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Separation-of-Powers Avoidance

ABSTRACT. When federal judges are called on to adjudicate separation-of-powers disputes, they are not mere arbiters of the separation of powers. By resolving a case (or declining to), federal courts are *participants* in the separation of powers. Stemming from this idea, this Article introduces the concept of *separation-of-powers avoidance*. Judges employ familiar techniques to avoid compelling high-level coordinate-branch officials to act.

Undertaking an original review of cases ranging from executive privilege to Congress's subpoena power to congressional standing, this Article documents and models separation-of-powers avoidance. It explores how courts have dug a protective moat around the separation of powers through transdoctrinal principles that can, if taken beyond the courtroom, distort the interpretation of the separation of powers. From constitutional rights to statutory interpretation, scholarship has recognized that judicial expositions of legal principles are not necessarily coterminous with underlying law.

This Article extends that insight to the structural Constitution. It then theorizes this form of avoidance as a phenomenon reflecting uniquely judicial considerations. Finally, it offers normative prescriptions for the resolution of separation-of-powers conflict outside of federal courts. Separation-of-powers doctrine refracted through the lens of avoidance should not be taken outside of the courtroom. Bilateral negotiations between Congress and the President should not incorporate this form of doctrine, and both public and legal discourse should adjust to account for avoidance's distortionary effects on the structural Constitution.

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INTRODUCTION

When federal courts are called on to adjudicate separation-of-powers disputes, they are not mere arbiters of the separation of powers. By resolving a case (or declining to), federal courts are *participants* in the separation of powers. To navigate this position, courts have engaged in a practice that this Article calls "separation-of-powers avoidance." From discovery to standing, mandamus to statutory construction, courts deploy avoidance techniques to prevent or allay clashes with coordinate branches. Separation-of-powers avoidance is the judiciary's use of avoidance techniques to avoid compelling a coordinate branch of government—or a high-level official within that branch—to take a specified action.[1] Much like other forms of avoidance, separation-of-powers avoidance can distort doctrine in deep and far-reaching ways or create legal vacuums that other actors can fill.[2] This Article documents separation-of-powers avoidance, theorizes it as a judicial phenomenon, and prescribes that judicial doctrine refracted through the lens of avoidance should not extend beyond the courtroom.

In the past several years, the judiciary has been called on to resolve many high-profile separation-of-powers clashes. In *Trump v. Mazars USA, LLP*, judicial power was invoked to answer whether Congress could obtain a sitting President's tax records.[3] In *United States v. Bannon*,[4] *Trump v. Thompson*,[5] and *Trump v. United States*,[6] judges were called on to determine a former President's ability to invoke executive privilege when the sitting President had chosen not to invoke or had affirmatively waived claims of privilege. And in *In re Graham*, a federal court in Georgia was asked to determine the scope of the Speech or Debate Clause's protection of a Senator's refusal to testify before a state special-purpose

1. Critically, separation-of-powers avoidance is not about the judiciary avoiding resolution of separation-of-powers cases or issues; rather, it is about avoiding compelling particular governmental *parties* from taking actions.

2. *See infra* Part I (reviewing critiques of the statutory canon of constitutional avoidance and the principle of constitutional avoidance).

3. 140 S. Ct. 2019, 2026-27 (2020).

4. Indictment at 5-8, United States v. Bannon, No. 21-cr-00670, 2021 WL 5284752 (D.D.C. Nov. 12, 2021).

5. 20 F.4th 10, 16 (D.C. Cir. 2021).

6. No. 22-81294-CIV, 2022 WL 4015755, at *8 (S.D. Fla. Sept. 5, 2022), *vacated*, 54 F.4th 689 (11th Cir. 2022).

grand jury.[7] Although the facts in these particular cases are in some sense extraordinary, the judiciary's involvement in salient separation-of-powers questions is far from it.[8]

But there is more to the story than this. From constitutional rights to statutory interpretation, scholars have recognized that judicial opinions concerning rights and law are not necessarily coterminous with underlying legal rights.[9] The right-remedy gap alone has been the subject of intriguing scholarship that prompts deep questions about our judicial system's core functions.[10] Courts are, after all, constrained by doctrines and practices—both mandatory and prudential—that hinder their ability to afford complete relief or often even to articulate the full range of legal rights. Although this insight has prompted foundational debates in the constitutional-rights space, the field of separation of powers has

7. *In re* Graham, No. 22-cv-03027, 2022 WL 13692834, at *1 (N.D. Ga. Sept. 1, 2022) (denying Senator Lindsey Graham's motion to quash a special grand jury subpoena in its entirety because, inter alia, the Speech or Debate Clause does not insulate him from testifying).

8. These recent cases do not stand alone. Separation-of-powers conflicts can arise in factually extraordinary circumstances—like a former President being investigated by the Federal Bureau of Investigation—but doctrine that is developed in such cases can form the basis for legal discourse for decades. Indeed, much doctrine on executive privilege was developed in the wake of the Watergate scandal and President Nixon's resignation, which at the time would have seemed factually extraordinary. *See infra* Section II.A.

9. *See, e.g.*, Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 60 (1997) (recognizing the gap between "the meaning of constitutional norms and the tests by which those norms are implemented"); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (arguing that courts underenforce some constitutional norms, like equal protection, but that these "should be understood as to be legally valid to their full conceptual limits" even if "the federal judiciary" will not enforce them); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790-93 (2008) (arguing that courts historically considered inquiry into legislative motive improper even while recognizing some motives to be unconstitutional); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1652-53 (2005) (arguing that judicial reasoning is often calcified into contemporary legal understanding despite imperfect enforcement); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975) ("Were our understandings of judicial review not affected by the mystique surrounding *Marbury v. Madison*, it might be more readily recognized that a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions . . . ." (footnote omitted)); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 2, 8-9 (2004) (proposing a taxonomy for the distinction between constitutional doctrine and constitutional meaning).

10. *See, e.g.*, John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

not yet recognized its import for structural constitutional law. Too often, scholarship has focused on outcomes, for example, critiquing courts as overly executive-friendly and insufficiently solicitous of Congress's role.[11] Although that may be true, this Article focuses on a different issue: systemic distortion that arises when the judicial branch — a participant in the separation of powers — adjudicates disputes between and among the coordinate branches.

