divisive debate.[80] Defenders of OLC argue that its cultural norms of professional integrity and robust detachment are largely internalised by actors in the executive branch. If OLC is perceived as a rubber-stamp for the president, this may undermine its ability to legitimise policies through legalistic analysis.[81] The OLC is only powerful because its work is taken seriously as sober legal analysis, not partisan advocacy,[82] and the executive has an interest in safeguarding the OLC's reputation by respecting the constraints of its judgments.[83] But presidential self-binding may go beyond political self-interest: a president might be committed to advertising his dedication to legality not just because it will help yield success in pursuit of

[79] Julian Davis Mortenson, *Law Matters, Even to the Executive* 112 MICH. L. REV. 1015, 1036 (2014).
[80] *See* Ackerman, *supra* note 27, for a strongly critical view. *See* Morrison, *supra* note 8 for an impassioned rebuttal.
[81] Anonymous, *supra* note 43, at 2098.
[82] Morrison, *supra* note 8, at 1722.
[83] Renan, *supra* note 1, at 882.

interests independent of law, but because 'being perceived to act lawfully is itself part of what he wants from his presidency'.[84] It may be an aspect of political morality.

The Canadian Attorney General, being the same person as the Minister of Justice, has a slightly more complicated role: while still only an advisor, she is also a full participant in government decision-making, creating a potential conflict of interests.[85] It might be unsustainable for the Minister to stay in office if his or her legal advice was ignored and the government acted in a manner they thought illegal or unconstitutional.[86] At the same time, there may be a political incentives for the Minister/Attorney may be to maximise freedom of action for the Cabinet, or a disincentive to impugn the desired policies of this group to which she belongs. This might mean that though the AG should have a constraining effect on governance, perhaps it does not. It is almost impossible to know given that the Attorney's interventions at Cabinet shield by Cabinet confidentiality. However, it is still clearly the case that conformity with the law and constitution is important in Canadian politics. Leading scholars of the Canadian political system suggest that 'Charter evaluation has become an intrinsic part of the policy process';[87] it is institutionalised at the federal level, has changed 'bureaucratic culture' and is reported to be fairly rigorous.[88] Charter considerations are taken into account early in the policy-making process, and may have a significant impact on how policy takes shape.[89] Kelly argues that the Ministry of Justice has a particularly significant influence in government by virtue of its role in Charter scrutiny.[90] Hiebert suggests that the reporting duty of the Minister, though it has never been used, may have a soft influence, encouraging augmentation/withdrawal of policies that would raise serious Charter concerns.[91]

In short, the pull of a culture of legality may operate as a constraint on action for reasons either of public/political perception, or of a genuine internal sense of being bound by the advice. In Ireland and the UK, there are several examples that show this constraining effect in action.

[84] Curtis A. Bradley and Trevor W. Morrison, *Presidential Power, Historical Practice, And Legal Constraint*, 113 COLUM L. REV. 1097, 1144 (2013).
[85] Hiebert, *supra* note 37, 11.
[86] *See Schmidt v Attorney General of Canada* 2016 FC 269; 2018 FCA 55.
[87] Hiebert, *supra* note 37, 54.
[88] Hiebert, *supra* note 37, 6-7.
[89] Hiebert, *supra* note 37, 10.
[90] James Kelly, *Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the Centre of Government* 42 CAND. PUB. AD. 478 (1999).
[91] Hiebert, *supra* note 37, 10.

Examples of constraint in the United Kingdom

The political tumult in the UK following the triggering of Article 50 of the TEU to exit the European Union provided interesting studies of the constraining effect legal advice can have, even on high-salience issues, and how dedication to perceptions of legality can constrain the executive in respect of crucial policies it would otherwise be eager to pursue. Then Prime Minister Theresa May's attempts to secure parliamentary approval for her draft Withdrawal Agreement with the EU were made very difficult partly due to a fear that elements of the agreement would be immensely difficult to disengage from should the EU and UK be unable to negotiate a permanent agreement for their prospective relationship. In particular, the Northern Ireland protocol (or 'backstop') was a source of particular criticism amongst influential Euro-sceptic backbenchers in her own party, the Democratic Unionist Party (with whom she had a Confidence and Supply agreement to shore up her minority government), and members of the opposition.[92]

Legal advice given by AG Geoffrey Cox in respect of the 'backstop' arrangement did little to strengthen the Prime Minister's hand. The AG advised the Government that his interpretation of the Agreement was that if the UK and EU simply could not conclude a future trade deal, which would supersede the backstop, then the UK would have no lawful means of exiting the backstop unilaterally under international law.[93] In March 2019, to help ease concern backstop would endure indefinitely, the Government agreed several additional instruments and declarations with the EU, with a clear hope the AG might alter his legal conclusions in a manner more conducive to the executive's policy goals. However, the AG reiterated his legal advice that, despite these additions, the protocol on Ireland/Northern Ireland still could not be legally unilaterally terminated by the UK save in very limited circumstances.[94]

