

Constitutional Avoidance and Presidential Power

By Aneil Kovvali*

Introduction

Recent developments have brought renewed attention to statutes designed to constrain and discipline the President. The federal anti-nepotism statute, the federal conflict of interest statute, and the Federal Advisory Committee Act all appear set to endure unusual stress in the coming years. Troublingly, these statutes have already been given limited constructions that weaken their power to restrain the President. Under the constitutional avoidance canon, courts construe statutes so as to avoid constitutional questions. Citing the avoidance canon and the President's (sometimes merely arguable) constitutional prerogatives, courts have limited the scope of statutes meant to discipline the presidency. The application of constitutional avoidance in this context is uniquely troubling. The President is an active participant in the legislative process, and can use his veto power to protect his prerogatives for himself. As a result, judicial avoidance can greatly extend presidential power in a way that is difficult for Congress to reverse. The President's unique powers also make the application of constitutional avoidance particularly problematic in this context.

I. Constitutional Avoidance

News reports have suggested that various norms will be under unusual strain in the coming years. For example, while the text of the federal anti-nepotism statute, 5 U.S.C. § 3110, seems to prevent the President from appointing close relatives to any civilian role, the President's son in law and daughter were recently appointed to White House positions.¹

But even when statutory text cuts against such arrangements, courts seem willing to distort such texts to expand presidential discretion. For example, in *Public Citizen v. United States Department of Justice*,² the Supreme Court gave a limited interpretation to the Federal Advisory Committee Act ("FACA"). The FACA was enacted by Congress to bring order to the patchwork of committees, boards, and commissions created to advise executive branch officials.³

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¹ See, e.g., Jackie Northam & Marilyn Geewax, *Ivanka Trump's Move to the White House Raises Questions About Ethics*, NPR (Mar. 21, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/21/520965076/ivanka-trumps-move-to-the-white-house-raises-questions-about-ethics>; Steve Holland & Emily Stephenson, *Trump's son-in-law Kushner to become senior White House adviser*, Reuters (Jan 10, 2017), <http://www.reuters.com/article/us-usa-trump-kushner-idUSKBN14T251>. The Department of Justice's Office of Legal Counsel blessed Kushner's appointment in a memorandum alluding to avoidance principles. See *Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office*, 41 Op. O.L.C. 1, 13 (2017).

² 491 U.S. 440 (1989).

³ *Id.* at 445-46.

Where it applies, it imposes strict procedural requirements, including various disclosures.⁴ In *Public Citizen*, the Court considered whether FACA applied to executive consultations with the American Bar Association regarding judicial nominations.

The Supreme Court adopted a narrow reading of FACA that excluded the American Bar Association's advice. While various considerations supported the decision, the Court was ultimately persuaded by the constitutional avoidance canon: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."⁵ Acknowledging the lower court's concern that the statute "infringed unduly on the President's Article II power to nominate federal judges and violated the doctrine of separation of powers,"⁶ the Supreme Court adopted a narrow FACA interpretation that avoided the constitutional question by excluding the consultations.⁷

Similarly, in *Association of American Physicians and Surgeons v. Clinton*, the District of Columbia Circuit held that the FACA did not apply to a presidential task force on health care, a group chaired by then-First Lady Hillary Rodham Clinton.⁸ The court was moved by constitutional concerns, stating that "Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes."⁹ Instead of deciding whether this principle would make it unconstitutional for Congress to regulate the task force, the court adopted a limited reading of the statute that excluded the task force.¹⁰

II. Presidential Involvement in the Legislative Process

The constitutional avoidance canon is well entrenched, though it has been heavily criticized.¹¹ But the canon is particularly problematic in this context, given the President's involvement in the legislative process. The President's veto power over legislation allows him to defend his constitutional prerogatives for himself, and means that the constitutional avoidance canon can have an unusually distortive effect in this context.¹²

⁴ *Id.* at 446.

⁵ *Id.* at 465-66 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

⁶ *Id.* at 466.

⁷ *Id.* at 467.

⁸ 997 F.2d 898 (1993 D.C. Cir.).