This Article introduces the concept of "separation-of-powers avoidance," the judicial branch's use of avoidance tools to keep from compelling a coordinate branch (or high-level official within that branch) to take a particular action. A familiar concept in legal interpretation, avoidance is commonly used in the context of the statutory canon of constitutional avoidance. But avoidance is a tactic whereby a legal interpreter prioritizes *not* resolving a particular issue. Although judges still resolve a case, they nonetheless do not resolve the targeted issue. This tactic often leads to systemic distortions and odd puzzles in the law.[12] So, too, with separation-of-powers avoidance. Courts prioritize not compelling a coordinate branch to take a particular action. In so doing, judges systemically distort doctrine away from its constitutional content. But unlike more familiar types of avoidance, where judges seek to avoid resolution of a particular legal issue — thus affecting the court's law-declaration role — with separation-of-powers avoidance, courts avoid taking an action vis-à-vis a particular party — thus affecting the court's dispute-resolution role.[13] Avoiding broad legal pronouncements, for example, does not lower the stakes if a court compels the President to turn over particular material.[14]

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11. Scholars and judges have recently questioned the role of courts in interpreting separation-of-powers principles more generally. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028-30 (2022) (arguing for a more robust role for Congress and the President, instead of courts, in defining separation of powers); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., concurring in the judgment and dissenting in part) ("Rather than impose rigid rules like the majority's, [courts] should let Congress and the President figure out what blend of independence and political control will best enable an agency to perform its intended functions.").

12. *See infra* Part I.

13. *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 672-73 (2012) (describing the two heuristic models that anchor the legal process school's approach to federal courts: the dispute-resolution model and the law-declaration model). Indeed, courts have recognized that the *who* matters to separation-of-powers conflict. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 811 n.17 (1982) ("Suits against other officials — including Presidential aides — generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.").

14. *See, e.g.*, Cheney v. U.S. Dist. Ct., 542 U.S. 367, 389 (2004) (referring to the "awkward" position that courts would be thrust into if the President had to invoke executive privilege in court).

Federal courts have been called on to adjudicate many of the high-profile and politically salient disputes of our time. Congress has sought to invoke the judiciary's jurisdiction to enforce congressional subpoenas.[15] The President has sought to shield his personal documents from discovery by Congress.[16] Congress has sought to defend its laws in courts when the Executive has refused.[17] Although these cases are in some sense extraordinary, judicial involvement in marking the boundary line between legislative and executive power is far from unusual.[18] Many, if not most, canonical separation-of-powers principles come from the courts.[19]

When federal judges opine on the separation of powers, they are not neutral arbiters of the separation of powers. As judges resolve cases and controversies that purport to draw the boundaries of our tripartite structure of governance, judges are active participants in the separation of powers. In some sense, this should be expected: the primary way that judges participate in the separation of powers is through dispute resolution. This feature of our judicial system—that

15. *See, e.g.*, Comm. on the Judiciary v. McGahn, 968 F.3d 755, 761-62, 778 (D.C. Cir. 2020) (en banc) (holding that the Committee on the Judiciary had standing to seek judicial enforcement of a subpoena calling on a former White House counsel to testify before the House). Although separation-of-powers cases are often politically salient, the doctrinal analysis in this Article is intentionally not focused on the real or assumed politics of the judges making the decisions. Skeptics who believe that judicial discretion is deployed for partisan reasons, of course, are likely to reject this choice. But there has to be a place for doctrine to coexist alongside these skeptics.

16. *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2028 (2020) (considering claims seeking to prevent an accounting firm from complying with a congressional subpoena of then-President Trump's tax records).

17. *See* U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 4 (D.C. Cir. 2020) (deciding standing issues in a suit alleging that the Secretary of Treasury illegally spent money to fund a southern border wall which Congress had not appropriated), *vacated as moot sub nom.* Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57-58 (D.D.C. 2015) (deciding standing issues in a suit brought by Congress arguing that the Secretaries of Health and Human Services illegally spent billions of dollars to support the Affordable Care Act's implementation); Windsor v. United States, 797 F. Supp. 2d 320, 321-22, 326 (S.D.N.Y. 2011) (granting the Bipartisan Legal Advisory Group's intervention motion to defend the Defense of Marriage Act).

18. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020); Zivotofsky v. Kerry, 576 U.S. 1, 5 (2015); Clinton v. City of New York, 524 U.S. 417, 448-49 (1998); INS v. Chadha, 462 U.S. 919, 928 (1983); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952); Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935).

19. *See* The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 135 (1996) (agreeing that Supreme Court decisions concerning the separation of powers are binding on the executive branch); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1603 (2007) (discussing the challenge to executive-branch actors of independently interpreting constitutional provisions which lack intrinsic meaning apart from judicial doctrine).

courts inject themselves into the separation of powers when they decide a question of the separation of powers—is an awkward reality that courts navigate using a familiar tool (avoidance) in an unfamiliar context (the separation of powers).

Separation-of-powers avoidance is one mode of avoidance that courts use to cool separation-of-powers conflicts with a coordinate branch of government. Although courts do not generally disclaim jurisdiction to adjudicate disputes implicating separation-of-powers concerns,[20] they interpret doctrines to avoid subjecting a coordinate branch to judicial coercion. Motivated in substantial measure by the unique concerns of dispute resolution involving coordinate branches, courts invoke separation-of-powers avoidance in ways that distort the constitutional content of the separation of powers when taken beyond the courtroom.

This Article proceeds in four parts. Part I situates separation-of-powers avoidance in the literature on judicial avoidance. Courts employ avoidance tactics across a broad range of substantive domains, the most well-known of which is the statutory canon of constitutional avoidance. Although separation-of-powers avoidance differs in significant respects from these previously identified forms of avoidance, avoidance literature sets the building blocks for an understanding of separation-of-powers avoidance's effects.

Part II—the heart of the Article—sets out three models that separation-of-powers avoidance takes. In the "embedded model," courts fuse separation-of-powers concerns into existing doctrine. In so doing, courts distort familiar doctrinal rules in the separation-of-powers context. This is particularly pervasive in the context of discovery of the President. In the "process model," courts add an additional separation-of-powers inquiry to decision-making. Appellate courts will vacate a lower-court decision not because it is *wrong* but because it does not adequately attend to separation-of-powers concerns. Finally, in the "fortified model," courts appeal to the idea of separation of powers to strengthen existing jurisdictional rules and thereby avoid embroiling themselves in a separation-of-powers conflict. The fortified model asks us to rethink familiar jurisdictional doctrines—namely, congressional standing—in the language of avoidance.