AG Cox's advice on the backstop and its international law implications clearly proved a major barrier to former Prime Minister Theresa May's ability to gain support for the agreement. Parliamentarians from the opposition benches, the Democratic Unionist, and backbenchers from her own party all explicitly cited the legal risk identified in her own AG's advice as a

[92] *See* House of Commons Library, *The UK's EU Withdrawal Agreement* (11th April, 2019).
[93] Geoffrey Cox AG, 'Legal Effect of the Protocol on Ireland/Northern Ireland' (Attorney General's Office, 13th November 2018).
[94] Geoffrey Cox AG, 'Legal Opinion on Joint Instrument and Unilateral Declaration concerning the Withdrawal Agreement' (Attorney General's Office, 12th March 2019) at para. 19.

reason to reject the agreement.[95] The Prime Minister could, in principle, have replaced the AG and shopped for a more permissive legal opinion, one harmonising the law with the executive's preferred policy outcome. But such a move would have clearly opened the Prime Minister to severe political critique for attempting to cynically circumvent legal constraints.

That perceptions of genuine commitment to legality by the executive matter to political credibility and legitimacy can be seen in controversy surrounding the advice outlined by AG Lord Goldsmith on the legality of the 2003 British invasion of Iraq. Considerable ink has been spilled over whether the AG was placed under political pressure by senior executive figures to give a legal opinion helpful to the government's proposal to take military action against Iraq.[96] The legality of the proposed invasion became a major source of political conflict, and affirmation of its validity crucial to support for it. Prior to invasion, it was widely accepted by parliamentarians that AG's legal clearance would be required before military force could be deployed.[97] Despite there being no rule of law mandating executive adherence to their legal advisors, the *potential* to cabin executive action highlights their capacity to act as a veto-player and internal constraint on important policy issues. The serious political fall-out from allegations that the executive tried to circumvent the AG's initial advice underscores that, even if the executive *can* ignore or circumvent advice, such action may come at significant cost to political credibility and legitimacy if revealed.[98]

Examples of constraint in Ireland

Similar examples of the binding quality of executive legal advice can be found in recent political controversies in Ireland. Between 2011-2016, the then Fine Gael-Labour coalition government faced several calls by factions in the Oireachtas and pro-choice advocacy groups to allow an exception to Ireland's strict abortion regime for fatal foetal abnormalities, where the foetus would not survive long outside the womb. On each occasion, the government reported that the AG advised this would be unconstitutional by virtue of the textually entrenched right to life of the unborn. This advice explicitly motivated the exclusion of this measures from a 2013 Act, and for later voting down of a private member's bills that would have allowed for it.[99] On each occasions, members of the socially liberal Labour Party, who

[95] Rowena Mason and Rajeev, 'ERG signals it could back May's Brexit deal if legal advice is clearer' *The Guardian* (13rd March, 2019).
[96] Robert Verkaik, 'Goldsmith under pressure from legal profession over impartiality' *Independent* (29th April 2005).
[97] Matthew Windsor, *The Special Responsibility of Government Lawyers and the Iraq Inquiry* BRIT. YB. INT'L. L. 3 (2016).
[98] James Blitz, 'Why the attorney-general will matter on Brexit' *Financial Times,* (26th October, 2018).
[99] Michael O'Regan, 'Government defeats Daly's abortion Bill with big majority' *The Irish Times* (10th February 2015).

had long campaigned on liberalising Ireland's abortion regime, were whipped to vote against the bill based on this advice.[100] The Minister for Health went so far as to state that the fact of the matter was that the government could not introduce any legislation to parliament if the AG had advised it was unconstitutional, effectively turning her advice into an ex-ante binding rule of law.[101] Though some members of the executive were either strongly in favour of these measures, the AG's opinion on the constitutionality seems to have been determinative of the issue.

Another recent example was seen in 2018, when the Irish State announced that it would honour repayments to holders of around 270 million euro of junior (subordinated) bonds sold by an Irish bank before its collapse and nationalisation during the financial crisis. This came as a surprise, due to repeated assurances by the previous Irish government that the bonds would not be honoured as they merely represented a risky and unsuccessful investment.[102] The only apparent basis for this unpopular *volte-face* was that the AG advised that any move not to pay the bondholders would not withstand a constitutional challenge, being an unjustified interference with constitutional property rights.[103] This advice apparently contradicted former AGs, who, during the financial crisis, advised that losses could be imposed on junior bondholders.[104] That the AG's view essentially determined this, highly politically unpopular issue, highlights the constraining effects of the role.