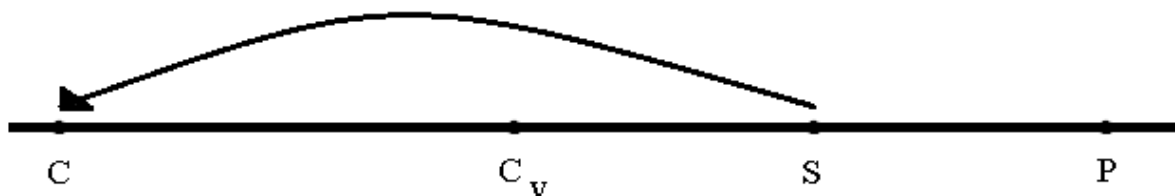
⁹ *Id.* at 909.

¹⁰ *Id.* at 911. The court also briefly commented on the anti-nepotism statute. *See id.* at 905.

¹¹ *See* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 331 (2015) (noting that "critics include the most eminent circuit judge of the last generation, two of the most eminent circuit judges of the present generation, and a host of thoughtful scholars").

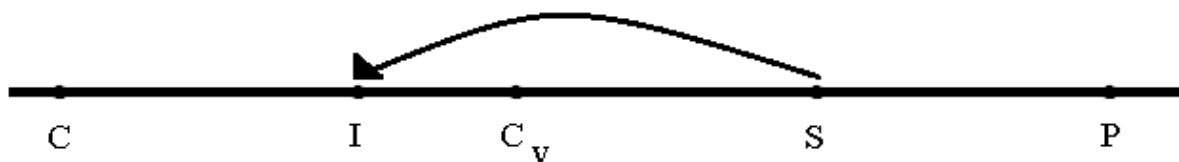
¹² These issues do not apply when the canon is used to protect judicial instead of presidential prerogatives. *See, e.g.*, *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 300-01 (2001) (avoiding the constitutional issues that would be raised if Congress stripped courts of jurisdiction). Unlike the President, courts cannot affect statutory text. Avoidance in that context can also be an expression of judicial humility. Indeed, the Supreme Court's greatest assertion of judicial power was based on the opposite approach – construing a statute so as to raise constitutional issues. *See* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI.

To illustrate, imagine that the extent of the President's power is mapped on a single line.¹³ The point "P" refers to the President's preferred level of power. The closer one gets to "P," the more satisfied the President will be; the farther away, the less satisfied he will be. Similarly, "C" refers to Congress's preferred level of presidential power, and "C_v" captures the preferences of the member of Congress whose vote will decide whether a presidential veto is sustained or overridden.¹⁴ Suppose that Congress passes a statute designed to change the situation from the status quo ("S") to Congress's preferred outcome ("C"):



The statute would be vulnerable to a veto. If the president vetoed the bill, the member of Congress whose vote will decide whether the veto is sustained will support the president — "S" is closer to "C_v" than "C" is, so the member would prefer the status quo to the bill.

Acting strategically, Congress might adopt a less aggressive measure, designed to bring about an intended outcome ("I").¹⁵



If the President attempted to veto this legislation, his veto would be overridden: "I" is closer to "C_v" than "S," meaning that the member of Congress whose vote will decide whether the presidential veto is sustained would prefer that the legislation remain intact.

This example demonstrates that, in the context of presidential power, the veto serves functions normally filled by the constitutional avoidance canon. It serves to resist intrusions on the relevant constitutional value, forcing Congress to back away from its preferred outcome "C" to a more moderate outcome "I," and it demands an unusual degree of agreement within

L. REV. 443, 456 (1989) (arguing that the Court adopted a questionable statutory interpretation in *Marbury v. Madison*, 5 U.S. 137 (1803)).

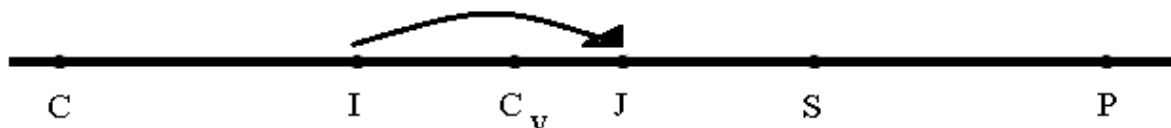
¹³ Figures like this one are used to capture legislative dynamics in ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 215 (1999).

¹⁴ In the event of a presidential veto, Congress could override by a two-thirds vote in both houses. See U.S. CONST. ART. I, § 7. As a result, the person who would decide whether a veto is sustained or overridden would have preferences somewhere between those of the President ("P") and a simple majority of Congress ("C").