Part III theorizes separation-of-powers avoidance as a uniquely judicial phenomenon. Courts employ separation-of-powers avoidance to stay out of the fray. Cognizant of the limited capital they have to compel coordinate branches to comply with judicial orders, courts deploy that capital when circumstances warrant it, which usually includes an incursion on the judicial power that is distinct from the separation-of-powers conflict presented to the court.

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20. I do engage with legislative standing in this Article, which is a qualified exception to this proposition.

Whether justifiable within courts or not, separation-of-powers avoidance creates a space between doctrine and the structural Constitution. When taken outside the courtroom, this space introduces distortions into the separation of powers. Building on Part II, Part IV expressly argues that the penumbra surrounding separation-of-powers avoidance distorts underlying doctrine. This allows the executive branch to rely on distorted case law with judicial imprimatur in negotiations with Congress and in the bully pulpit. Part IV thus argues that judicial decisions refracted through the lens of avoidance should not be taken outside of the courts where they have distortionary effects. First, bilateral negotiations between Congress and the President generally should not rely on doctrine refracted through judicial concerns. Second, both public and legal discourse should readjust to account for the space between doctrine and the Constitution where doctrine is refracted through an avoidance lens.

* * *

At the outset, three clarifications about this Article are necessary. First, this Article's discussion of "avoidance" is limited to a particular kind of avoidance. I use the term "separation-of-powers avoidance" to apply to the tactics that courts use to avoid a direct conflict with a coordinate branch of government in a *dispute-resolution* sense. Courts frequently issue opinions that express the constitutional bounds of separation of powers, but I refer here to the legal dispute that the court seeks to avoid. Courts use separation-of-powers avoidance to keep from compelling a coordinate branch (or high-level official within that branch) to take a particular action.[21] When I use the term "avoidance," I am referring to "separation-of-powers avoidance." I use the long form "statutory canon of constitutional avoidance" to refer to the well-known canon of constitutional avoidance.

It is important to distinguish a broader use of the word "avoidance" in scholarship from the discussion at hand. Some refer to judicial uses of tools that contain some measure of discretion in unprincipled, undisciplined, or directed ways as avoidance. For example, Henry Monaghan describes the Supreme Court's use of agenda-control mechanisms, used to decide when to consider particular doctrinal issues versus putting them off to a later date, as a form of avoidance.[22] This

21. The Court's jurisprudence concerning the political question doctrine and severability in statutory interpretation bear a family resemblance to the ideas I explore, but they are not the direct subject of this Article. The Supreme Court, in particular, seems to avoid major conflicts with coordinate branches in those contexts as well, but not through the mechanisms that I discuss in Part II.

22. Monaghan, *supra* note 13, at 679-83.

more capacious use of avoidance is even more prevalent in foreign-affairs or international-litigation contexts.[23] Although these forms of avoidance share some similarities with separation-of-powers avoidance, I want to bracket them in order to keep the definition of separation-of-powers avoidance precise: it is a dispute-resolution tool used to avoid compelling a coordinate-branch official to act when a court is presented with a separation-of-powers conflict.[24]

Second, in keeping separation-of-powers avoidance's meaning precise, there is a tension that should be openly acknowledged. Federal courts are and have been actively involved in resolving major separation-of-powers cases.[25] In prior work, I have argued that federal courts have recently found it "appropriate to *reach for* (rather than avoid) the hefty separation-of-powers questions."[26] Even in so doing, however, federal courts generally avoid a particular kind of separation-of-powers clash: the use of judicial power to compel a coordinate branch to act. This might include ordering the President to turn over discovery materials in court or ordering a cabinet official to testify before Congress. Therein lies the friction. On the one hand, federal courts avoid compelling coordinate-branch officials to act. On the other, federal courts actively take on separation-of-powers cases. The tension between separation-of-powers cases and the parties in those cases is not the subject of this Article, but it has been addressed in part by my prior work and by others.[27]

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23. *See, e.g.*, Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1090 (2015) (describing how courts use familiar justiciability tools as avoidance in transnational litigation); Although they do not use the term "avoidance," Curt Bradley and Eric Posner argue that lower courts use the political question doctrine differently than the Supreme Court to address limited judicial capacity to decide particular sorts of disputes, generally limited to the foreign-affairs area. Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031 (2023).

24. This Article's scope is mostly confined to domestic separation-of-powers disputes. This involves congressional subpoenas, executive privilege, and the like. Although judges may employ separation-of-powers avoidance in foreign-affairs contexts, see, for example, Goldwater v. Carter, 444 U.S. 996 (1979), the Article's core findings and claims are about domestic disputes.

25. *See generally* Elizabeth Earle Benske, *Litigating the Separation of Powers*, 73 ALA. L. REV. 823 (2022) (arguing that the Roberts Court has evinced a propensity for resolving interbranch conflicts when brought by individual private litigants, but less so when claimed by institutional actors).

26. Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 944 (2022).

27. *See, e.g.*, *id.* at 979-89. *See generally* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013) (exploring the oddity of having private individuals as plaintiffs in cases implicating structural institutional injuries); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229 (2019) (exploring the tension between institutional injuries that mirror and diverge from private injuries in structural cases).

Third, this Article assumes that doctrine has a role in judicial decision-making even where judges have discretion. Of course, those who see partisanship as playing a dominant or increasing role in judicial decision-making are likely to reject or be skeptical of this assumption. But by carving out the political explanation, this Article draws from historical and contemporary examples to show that there is a constraining and coherent principle on judicial branch actors.

I. AVOIDANCE IN THE JUDICIAL BRANCH

Judicial "avoidance" is a capacious and well-explored term in legal scholarship.[28] The term is now commonly used to describe the jurisprudential principle by which courts steer clear of issuing broad constitutional holdings where narrower ones would do or to describe the statutory canon of construction. But avoidance operates on broader substantive planes as well.[29] Commentators have suggested that avoidance can be used as a signaling device[30] or as creative judicial maneuvering that can be selectively invoked.[31] In its most basic form, "avoidance" captures a practice in legal interpretation where the interpreter prioritizes *not* resolving a particular legal issue if possible. The interpreter will still resolve the case but will take measures not to reach certain legal issues, which can cause systemic distortions in statutory interpretation and constitutional law. This focuses us on two forms of avoidance that shed light on separation-of-powers avoidance's potential impacts: the principle of constitutional avoidance and the statutory canon of constitutional avoidance.