(b) Source of empowerment

While it is clear that constitutional advice can and does constrain executive actors, this is not the whole story: even if legal advice does not always favour the government's preferred course of action, the *fact* that the executive is subject to legal review by executive legal advisors provides a source of powerful political credibility.[105] Posner and Vermuele note that credibility is critical to executive power; without it, the executive's ability to employ its constitutional, statutory, and political authority is impaired.[106] Executive commitment to binding itself to its legal advisors' articulation of constitutionality constitutes what Renan dubs a form of

[100] Lucinda Creighton, 'Why an attorney general's advice should be public: Opinion Governments should not use secret legal advice as an excuse for policy U-turns' *The Irish Times* (6th April 2015).
[101] Dáil Eireann Debate, 31st Dail 886 No.4 Friday, 6 February 2015.
[102] Joe Brennan, 'Repayment to junior Anglo bondholders unpreventable, said AG' *Irish Times* (19th December, 2018).
[103] *Id.*
[104] Peter O'Dwyer, 'Irish taxpayers could have been spared €14bn' *Irish Examiner* (July, 2015).
[105] Richard Pildes, *Law and the President* 125 HARV. L. REV. 1381, 1390 (2012); Adrian Vermuele, *Conventions of Agency Independence* 113 COLUM. L. REV. 1163, 1210 (2013).
[106] Adrian Vermuele and Eric A. Posner, *The Credible Executive* 74 U. CHI. L. REV. 865, 913 (2007).

'reputation building', signalling to other political actors that the executive acts in accordance with law and the constitution.[107] It may be worth sacrificing some freedom of policy action to do this: while elite actors, political opponents, or the electorate might viscerally dispute a government policy or ethical or moral grounds, they cannot as easily attack it on *legal or constitutional grounds* if there is a perception that it has undergone rigorous scrutiny for compliance with legal norms by legal experts. This is particularly the case when advice is not published, and its cogency cannot be assessed in depth, and where there is cultural belief in the technocratic, apolitical nature of the advice.

Several examples from Ireland, the UK and the US show constitutional advice as central to legitimation of controversial executive policy positions, just as much as or more than ethical/ /moral or political arguments. It is difficult—sometimes impossible—for us to know if the advice being relied upon justifies the particular action or inaction, or if the government is using legal advice as cover to justify courses of action it already wished to take. This could be done with the collaboration of an AG that allows ideological affinity to cloud political independence, or the advice could be exaggerated, presented as being firm when it is equivocal. In either case, the result could be a substantial bolstering of the executive's position using contestable or incorrect legal advice.

Examples of empowerment in the UK

On several recent occasions, the UK government heavily leaned on legal advice to justify intensely controversial decisions on the use of armed force. As discussed above, prior to the invasion of Iraq in March 2003, pressure mounted on the then Labour Government to make public advice that it had received providing legal basis for military action in Iraq. It later emerged that the AG had altered his views on the legality of the war in the period leading up to invasion. Differences between the original advice tendered by the AG to Prime Minister Tony Blair, and the summary of advice published at the time of parliament's vote, gave rise to speculation that the Attorney had been under political pressure to temper his opinion to align with government.[108] The AG's advice on invading Iraq was crucial to legitimizing the government's decision[109] - a fact underscored by Blair's emphatic statement during his testimony to the Chilcot Inquiry on the Iraq War that it was 'absolutely clear' that if the AG

[107] Renan, *supra* note 1, 818.
[108] Windsor, *supra* note 74, at 4.
[109] Rebecca Moosavian and Conall Mallory, 'How Tony Blair, Jack Straw and Lord Goldsmith come out of the Chilcot Report' *The Conversation* (July 19, 2016).

'in the end had said, "This cannot be justified lawfully", we would have been unable to take action'.[110]

Governments have, on several later occasions, heavily relied on advice from the Law Officers regarding the legality of deploying the armed forces abroad. Debates on armed intervention in Libya, the Syrian Civil War and against ISIS, all involved executive invocation of 'almost every conceivable legal justification for the use of force before the Westminster Parliament'[111] in a bid to secure political approval for the exercise of prerogative power. For example, when debating whether the UK could and should extend airstrikes against ISIS into Syrian territory, then Prime Minister David Cameron stressed to parliament, justifying military action, that intervention had a strong legal, as well as moral, basis but refused to reveal the advice received from the Law Officers.[112]

Following use of chemical weapons by Syrian Armed Forces against Syrian civilians in April 2018, the United Kingdom participated in deterrent retaliatory strikes alongside France and the United States. The UK government did not seek parliamentary approval for these strikes but relied on its prerogative power to act unilaterally, a move the Leader of the Opposition decried as 'legally questionable'. Then Prime Minister Theresa May defended by insisting the military action was both 'moral and legal', swiftly releasing a summary of the legal advice justifying the air strikes to parliamentarians and the public.[113] Commentators observed release of a summary of the government's legal position was unsurprising, given how legal advice received by the government had become central to political argument over military action.[114]