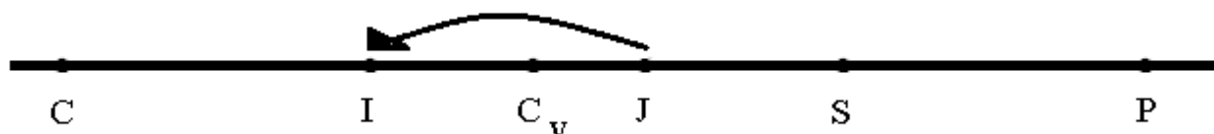
¹⁵ As a possible example, the War Powers Resolution survived President Nixon's veto, but incorporated compromises that actually expanded presidential power in significant ways. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 301-07 (3d ed. 2004).

Congress before a more intrusive measure can be adopted.¹⁶ And this conclusion flows from the President's *formal* powers alone. The President also has informal tools for shaping legislation, which amplify the effect.¹⁷

The avoidance canon amplifies the effect even further. Suppose that a court, uncomfortable with the constitutional questions raised by the statute, adopts a judicial interpretation more favorable to the President ("J"):



Congress might seek to undo the interpretation with a new statute:



But this new statute would be vulnerable to a presidential veto.¹⁸ Since "J" is closer to "C_v" than "I," the member of Congress whose vote will decide whether the presidential veto is sustained would back the President.

In sum, the judicial interpretation has the effect of making it impossible for Congress to achieve its desired outcome of "I."¹⁹ Importantly, if the courts insist on this outcome because of

¹⁶ See, e.g., The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 178 (1996) (stating that rule is intended in part to require unusual degree of agreement in Congress); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 401 (2005) (avoidance can "shift[] the burden of overcoming legislative inertia to those opposing the Court's understanding of public values"); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1212 (2006) (describing normative justifications for the avoidance canon as advanced by Professors Ernest Young and William Eskridge); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000) (rule enforces constitutional values by making it "harder—but still not impossible—for Congress to write statutes that intrude into areas of constitutional sensitivity").

¹⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) ("Party loyalties and interests, sometimes more binding than law, extend [the President's] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.").

¹⁸ See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2119-22 (2015); Morrison, *supra* note 16 at 1234.

¹⁹ Applying the avoidance doctrine in this context can actually create more distortion than striking down the entire statute as a violation of the constitution. If the statute were struck down, the status quo "S" would be restored. There would thus be a broader range of legislation that would survive a presidential veto, since the member of Congress whose vote would decide whether a veto is overridden dislikes "S" more than she dislikes "J." Congress would thus have a freer hand to legislate to the limits of its constitutional authority. While that limit would be to the right of "I," it would be at or to the left of "J."

“constitutional avoidance” instead of an actual violation of the Constitution, it is entirely possible that “I” — the outcome that the courts have prevented Congress from achieving — is a constitutional outcome that is within Congress’s legitimate power.

III. Unique Concerns with Presidential Power

Using the avoidance canon to give the President flexibility poses other problems. First, it emboldens the executive branch in potentially dangerous ways. The executive often interprets statutes, without any opportunity for judicial review.²⁰ In these contexts, the executive can adopt a self-serving understanding of potential constitutional issues, and use that understanding to reshape statutes as it pleases without judicial discipline.²¹ Recent history suggests that this is not a purely theoretical concern.²² In an age when serious scholars remark that “the legally constrained executive is now a historical curiosity,”²³ there is little need to further embolden the executive.

Second, the avoidance canon muddies the issues. The limits of presidential power cannot be identified in isolation — they emerge from the relationship between the President and Congress. Per the tripartite scheme articulated in Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, the strength of the President’s authority depends on Congress’s position: “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,” when he “acts in the absence of either a congressional grant or denial of authority” his authority is in a “zone of twilight,” and when he “takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”²⁴ Avoidance blurs the categories: it treats presidential acts incompatible with statutory text as if they were consistent with a statute reinterpreted to avoid conflict.