In his highly regarded *Ashwander v. Tennessee Valley Authority* concurrence, Justice Brandeis delineated seven principles of constitutional interpretation.[32] Principally cited in the context of the statutory canon of constitutional avoidance, Justice Brandeis's concurrence concisely describes a much deeper principle

28. *See, e.g.*, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184-92.

29. *See* Richard H. Fallon, Jr., *Why and How to Teach Federal Courts Today*, ST. LOUIS U. L.J. 693, 709 (2009) ("[T]he Court might occasionally depart from principles of strict legality in the service of what it takes to be higher, long-term, prudential goals."); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 72-74.

30. *See* Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 174 (2014).

31. *See* Monaghan, *supra* note 13, at 679; Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 517-19 (2019).

32. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Nearly a decade earlier, Charles Evans Hughes wrote, "The Court will not undertake to decide questions of the constitutional validity of legislation unless these questions are necessarily presented and must be determined." CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 36 (1928).

of avoiding constitutional decisions where possible.[33] Animated in part by Article III's prohibition against issuing advisory opinions, courts generally do not announce constitutional rules "unless absolutely necessary to a decision of the case," and "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which a case may be disposed of."[34] I refer to this broad directive to avoid constitutional rulings in favor of other grounds as the "principle of constitutional avoidance." The principle of constitutional avoidance acts as a rule of decision — or at least a considerable guideline — in cases where, for example, a plaintiff argues that a regulation was promulgated in violation of both the Administrative Procedure Act and the Fifth Amendment.[35] It also animates the judiciary's current stance on the order of operations for qualified immunity determinations.[36]

The second practice, the statutory canon of constitutional avoidance, is a substantive canon of statutory interpretation. The statutory canon of constitutional avoidance has morphed over time and does not have a single definition. For present purposes, it suffices to say that its modern incantation[37] directs that where a particular statute has two plausible readings — one of which raises a constitutional question and the other of which does not — courts should adopt the reading that avoids raising the constitutional question.[38]

Both the principle of constitutional avoidance and the statutory canon of constitutional avoidance have prompted countless objections, justifications, and debates. This Part's brief foray into this existing scholarship lays the groundwork

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33. *See* Schauer, *supra* note 29, at 72 ("The disfavor of judicial invalidation on constitutional grounds of the actions of more properly responsive bodies is operationalized by numerous theories, doctrines, rules, principles, maxims, and standards. Of all of these, few have been as enduring as the collection of principles set forth by Justice Louis Brandeis in his concurring opinion in *Ashwander v Tennessee Valley Authority*."); Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 632 (1938) (describing Justice Brandeis's words as "perhaps the most notable opinion expounding the rationale of jurisdiction in constitutional controversies"); *cf.* Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 60 (1961) (arguing that courts should avoid "resolv[ing] issues on which the political processes are in deadlock").

34. *Ashwander*, 297 U.S. at 347-48 (quoting Burton v. United States, 196 U.S. 283 (1905)).

35. *See, e.g.*, DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020); Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

36. *See infra* Section I.A.2.

37. *See, e.g.*, Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1945 (1997).

38. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1020-22 (1989) (describing the canon of constitutional avoidance as the "most important" statutory interpretation rule "based upon constitutional values").

for understanding separation-of-powers avoidance's effect on legal interpretation and supports Part IV's normative prescriptions. Section I.A recounts some of these debates regarding avoidance and constitutional meaning that shed light on the ways in which systemic avoidance shapes doctrine. Section I.B raises context-dependent critiques of avoidance that recalibrate its utility depending on the legal-interpretive context or substantive area.

A. Avoidance and Constitutional Meaning

Both the statutory canon of constitutional avoidance and the principle of constitutional avoidance raise questions about constitutional meaning. When judges make the antecedent determination that a particular holding would implicate constitutional norms, what does that determination mean for constitutional interpretation? Avoidance can distort legal meaning. It can also create legal deserts where courts do not resolve legal issues and, in practice, hand over legal decision-making to another actor. Separation-of-powers avoidance similarly creates these issues.

1. Constitutional Distortion

The statutory canon of constitutional avoidance has sparked debates about its relationship to constitutional meaning. The modern canon is invoked when a given statute has two possible readings, one of which raises a constitutional question. But what is the import of determining that statutory text merely *raises* a constitutional question? When courts invoke the canon of constitutional avoidance, what are they saying, if anything, about the Constitution?

Some argue that the determination that statutory text raises a constitutional question is itself a comment on the Constitution.[39] Some have described the statutory canon as creating a sort of buffer around the Constitution: broadening the import of constitutional provisions beyond their natural minimum. Dick Posner,

39. *See, e.g.*, Schauer, *supra* note 29, at 87 (remarking that the determination of whether a serious constitutional question exists "is itself a confrontation with the very issue that [the avoidance canon] seeks to avoid"); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000) (arguing that "[c]ourts *are* engaged in constitutional adjudication when they 'avoid'" certain constitutional questions); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 3-4 (1996); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

for example, has argued that the statutory canon of avoidance creates a "penumbra" problem.[40] Because statutory interpretation is influenced even in cases where the constitutional challenge might be rejected, "the canon actually broadens the impact of constitutional provisions beyond their legitimate warrant."[41] But if the specter of unconstitutionality causes a different result, then something more than the constitutional minimum is doing dispositive adjudicative work.

This "penumbra" is not necessarily neutral or benign. Others have criticized it as not only broadening the import of constitutional provisions but also distorting them. Hiroshi Motomura, for instance, argues that the statutory canon creates "phantom constitutional norms" that would not hold if courts were to decide a question on the constitutional merits.[42] These phantom norms could work to deny relief or, as he argues in the immigration context, to provide it.[43] But in any case, the norms distort constitutional content. And these distortions do not end with the case or the statute at issue. They build upon one another, creating further constitutional and statutory distortions down the line.[44] These constitutional and statutory distortions live on and are magnified when the same statute is interpreted in later contexts. The original tainted interpretation serves as the later basis for decision-making. These critiques similarly apply to separation-of-powers avoidance, which broadens the import of doctrines like executive privilege beyond their constitutional floor and insulates nonprivileged communications from disclosure.[45] Parts II and IV demonstrate that, like Motomura's phantom constitutional norms, the penumbra surrounding separation-of-powers avoidance distorts underlying doctrine so that the executive branch can rely on distorted case law with judicial imprimatur in negotiations with Congress and in the bully pulpit, furthering the distortions' reach.