Murray and O'Donoghue have argued the legal justifications proffered in some of these instances was—insofar as it could be critiqued in the absence of disclosure of full legal advice—based on 'legally dubious…doctrines' and 'superficially-impressive legalese'.[115] But

[110] Transcript of evidence given by the Rt Hon Tony Blair, 29 January 2010, 150. Available at: https://webarchive.nationalarchives.gov.uk/20171123123234/http://www.iraqinquiry.org.uk/the-evidence/witnesses/b/rt-hon-tony-blair/.
[111] Colin Murray and Aoife O'Donoghue, *Toward Unilateralism? House of Commons Oversight of the Use of Force* 65 INTL' & COMP. L. QUART. 305, 306 (2016).
[112] Prime Minister's Office, 'Memorandum to the Foreign Affairs Select Committee Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria' (November 2015) 15-17.
[113] BBC News, 'Syria air strikes: Theresa May says action 'moral and legal', 17th April 2018. Available at: https://www.bbc.co.uk/news/uk-politics-43775728; Prime Minister's Office, 'Syria action – UK government legal position' (14th April 2018).
[114] BBC News, 'Syria air strikes: UK publishes legal case for military action' (14th April 2018).
[115] Murray and O'Donoghue, *supra* note 111, at 306.

whatever the merits of the advice, this shows that such advice has been central to legitimation of controversial decisions of the government in the eyes of external political actors, in perhaps equal measure to ethical and moral concerns.

Examples of empowerment in Ireland

Irish Governments have regularly relied on the advice of the Attorney General to justify controversial policy positions concerning executive power.[116] One recent example came to light after a revealing exchange in late 2019, when then Taoiseach Leo Varadkar told the Dáil it would not be appropriate to issue a 'money message' for a private members bill pursuant to Article 17.2. of the Constitution, if the executive was advised by the AG that a bill was unconstitutional, contrary to European law or to any international treaties.[117] This interpretation, which the Taoiseach squarely attributed to AGs advice, effectively provides the executive with a veto authority over which private members bills receive a money message, and thus continue to proceed through the legislative process. Bills which do not receive a money bill cannot proceed to Committee Stage and can languish indefinitely. This statement was criticised by constitutional commentators on the basis that while Article 17 provides that only the executive may introduce a bill of financial significance, it was never intended to provide the executive with a generic veto power which would subordinate the entire sweep of the Oireachtas' law-making function to the executive's views on a bill's legality.[118]

An arguably even more constitutionally controversial example came during the 2020 General Election. While the polling date was set for 8th February 2020, uncertainty emerged following the sudden death of a candidate in the Tipperary constituency. Section 62 of the Electoral Act 1992 provides that in such circumstances: 'all acts done in connection with the election (other than the nomination of the surviving candidates) are void and that a fresh election will be held.' On foot of this provision, the returning officer for the constituency postponed the polling date. However, a further difficulty arose as Article 16.3.2 of the Constitution states that a general election must be held not later than 30 days after the dissolution of the Dáil. Applying the 1992 Act and restarting the electoral process in Tipperary, would take the poll outside that time period. Evidently concerned postponement of the poll could leave the whole election open to

[116] Daly *supra* note 52, 40.
[117] Dáil deb 4 December 2019 vol 990 no 5.
[118] Kenny and Casey, *supra* note **51**, at 104. *See* David Kenny and Conor Casey, *The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019* PUBLIC LAW 356-376 (2021).

challenge as a breach of Article 16.3.2, the Government issued a 'special difficulty order' purporting to suspend operation of s.62 and allow the poll to continue in early February. The government justified the legitimacy of this decision by citing the advice of the AG, who given the executive's course of action appeared to advise that, contrary to clear legislative provision in s.62, the poll should go ahead on the basis suspending it was unconstitutional having regard to 16.3.2.[119]

The Government and AG are, of course, entitled to hold the view that a given statutory provision is unconstitutional. But even if s.62 is of dubious constitutionality, what makes the Government's actions an unprecedented and highly controversial exercise of executive authority[120] is that it is a bedrock tenet of the Irish constitutional order that the executive cannot suspend a duly enacted statute, whether through its Article 28 executive power,[121] or by relying on a statutory administrative power.[122] The Constitution explicitly vests the power to invalidate unconstitutional laws in the Superior Courts, and the executive enjoys no authority to dispense or de facto repeal laws it considers harmful or unlawful. In both the foregoing scenarios, AG's advice appeared front and centre of Government attempts to justify and legitimate broad assertions of executive authority.[123]