Third, the canon distorts the balance of power between the branches. Institutionally, Congress must speak in generalities through universally applicable laws, while the President is able to make targeted decisions.²⁵ That is particularly true in the context of statutes like FACA, which is intended to address extemporaneous groups instead of agencies established by statute. Congress cannot anticipate every group that the executive may be inspired to convene at some later time. By requiring Congress to speak with particularity, the constitutional avoidance canon places the burden of prediction on Congress, when it is often more reasonable to insist that the

²⁰ Morrison, *supra* note 16 at 1196-97.

²¹ For this reason, some have urged that the executive branch should not apply the constitutional avoidance canon where presidential power is concerned. See H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1315 (2006); but see Morrison, *supra* note 16 at 1229-32 (urging that the executive use of the avoidance canon to weaken the statutory prohibition on torture was flawed on other grounds). But as shown above, the canon is problematic in the presidential power context even when courts apply it.

²² See Katyal & Schmidt, *supra* note 18, at 2118 n.33 (listing recent aggressive executive interpretations of statutes).

²³ 4 ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010).

²⁴ 343 U.S. 579, 635-37 (1952).

²⁵ See Anil Kovvali, *Power Games*, 112 MICH. L. REV. FIRST IMPRESSIONS 73, 75 (2014).

President anticipate problems and request an accommodation from Congress. Congress has proven willing to entertain such requests.²⁶

Finally, presidential power often conflicts with other constitutional values, which Congress seeks to enforce through statutory law. When Congress adopted statutes prohibiting torture and limiting surveillance, it was defending values that find support in the First, Third, Fourth, Fifth, and Eight Amendments to the Constitution.²⁷ Similarly, ethics statutes defend anti-corruption values that find support in the Emoluments Clauses.²⁸ When avoidance is used to narrow these statutes, their underlying constitutional values are diminished in favor of the somewhat unclear²⁹ constitutional provision vesting the “executive power” in the President.³⁰

IV. Conclusion

The constitutional avoidance canon creates special problems when it is used to defend presidential prerogatives. In that context, its role is already filled by the presidential veto, and the presidential veto amplifies its distortive effect. The doctrine also interacts dangerously with the unique powers of the presidency. As statutes constraining the President are placed under stress, both courts and executive actors should hesitate to weaken them by deploying the canon of constitutional avoidance.

²⁶ See Josh Gerstein, *Trump Owes Ethics Exemption to George H.W. Bush*, POLITICO (Nov. 13, 2016) available at <http://www.politico.com/story/2016/11/trump-bush-ethics-exemption-231773> (noting that Congress carved out an exception to the federal conflict of interest statute in response to executive request). Indeed, the executive has sometimes underestimated Congress’s willingness to cooperate. See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 138-40, 207-08 (2009) (noting that Congress readily provided requested statutory authorities after courts had limited presidential power, but limiting decisions might have been prevented if the executive had simply requested authorities in advance).

²⁷ Constitutional avoidance was cited to diminish such statutes, despite their underpinnings. For a succinct treatment, see Trevor W. Morrison, *The Canon of Constitutional Avoidance and Executive Branch Legal Interpretation in the War on Terror*, 1 *ADVANCE* 79, 85-94 (Spring 2007). Such application of constitutional avoidance is contrary to one of its strongest normative justifications — its effect of placing the burden of overcoming legislative inertia on the powerful when they seek changes that would harm the powerless. See Frickey, *supra* note 16, at 401; Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 *COLUM. L. REV.* 2162, 2210 (2002).

²⁸ U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. II, § 1, cl. 7.

²⁹ See generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *HARV. L. REV.* 1939 (2011) (arguing that the concept of “separation of powers” does not have the precision often claimed for it).

³⁰ Indeed, any application of the constitutional avoidance canon to defend presidential power suffers from this problem, since it privileges the constitutional provisions that empower the President over provisions that empower Congress. This competition between constitutional principles suggests another drawback to application of the canon in the structural context. In other contexts, constitutional avoidance can help delay a constitutional decision as norms evolve. See Frickey, *supra* note 16, at 402-03. Norms around individual rights evolve rapidly. Compare *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating sodomy laws) with *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding sodomy laws); compare *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (finding a constitutional right not to salute flag or recite pledge of allegiance) with *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (holding that there is no such right). But there is no clear trend in structural norms that would routinely justify delay. See SCHLESINGER, *supra* note 15, at xxiv (describing cycles of expansion and contraction of executive power). Avoidance would only have value in a perceived emergency, where delay could prevent rash actions from being enshrined in constitutional law.