Ernie Young defends the canon's use in certain contexts—and its reach beyond the constitutional minimum—on the grounds that it instantiates a resistance norm.[46] Instead of "avoiding" a question under Article III, Young maintains that courts "are *enforcing* Article III by demanding a clear statement of

40. *See* Posner, *supra* note 39, at 816.

41. Young, *supra* note 39, at 1574.

42. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 545, 586 (1990).

43. *Id.* at 549-50.

44. *See* Charlotte Garden, *Avoidance Creep*, 168 U. PA. L. REV. 331 (2020).

45. *See infra* Part II.

46. *See generally* Young, *supra* note 39 (defending the use of the canon of constitutional avoidance in the context of the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigration Responsibility Act of 1996).

Congress's intent before accepting a limitation on federal jurisdiction."[47] Young thus views the canon, at least in part, as saying something about Article III. That can be distinct from or coexist with other constitutional content that the canon might create.

2. *Constitutional Deserts*

The principle of constitutional avoidance is often defended on two grounds: appeals to judicial minimalism[48] or based on the spirit of not rendering advisory opinions.[49] The first defense, most prominently articulated by Alexander Bickel, reasons that judges can insulate themselves from political and legal controversies by exercising control over jurisdiction and *not* wading into hot-button constitutional controversies. The second defense—that the principle of constitutional avoidance helps to keep judges from rendering advisory opinions—is at the root of certain applications of avoidance. Article III limits federal judges from rendering true advisory opinions that would have no effect on the parties to the case.[50] Over time, some have appealed to this true constitutional rule to suggest that alternative grounds for a decision would be redundant and therefore ultra vires. This application is more prophylactic than constitutionally mandated, but it has informed the rhetorical argument used to justify an order of operations in qualified-immunity cases. But when courts place resolution of constitutional questions on the backburner—and when they do so systemically—they leave legal vacuums that other actors can later fill through practice or interpretation.[51]

One way to see this in action is to dissect the judiciary's practice toward qualified immunity. Officers who enjoy qualified immunity are immune from liability for damages unless their actions were in violation of "clearly established"

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47. *Id.* at 1552.

48. *See, e.g.*, Bickel, *supra* note 33, at 75-79.

49. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 241 (2009) (citing the principle of constitutional avoidance to depart from *Saucier* rule, which mandated that lower courts decide constitutional questions first in qualified-immunity cases).

50. *See* Letter from Chief Justice John Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (Henry P. Johnston ed., New York, G.P. Putnam's Sons 1891); 15 THE PAPERS OF ALEXANDER HAMILTON 110 n.1 (Harold C. Syrett ed., 1969) (explaining the Justices' letter to George Washington); Questions Submitted by the President to the Judges of the Supreme Court (July 1793), *in* 10 THE WRITINGS OF GEORGE WASHINGTON 542-45 (Jared Sparks ed., Boston, Little Brown & Co. 1855).

51. *See* Bookman, *supra* note 23, at 1100-02 (arguing that judicial avoidance techniques in the space of transnational litigation cedes ground to other branches to make foreign relations decisions).

law.[52] This means that two questions could arise in a qualified immunity determination: (1) Did the officer act in violation of law? and (2) Was that law "clearly established" at the time the officer acted? Although district courts retain discretion over the order of operations in a qualified-immunity case,[53] the Supreme Court has counseled those courts to "think hard, and then think hard again, before turning small cases into large ones" by resolving the constitutional question first.[54] Because law is developed in an iterative, case-by-case process, judicial reluctance to announce that an officer's action violated law before holding that the law was not "clearly established" stifles legal development.[55] This can create constitutional deserts, where officers can violate constitutional rules but not be held liable because no appropriate court has "clearly established" the law.[56] Although an action may in fact be unconstitutional, on the ground, officers can act without that legal tether.[57]

Separation-of-powers avoidance creates similar legal deserts. When courts aim not to make certain determinations—like whether Congress can compel a White House official who claims to be cloaked in executive privilege to testify—the bounds of Congress's subpoena power are not developed.[58] Indeed, the systemic distortions caused by the different models of separation-of-powers avoidance documented in Part II has led to legal vacuums ranging from who can claim executive privilege, to the limits of Congress's subpoena powers, to the contours of the Speech or Debate Clauses.

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52. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

53. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

54. Camreta v. Greene, 564 U.S. 692, 707 (2011).

55. *See* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) ("[I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment of both officials and individuals.").

56. *See generally* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237 (exploring *Camreta*'s effects on legal development); *cf.* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159 (2021) (noting similar effects in the context of habeas corpus).

57. *See* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120-21 ("For rights that depend on vindication through damage actions, the repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content. Functionally, the Constitution will be defined not by what judges, in their wisdom, think it does or should mean, but by the most grudging conception that an executive officer could reasonably entertain.").

58. *See, e.g.*, Comm. on the Judiciary v. McGahn, 968 F.3d 755, 773, 778 (D.C. Cir. 2020) (en banc) (holding that Congress has standing to enforce a subpoena in federal court without resolving the merits of a former White House counsel's privilege claim).

B. Improper Avoidance

Another line of critique takes avoidance's application in certain contexts as a given and instead questions its application in defined circumstances. Even if avoidance can be justified generally, should it be repudiated in particular contexts?

John Manning argues that the statutory canon of constitutional avoidance is less suited to particular substantive contexts — namely, the nondelegation context — than others.[59] If the goal of invoking the statutory canon of constitutional avoidance is "to promote legislative responsibility for policy choices and to safeguard the process of bicameralism and presentment," Manning writes, "it is odd for the judiciary to implement it through a technique that asserts the prerogative to alter a statute's conventional meaning and, in so doing, to disturb the apparent lines of compromise produced by the legislative process."[60] In other words, when Congress carefully negotiates the boundaries of delegated power to the executive branch, the statutory canon of constitutional avoidance is likely to disrupt that bargain. Congress may prefer for courts to negate that bargain entirely than to rewrite its terms, thus rendering the canon's use particularly inappropriate in that context.

Trevor Morrison's critique of the canon of constitutional avoidance is related not to substantive law but instead to legal interpretative context.[61] Morrison explores the different justifications for the canon of constitutional avoidance and argues that if it is justified as a tool of judicial restraint, then its use is not justified in executive-branch legal interpretation.[62] If, however, the canon is justified on the grounds of a resistance norm, then it may have a place in executive-branch legal interpretation.[63] Still, he argues that executive-branch legal interpreters — in particular, the Office of Legal Counsel (OLC) — should not feel compelled in all circumstances to apply the canon of constitutional avoidance because they are situated differently from courts and thus may not have the requisite uncertainty as to the canon's application in the first place.[64]

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59. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228.