Examples of Empowerment in the US

In the US, OLC endorsement of a presidential policy can increase its perceived legitimacy by the other branches of government and public at large. Presidential self-binding to OLC opinions, even if they are not always in his favour, is an important source of self-imposed constraint critical to executive credibility which can then justify assertions of presidential powers.[124] Moreover, OLC opinions *are* statistically favourable to the executive, frequently providing legalistic affirmation in the pursuit of controversial political policies.[125] Since OLC often relies on its own precedent, generous OLC interpretations of presidential authority pass on an increasingly expansive set of opinions and precedents for the next OLC to build on. OLC advice has bolstered and affirmed broad executive powers in the context of foreign affairs,

[119] Irish Government News Service, 'Special Difficulty Order' (5th February 2020) https://www.merrionstreet.ie/en/news-room/releases/special_difficulty_order.html.
[120] Gerard Hogan and Hilary Hogan, *Legal and Constitutional Issues Emerging from the 2020 General Election* 63 IR. JUR. 113, 116 (2020).
[121] Conor Casey, *Underexplored Corners: Inherent Executive Power in the Irish Constitutional Order* 40 D.U.L.J. 1, 28 (2017).
[122] Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution,* para. 4.2.27
[123] Kenny and Casey, *supra* note 118.
[124] Pildes, *supra* note 105.Mortenson, *supra* note 79, at 1036
[125] Renan, *supra* note 1, at 869.

national security, war powers, and separation of powers.[126] The OLC's work under the Trump administration is no exception, as it has been on the 'frontlines defending some of the Trump Administration's most politically fraught policies.'[127]It approved President Trump's controversial executive order relying on emergency statutory powers to reallocate funding to pay for his long sought-after border wall, and its opinions have been deployed to buttress controversial positions on Congressional scrutiny of the President.[128]

Informal pressure on the OLC from the White House has also been highlighted as a threat to its independent judgment. Intense national security concerns can put enormous pressure on the OLC to justify expansive understanding of presidential authority.[129] Perhaps the most extreme example of an OLC opinion bending legal sources to justify broad interpretations of presidential power because of such pressures came during the Bush presidency, when the OLC provided several opinions upholding every aspect of the Bush administration's aggressive antiterrorism initiatives, including torture, based on an extremely broad understanding of the president's war powers. The memos, which were eventually withdrawn,[130] are said to be replete with strained legal reasoning and lacking support in judicial precedent.[131]

(c) Source of policy distortion and uncertainty

The final possible effect of constitutional advice on executive power is that is can distort policymaking and governance. Distortion—with its pejorative connotations—must go beyond the appropriate influence of legal or constitutional boundaries, which are legitimate and appropriate fetters on policy. However, when the constraining effect goes beyond this—when advice is wrong, or overly cautious—then policy distortion can occur and the political branches are forced to not act in ways that they would, absent this inappropriate fetter, think best.[132]

Hiebert, writing in the Canadian context, notes that legal advice on constitutional matters 'may lead to risk-aversion that distorts policy objectives and undermines Parliament's ability to pursue legislative objectives effectively'. In particular, when this advice is court-mimicking—

[126] Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel* 28 YALE. L. & POL. REV. 439, 453 (2010).
[127] Shalev Roisman, 'The Real Decline of the Office of Legal Counsel' *Lawfare* (8th October, 2019).
[128] Johnathan Shaub, 'The Prophylactic Executive Privilege' *Lawfare* (June 14th, 2019).
[129] Neal Katyal, *Internal Separation of Powers: Checking Today's Most Powerful Branch From Within* 115 YALE L. J. 101, 124 (2006).
[130] Goldsmith, *supra* note 57, 98; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel* 110 COLUM. L. REV. 1448, 1454 (2010).
[131] Cornellia T. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands* 103 MICH. L. REV676, 677 (2005).
[132] *See* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty* 94 MICH. L. REV. 245, 247 (1995).

predicting judicial outcomes rather than fostering distinctive constitutional understandings—there is a risk that the political branches 'may forego important legislative objectives or adopt legislative measures that are less ambitious and comprehensive than required, because of inaccurate assumptions that courts would find these faulty'.[133] However, evidence from Canada suggests, first, a fairly distinct political view of the Charter rather than an entirely court-mimicking approach. Moreover, far from being overly constrained by court interpretations of the Charter, Kelly and Hennigar argue that the political branches have perhaps even been *too* willing to offer divergent interpretations of Charter values that directly conflict with the courts.'[134]