60. *Id.* at 224.

61. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1192-95 (2006).

62. *Id.* at 1202-08, 1220-21.

63. *Id.* at 1212-14.

64. *Id.* at 1244-45.

II. MODELS OF SEPARATION-OF-POWERS AVOIDANCE

From standing to discovery, statutory interpretation to mandamus, the judiciary has implemented a separation-of-powers inquiry in a variety of doctrines. In some contexts, the separation of powers is fused into underlying doctrine. I call this the "embedded model." In other contexts, courts of appeals caution that an underlying opinion was not "separation of powers-y" enough and vacate and remand those opinions for further consideration of the structural-constitutional implications of judicial review.[65] I call this the "process model." Still in other contexts, courts appeal to the separation of powers to strengthen justiciability rules and avoid hearing a case. I call this the "fortified model." Lower courts, for their part, sometimes stack separation-of-powers inquiries and, at other times, neglect to apply them. Lines between each model are not always clear, as the same case can involve multiple forms of avoidance. This typology remains useful for understanding the forms separation-of-powers avoidance can take. And whatever the mechanism, in each of these contexts, what has emerged is judicial avoidance that can distort underlying doctrine and, consequently, our understanding of the content of governing authority.

A. Embedded Model

In the embedded model, courts interpret doctrines through the lens of separation-of-powers avoidance. The specter of a separation-of-powers conflict looms large over certain doctrinal categories. For example, when the White House defends against a discovery motion or the Department of Justice (DOJ) petitions for mandamus, the judicial and executive powers are pitted against one another even where it does not appear on the face of court filings. Courts react to this separation-of-powers clash in a way that alters substantive doctrine.

This Section explores two doctrinal categories—discovery and mandamus—as models for embedded avoidance. Often overlooked, these two postures reveal a lot about the separation of powers. Many recent separation-of-powers clashes involve claims of executive privilege, and discovery disputes are a key posture through which judges opine on that privilege. Appellate mandamus is also very revealing. When a district court judge rules against an actor in another branch, that individual may take the step of seeking appellate mandamus. This is quite extraordinary: an actor from another branch of government asks a federal court to order a district-court judge to enter a different decision from the one she

65. *See, e.g.*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2033-34 (2020); Karnoski v. Trump, 926 F.3d 1180, 1204-05, 1207-08 (9th Cir. 2019).

reached. This posture reveals how and when judges choose to subordinate their own power to avoid conflict with other branches.

1. Discovery

Discovery is a touchstone of the American judicial system. In private civil suits, discovery gives plaintiffs access to information and documents that can bolster their claims of wrongdoing. In suits involving the White House or administrative agencies, discovery can provide transparency into official decision-making and foster public accountability.[66]

Discovery of the President (and close advisors) generally arises in three contexts.[67] In civil cases, private plaintiffs may seek discovery through a statutory right to information — such as the Freedom of Information Act — or in the course of a contract or tort dispute with the government.[68] In criminal cases, defendants may seek executive information when such information relates to a defense.[69] Finally, Congress — or some subset of Congress — may bring an action seeking to enforce a congressional subpoena.[70]

In ordinary civil litigation, the Federal Rules of Civil Procedure, particularly Rule 26, prescribe the contours of discovery and ensure that judges have the power to enforce discovery orders.[71] If a party resists discovery by asserting a privilege, such as the attorney-client privilege, then the burden is on the party invoking the privilege to prove every element of that privilege.[72]

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66. *See* Ahdout, *supra* note 26, at 961-64; *cf.* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752-58 (2021) (arguing that certain Roberts Court administrative-law decisions can be viewed through the lens of political accountability).

67. In this Section, when I write about discovery of the "President," I generally mean to include the Vice President and the President's close advisors. This is consistent with the D.C. Circuit's approach to the presidential-communications privilege. *See In re* Sealed Case, 121 F.3d 729, 749 (D.C. Cir. 1997) (holding that the presidential-communications privilege extends "beyond the President to his immediate advisers").

68. *See, e.g.*, Dairyland Power Coop. v. United States, 79 Fed. Cl. 659, 660-61 (2007).

69. *See, e.g.*, United States v. Poindexter, 727 F. Supp. 1501, 1502-03 (D.D.C. 1989).

70. *See, e.g.*, Comm. on the Judiciary v. McGahn, 968 F.3d 755, 760-61 (D.C. Cir. 2020) (en banc); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 55-57 (D.D.C. 2008).

71. *See* FED. R. CIV. P. 26; *id.* R. 37.

72. *See, e.g.*, Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 24 (1st Cir. 2011) ("The party invoking the privilege must show both that it applies and that it has not been waived."); United States v. BDO Seidman, 337 F.3d 802, 811 (8th Cir. 2003) ("The mere assertion of a privilege is not enough; instead, a party that seeks to invoke the attorney-client privilege has the burden of establishing all of its essential elements.").

Discovery of the President works differently. At the threshold, very few cases involving even the specter of executive privilege get to court.[73] Where cases do arise, presidential privileges are interpreted exclusively through the lens of separation-of-powers avoidance. The Supreme Court's most recent statement on the issue is *Cheney v. U.S. District Court*.[74] There, the President established the National Energy Policy Development Group (Group) to provide advice concerning energy policy and authorized the Vice President to include other federal officers in the Group.[75] Arguing that the Group constituted an "advisory committee," Judicial Watch filed suit alleging that the Group failed to comply with certain requirements under the Federal Advisory Committee Act.[76] In the course of litigation, the district court entered discovery orders directing the Vice President and other senior executive-branch officials to produce information about the Group.[77] But the Vice President did not want to produce information; nor did the Vice President claim privilege. Instead, the Vice President petitioned for mandamus relief. In response, the D.C. Circuit ruled that the executive branch must first invoke executive privilege to stand behind its shield from discovery.[78]

The Supreme Court reversed and succinctly stated its motivation for invoking avoidance:

> Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These "occasion[s] for constitutional confrontation between the two branches" should be avoided whenever possible.[79]

The Court reasoned that the district court should have narrowed its discovery order to avoid even the assertion of privilege.[80] It is noteworthy that the Vice

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73. *See* Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 6-7 (2020).

74. 542 U.S. 367 (2004).

75. *Id.* at 373.

76. *Id.*

77. *Id.* at 375-76.

78. *In re* Cheney, 334 F.3d 1096, 1109 (D.C. Cir. 2003).

79. *Cheney*, 542 U.S. at 389-90 (quoting United States v. Nixon, 418 U.S. 683, 692 (1974)).

80. *Id.* (citing approvingly United States v. Poindexter, 727 F. Supp. 1501 (D.D.C. 1989)).

President never asked the district court to narrow the discovery order;[81] the Court's language requires that federal district courts do so sua sponte.

In effect, the Court's words draw a moat around executive privilege that protects executive documents not privileged from discovery. This protection goes beyond simple burden shifting. Courts tailor discovery of the President to avoid even the appearance of a separation-of-powers conflict. Doing so has consequences both in federal court and beyond.[82]

a. Avoidance's Effect on Discovery in Court

When disputes with the President land in the courts, separation-of-powers avoidance's distortion touches on all manner of suits: from the routine and mundane to the high profile and complex. In *Dairyland Power Cooperative v. United States*, which concerned a Court of Claims contracts dispute involving the government, the Administration turned over forms that were "completely redacted."[83] The Administration claimed that the discovery request did not meet the *Cheney* standard and then refused to respond with either a particularized claim of privilege or by producing documents.[84]

In *Karnoski v. Trump*, a due-process case concerning President Trump's bar on military service by transgender individuals, the Government used separation-of-powers avoidance to argue for a protective order on its communications.[85] Plaintiffs served interrogatories on the Administration asking, among other things, that defendants "[i]dentify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy" and sought a number of documents.[86] The Government moved for a protective order objecting to the interrogatories to the extent that those interrogatories sought communications protected by the deliberative-process privilege or the presidential-communications privilege.[87] The Government did not, however, invoke the presidential-communications privilege. This distinction matters: the deliberative-process privilege protects only portions of documents, and the Government

81. *In re* Cheney, 334 F.3d at 2106. Since *Cheney*, this idea has been fortified. *See In re* United States, 138 S. Ct. 443, 445 (2018) ("[T]he District Court may not compel the Government to disclose any document that the Government believes is privileged without first providing the Government with the opportunity to argue the issue.").

82. *See infra* Sections II.A.1.a & II.A.1.b.

83. 79 Fed. Cl. 659, 660 (2007).

84. *Id.*

85. 926 F.3d 1180, 1194 (9th Cir. 2019).

86. *Id.*

87. *Id.*

would be required to turn over redacted papers.[88] The presidential-communications privilege, by contrast, protects the entire communication.[89]

The district court granted the motion to compel, holding that "Defendants' initial disclosures did not provide 'any actual information concerning Defendants' claims or defenses.'"[90] It required the Government to invoke the presidential-communications privilege *expressly* before being able to enjoy its protection. Subsequently, the Government argued that "[a] protective order would serve the interests of judicial economy because the Court could avoid addressing constitutional separation-of-powers issues."[91] The district court denied the motion for a protective order.[92]

The court of appeals vacated the discovery order, holding that the district court did not adequately consider the separation-of-powers avoidance principles articulated in *Cheney*: "On remand, the district court should give due deference to the presidential-communications privilege, but also recognize that it is not absolute."[93] Notice that the Administration was able to withhold documents relevant to whether it had stripped transgender individuals of their ability to serve without proper process *without* invoking privilege, demonstrating the avoidance moat's depth. In such a politically charged case, moreover, the President was able to avoid the political consequences of invoking its privilege.[94]

Discovery in criminal cases, like *United States v. Nixon*[95] and *United States v. Poindexter*,[96] also raises issues of separation-of-powers avoidance when courts compel presidential compliance with a discovery order. The balance is calibrated

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88. *See* Army Times Publ'g Co. v. Dep't of Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993).

89. *See* Loving v. Dep't of Def., 550 F.3d 32, 37-38 (D.C. Cir. 2008). The two privileges ostensibly emanate from different sources: the deliberative-process privilege comes from the Administrative Procedure Act, whereas the presidential-communications privilege may be grounded in constitutional principles.

90. *Id.* (quoting Karnoski v. Trump, No. 17-cv-01297, 2018 WL 9649937, at *1 (W.D. Wash. Mar. 14, 2018)).

91. *Karnoski*, 926 F.3d at 1194.

92. *Id.*

93. *Id.* at 1205.

94. In *United States v. Poindexter*, which the Supreme Court cited approvingly in *Cheney*, *see* Cheney v. U.S. Dist. Ct., 542 U.S. 367, 390 (2004), the court explained that it had "no concern with the political consequences, if any, from a delay in the assertion of executive privilege," 727 F. Supp. 1501, 1503 (D.D.C. 1989).

95. 418 U.S. 683, 703-07 (1974). Ordinarily, fair-trial concerns are about protecting the defendant in a criminal trial. Oddly, in *Nixon*, it was the prosecution that wanted the protected materials. *Id.* at 687-88.

96. 727 F. Supp. at 1505-06.

slightly differently, however, because those cases involve the judicial responsibility of "fair adjudication of a particular criminal case in the administration of justice,"[97] which the *Nixon* Court referred to as "the *primary* constitutional duty of the Judicial Branch."[98] There is thus a heightened judicial interest in the criminal docket which, in practice, yields different results. This modified standard shows that where a core judicial function is at issue, it might be worth enduring the awkwardness of compelling a coordinate branch of government to act.

b. Avoidance's Effect on Privilege Outside Court

Although the judicial branch claims the power to interpret the scope of executive privilege,[99] the secondary effect of avoidance in this area is to cede ground to the Executive to fill in the privilege's content. One could argue normatively that the President should have to invoke the privilege in court, but the case law is the other way.[100] Executive privilege thus operates almost exclusively outside the courts, extending the reach of the executive branch's interpretation of the scope of the privilege.[101] This means that entities housed within the executive branch, such as OLC, have a greater role in defining executive privilege's boundaries than other legal principles. In a comprehensive analysis of executive privilege, Jonathan Shaub unsurprisingly concludes that "the executive branch doctrine has become an absolute prophylactic privilege, designed to protect the asserted absolute authority of the president to control information."[102]

Cheney's effect goes beyond leaving the fox in charge of the hen house. OLC uses *Cheney* and its progeny to fortify executive privilege in situations that have nothing to do with Article III courts or the awkwardness that might result from invoking privilege in federal court.[103] Indeed, OLC has used *Cheney* as a basis to argue that *Congress*—a branch with its own ability to determine whether to check executive power—has very little oversight power over the Executive Office of the

97. *Nixon*, 418 U.S. at 713.