In Ireland, however, the risk of policy distortion seems real. Between 2011-2020, a Fine Gael-Labour coalition government, followed by a Fine Gael minority government, faced serious criticism for their handling of Ireland's homelessness crisis. The government received considerable critique for its alleged lack of robust action. On over a dozen occasions, both governments claimed to face very severe limitations on legislative action due to AG's advice on constitutional property rights.[135] The coalition government asserted that several measures it hoped to adopt to tackle the growing housing crisis—including vacant site levies, land hoarding restrictions, capping mortgage interest rates, eviction protections, and regulation of 'vulture funds'—were all stymied by AG's advice.[136] Then Minister for Housing Alan Kelly TD explicitly stated after his period in office that these measures were sincerely desired by government, and were hampered not by political or financial obstacles or objections, but solely by the AG's advice on constitutional property rights.[137]

In response to various parliamentary proposals to tackle the crisis, the then Fine Gael minority government stated that the proposals were unconstitutional according to the AG and said it could not support them. The legal advice may have served as political cover when opposing potentially popular measures, as well as giving other parties reasons to oppose the measure.[138]

But the AG's stated position on many of these points has been seriously contested on the basis that under Supreme Court precedent property rights can be highly qualified in the interests of

[133] Hiebert, *supra* note 37, 55.
[134] Kelly and Hennigar, *supra* note 28, at 35.
[135] Finn Keyes, "Property rights and housing legislation" *Oireachtas Research & Library Service Briefing Paper* (2019).
[136] Kenny and Casey, *supra* note 30
[137] Kitty Holland, 'Kelly says Constitution blocked attempts to tackle housing crisis' *The Irish Times* (31st March 2016).
[138] Kenny and Casey, *supra* note 118.

the common good and social justice.[139] As the advice was not published the plausibility of the AG's reasoning—or even how the government portrayed the AG's reasoning—could not be assessed or critiqued. Some commentators suggested the AG's advice was highly cautious and based on a conservative reading of judicial precedent.[140] If this is so, this legal advice has had a major distorting effect on policy, denying the political branches of the ability to pursue important measures on the basis of questionable predictions of judicial action.[141]

PART IV: NORMATIVE IMPLICATIONS

In light of the foregoing comparative analysis, what should we make of the practice of executive legal advice in these jurisdictions, and in general? We suggest three salient normative points emerge from this survey.

A hugely important phenomenon with constraining/empowering effects on executive

First, this study shows the immense significance of executive legal advisors. The many examples discussed here show beyond doubt that it is something that can have vast effect on the role and powers of the executive in the constitutional order. What they do not show, however, is a simple model of understanding this phenomenon such that we could suggest an 'optimal' structure for executive legal review. Certain legal cultures will take a different view of what it means to conform to the law than others, and one cannot say *a priori* that one is right and one is wrong. Such review can come in many different manifestations, varying along the axes outlined in Part II, each with their own difficult normative trade-offs which are inescapably political choices. What we can say is that the structure of executive legal review has real effects and consequences on the constitutional order, the most important effects being related to the question of whether the work of executive lawyers represents, on balance, a constraining or an empowering force for the political executive.

These effects seem to map to some extent onto the variables identified here. A technocratic system of executive review like Ireland may be more apt to constrain executive action than a more ideologically and politically loyal advisor, as in the US or Canada. However, such an advisor may have the effect of overcorrecting with conservative legal advice, distorting policy

[139] Kenny and Casey, *supra* note 51.
[140] Hilary Hogan and Finn Keyes, 'The Housing Crisis and the Constitution' *The Irish Jurist* (Forthcoming, 2021).
[141] The only other possibility would be that the government presented the AG's advice as very starkly negative when it was in fact more mixed, as legal cover for an ideological political preference for market-based solutions to the housing crisis. This would be a problematic instance of the sort of executive empowerment discussed above. But there is little evidence for this reading, so we take it an example of policy distortion.

by stopping desirable social or economic policies that might be constitutionally acceptable. This effectively blocks policy that no court has ruled unconstitutional and that the popularly elected branches wish to pursue. This is compounded if advice giving is highly centralized and executive lawyers face no institutional competitors to which the political executive can look for a second opinion. A highly technocratic system can thus stifle dialogue or collaboration (or whatever else you might call it)[142] between courts and the political branches on the boundaries of the Constitution and prevent development of distinctive political constitutional views.

When allied with high levels of opacity, such a system also may allow the executive to cite legal advice to deflect blame for unpopular policy stances by hiding behind the constitution. This model may nurture a public impression that the constitution is simply a barrier and obstacle to policymaking, with lawyers and judges as the gatekeepers. It does not see the Constitution as an empowering document that inspires and directs governance and politics. To paraphrase Appleby and Olijnyk, this kind of system could lead to an inappropriately 'constitutionally conservative' approach to policy development which in turn risks 'constitutional – and potentially social – stagnation'.[143]

On the other pole, as embodied by the OLC and the Canadian AG, advice can invoke departmentalism or political constitutionalism, and offer independent, institutionally-specific viewpoints of the Constitution cultivated by the political branches. While judicial precedent may be weighty, it may not be determinative or adhered to in a rigid fashion. This can allow an executive lawyer to offer a plausible, good-faith political constitutionalist view of the law that better facilitates the pursuit of policies that the government or parliament believe to be in the common interest.

However, the risks of this configuration are also clear, as highlighted by examples from Part III. By or stretching precedents and constitutional concepts, executive lawyers can facilitate executive circumvention of constitutional constraints, greatly empowering the executive by clothing its policies in a superficial veneer of legality. The executive may manipulate this system to secure advice that is conducive to its powers and agenda. Executive manipulation of advice may be aggravated by a more diffused model, which allows the executive to shop for

[142] *See* generally Aileen Kavanagh, *The Lure and Limits of Dialogue* 66 U. TOR. L. J. 83 (2016).
[143] Gabrielle Appleby and Anna Olijnyk, *Executive Policy Development and Constitutional Norms: Practice and Perceptions* INT'L J. CONST. L. 1, 8 (2021).

compliant advice. If accompanied by opacity, allows the executive to shield legally empowering opinions from critique and controversy by other political actors and the courts.[144] The capacity for abuse is obvious.

The examples outlined in Part III highlight that both of these negative effects—excessive constraint and excessive empowerment—are all real possibilities. Institutional design—in terms of the level of independence of the advisor and the centralisation of the provision of advice—can make some outcomes more likely, even if the political culture and practice of legal advice is perhaps as important in shaping how the system plays out. Attempting to set up such a system, to the extent it can be controlled and reliably designed in light of the variables considered in Part II, requires extremely difficult normative trade-offs, to which there are no easy answers—only politics and a preference for accepting one form of political risk over another.[145]

The structure of advice matters and deserves attention

Secondly, this study shows, we think, that we should pay a great deal more attention to the structures that surround executive legal advice and to the culture and practice of advisors. Constitutional designers and comparative constitutional scholars should give thought and consideration to what features of the design of the executive and its legal advisors should be adopted; to what outcomes might be made more or less likely by certain structural choices; about how and why certain cultures develop. A striking feature of all four systems is the informal and unstructured development of these advisors and their culture. Given the immense importance of this institution as demonstrated here, it would seem to us that this deserves much more attention, and that certain features and structures would be worth formalising in statute or perhaps, in some instances, in constitutional text. For example, methods of appointments and removal; level of independence; required skills and competences; the purpose and focus of advice—these might sensibly be decided upon in an effort to achieve certain outcomes and avoid others. No approach is acontextually optimal, and the difficulty of controlling or developing culture is acute here. But it would seem to be preferable to actively consider these points and attempt to achieve the outcomes we desire rather than not making this attempt at all.

[144] Renan, *supra* note 1, at 852.
[145] *See* Adrian Vermeule, THE CONSTITUTION OF RISK (2013).

Moreover, comparative constitutional law could usefully pay more attention to the role and influence of these advisors on constitutionalism in practice. Their effect on constitutional law is very significant, and yet has not been the subject of sustained and broad comparative enquiry. It might be that, with broader study of more (and more diverse) jurisdictions, trends may emerge that would suggest that certain outcomes correlate to certain structures or design choices, or that either empowerment or constraint is a more dominant effect of these systems. Certain types of legal system may fit better with certain practices. It may be possible, though difficult, to undertake detailed assessment of the culture, norms and practices of advisors to paint a richer picture of this advice. It seems that this is an area worthy of further and deeper exploration to postulate rules—or rules of thumb—for how to structure this institution.

The case for transparency

Our third normative argument is that there is one variable of executive legal advice that is problematic in a constitutional democracy: severe lack of transparency.[146] Given their importance to executive power and the broader constitutional order, executive lawyers require greater scrutiny and greater transparency than these jurisdictions exhibit. Transparency could combat some of the negative consequences of both the technocratic and political models of executive legal review. If legal advice on contested constitutional or legal matters were a matter of public record, we could see how the advice is formulated; understand its biases and blind spots; and how it is used in practice in governance. Where appropriate, politicians and the people can challenge the inappropriate use of advice. It would also help to hold executive lawyers—with the increasingly powerful role in the wielding of executive power—to account. For example, transparency would deter an executive from citing cautious or equivocal court-centric legal advice to deflect blame for unpopular policy stances. It could also deter an executive from exploiting the political model to leverage little more than politically motivated and flimsy legal cover for executive action. It could, over time, allow policy-distorting effects of executive legal advisors to be highlighted and challenged.

This transparency could come in multiple forms: framework statutes or executive orders which offer greater clarity over the basis for appointing executive lawyers, their precise role & purpose, and the substantive ethics and norms which govern their work; greater disclosure of advice; or publication of a precis or summary of advice. It need not involve exhaustive

[146] Kenny and Casey, *supra* note 4.

disclosure of all relevant preparatory material, disclosure of all advice on any matter engaging constitutional issues, nor issues engaging acutely sensitive national security questions or pending litigation. Rather, as a matter of pragmatism, it could be reserved for politically contentious issues, where it is most important to involve the legislature and the public in debate, deliberation, and scrutiny.

The recent Canadian development of Charter Statements is an important innovation. These began in 2016 as discretionary statements by the Minister on the Charter considerations surrounding any given bill. Even in this informal form, they offset to some degree the failure of the formal reporting procedure to produce any observable effect. In 2018, they were placed on a formal statutory footing and expanded to cover all bills.[147] These statements are not revelations of the legal advice provided by the Minister/Attorney General. Indeed, is not formal advice on constitutionality but instead a way to 'to help inform members of the Senate and the House of Commons as well as the public'[148] of a Bill's potential effects. It is a measure to put out public information on important rights matters and improve parliamentary scrutiny of same. The legal obligation is that the statement 'sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the Canadian Charter'.[149] But it is probable that this is a partial, but not complete, account of what might go into a determination on inconsistency: 'the Minister is sharing some of the key considerations that informed the review of a bill for consistency with the Charter… It is not intended as a comprehensive overview of all conceivable Charter considerations.'[150] It also does it include non-Charter constitutional issues that might be raised in the Minister's consideration of a bill. The tone of such statements is not highly legalistic, instead canvassing the rights issues in a more accessible way. They tend consider the rights vindicated by a bill as well as those that might be infringed. They also tend to steer away from hard conclusions, but instead to broadly support consistency of a measure. Although partial, they are also consistently more extensive and detailed than the often perfunctory statements of compliance issued by Ministers pursuant to section 19 of the Human Rights Act 1998.[151]

[147] See Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act, amending s 4 of the Department of Justice Act. The Bill was given royal assent on December 13th 2018.
[148] S 4.2(2) of Department of Justice Act, as inserted by C-51.
[149] 4.2 of Dept of Justice Act.
[150] See 'Charter Statement - Bill C-81: An Act to ensure a barrier-free Canada', June 20th, 2018. https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c81.html.
[151] Section 19 provides that a minister must 'make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights' or if he is 'unable to make such a statement of compatibility the government nevertheless wishes to proceed with the Bill'. https://www.legislation.gov.uk/ukpga/1998/42/section/19.

There are several noteworthy features of this development. First, it is a formalised legislative requirement that an influential legal advisor reveal, at least in part, the thinking that underlies the legal advice it provides. Secondly, it is a direct response to the opacity of the system of advice (and the failure of a prior transparency measure to provide any transparency in practice).[152] Thirdly, it is specifically directed to empowering politicians and the public to consider the advice and to debate legislation in light of this, which provides scope for much greater challenge to its authority and much greater accountability for such advisors. Fourthly, it does not mandate disclosure of the full and detailed legal advice, which might offset objections from those who maintain that some level of confidentiality around the advice itself is required.[153] Charter Statements could thus be a roadmap for increasing transparency in other systems where there is a strong and secretive executive legal advisor. It is important to be realistic: the efficacy and influence of Charter statements will take time to know, and there is no necessary reason to think that this development is likely to be copied elsewhere. But it illustrates how transparency could be improved with a fairly modest change in practice.

CONCLUSION

The work of executive lawyers can operate either as a legalistic brake, or constitutional accelerator for executive power. Depending on the conventions, norms, and structure in which they operate executive legal advisors can be seen as the:

> 'Machiavellian counsellor in the shadow of the elected official; the hired gun who meekly accedes to executive policy proposals; or the conscience of the administrator, tasked with 'speaking law to power'.[154]

One's views on the appropriate way to handle the executive power and the norms that surround it will probably dictate the structure and culture that one wishes to develop. But a level of transparency in the process appears desirable regardless of other considerations. Beyond this, the crucial point is that the processes and substantive norms governing the work of executive legal advisors are of great importance to the exercise of public power in constitutional democracies, and our understanding of executive authority. More work is needed on similar mechanisms in other legal systems and traditions. The relationship of legal advice to executive

[152] See Martin, *supra* note 23, at 201.
[153] For example, based on cabinet confidentiality.
[154] Windsor, *supra* note 74, 117.

power deserves much greater scrutiny from a comparative and theoretical perspective in the study of constitutional law and in the practice of politics to understand how they empower and constrain those they serve.