98. *Id.* (emphasis added).

99. *See id.* at 703 ("The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (citation omitted))).

100. *See supra* Section II.A.1.a.

101. *See* Shaub, *supra* note 73, at 9 ("[S]ince Watergate . . . the executive branch has developed a comprehensive constitutional theory of executive privilege, laid out in White House statements, Office of Legal Counsel (OLC) opinions, letters to Congress, and court filings.").

102. *Id.* at 7.

103. *See infra* Section IV.A.

President.[104] These judicial decisions thus form the starting point of negotiations between Congress and the executive branch, and they lend to the executive branch the judiciary's imprimatur to withhold information from Congress.[105] Likewise, the Executive has used judicialized language stemming from *Cheney* in the bully pulpit to fortify executive privilege in the court of public opinion.

One nascent and potentially executive-privilege-limiting development is worth noting. Although power is less diffuse in the executive branch than in Congress or the courts, the executive branch is not necessarily a monolith. The Justice Department alone might not be in sync on every issue. Commentators have documented the trend within OLC of fortifying executive privilege across administrations.[106] This may be because there is generally no incentive to curtail executive privilege from one administration to the next, but it may also be because it would be challenging for OLC to contravene positions that DOJ has taken in litigation where it claims the full extent of the executive privilege's protection. In the suit challenging the Federal Bureau of Investigation's search of former President Trump's home,[107] DOJ has recognized a potential limit on executive privilege. Analogizing to the need for executive privilege to give way in a criminal trial, DOJ asserts in its brief that any executive privilege a former President may assert must give way where the executive branch's core functions of "investigating the potential unlawful handling of [highly classified] records" and "assessing the resulting risks to national security" are at issue.[108] DOJ's position is notable for its suggestion of a limit on executive privilege.

2. Mandamus

The embedded model operates in a related but distinct context: in cases where the government petitions for mandamus relief from a district court and invokes this unique writ. Where the government petitions for mandamus relief, the ordinarily high standard for obtaining relief is turned on its head.

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104. *See, e.g.*, Cong. Oversight of the White House, 45 Op. O.L.C., at *25-27 (Jan. 8, 2021).

105. *See infra* Section IV.A.

106. *See* Shaub, *supra* note 73, at 8-27.

107. *See* Trump v. United States, No. 22-CV-81294, 2022 WL 4015755, at *2-3 (S.D. Fla. Sept. 5, 2022), *vacated*, 54 F.4th 689 (11th Cir. 2022).

108. United States' Response to Motion for Judicial Oversight and Additional Relief at 26-28, *Trump*, 2022 WL 4015755 (No. 22-CV-81294), 2022 WL 3925207. Although the case was ultimately dismissed on jurisdictional grounds, *Trump*, No. 22-cv-81294, 2022 WL 17586276, at *1, the public articulation by the Department of Justice (DOJ) of a limit on executive privilege is notable.

Mandamus is the process by which courts can "compel an officer"—including a judge—"to perform a purely ministerial duty."[109] Federal courts have authority to issue writs of mandamus under the All Writs Act.[110] As a practical matter, where appeal is not authorized—for example, where a nonfinal judgment is issued in district court—mandamus is often the only avenue that a litigant has for obtaining relief from an erroneous ruling. Referred to as an "extraordinary remedy,"[111] appellate mandamus relief is generally difficult to obtain. The party seeking mandamus must demonstrate "(1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists."[112] It is clear why courts are reluctant to grant this form of relief. Compelling a government officer—or a judge—to undertake a particular action is a substantial incursion into that officer's autonomy and authority. Indeed, the Supreme Court has referred to mandamus as "among the most potent weapons in the judicial arsenal."[113]

However, in cases involving the government[114] as a petitioner for mandamus relief, this exceedingly high standard is turned on its head. To avoid separation-of-powers conflicts, courts are apt to *grant* mandamus relief in favor of the government. *Cheney* again provides the relevant context.[115] The Supreme Court began its discussion of mandamus in that case by reaffirming that mandamus relief is, in the ordinary course, extraordinary.[116] Nonetheless, the Court held that the court of appeals erred in failing to readjust the bounds of mandamus relief to account for "separation-of-powers considerations."[117] The Vice President's presence in the mandamus petition underscored "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties."[118] Building on the notion that merely *invoking* executive privilege in court sets the branches on a collision

109. Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925).

110. 28 U.S.C. § 1651(a) (2018) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

111. Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380 (2004) (observing that mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes'" (quoting *Ex parte* Fahey, 332 U.S. 258, 259-60 (1947))).

112. Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 189 (D.C. Cir. 2016).

113. Will v. United States, 389 U.S. 90, 107 (1967).

114. In this context, the government is generally represented by DOJ.

115. *Cheney*, 542 U.S. 367.

116. *Id.* at 380-82.

117. *Id.* at 382.

118. *Id.*

course, the Court held that when the government is a party to a mandamus petition, it signals the presence of separation-of-powers issues that inform the decision whether to grant relief. Recall that relief is *directing* a lower court to enter a particular outcome. Perversely, what is extraordinary here is not mandamus relief but instead the fact that the Court chose to subordinate judicial power to executive power in mandamus doctrine. After *Cheney*, it seems, when the Executive brings a mandamus petition, judicial power bends to executive power as a doctrinal matter.[119]

Courts of appeals resolving mandamus petitions filed by the Executive routinely rely on *Cheney*'s statements and separation-of-powers sentiments.[120] For example, in *Karnoski v. Trump*, the Ninth Circuit granted mandamus relief to President Trump after the district court had ordered Trump to produce certain documents related to his administration's ban on the service of transgender individuals in the military, relying on *Cheney* as precedent.[121]

Of course, the fact that the Executive petitions for mandamus relief is not conclusive.[122] But the Executive is generally held to a different threshold for this extraordinary relief than ordinary individuals, and this reverberates beyond relief in the mandamus context, particularly when coupled with the statutory canon of constitutional avoidance.

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119. Indeed, the Federal Circuit has read *Cheney* to create a different mandamus rule for cases involving the President and close advisors. *See In re* United States, 678 F. App'x 981, 987 (Fed. Cir. 2017) ("[T]he government asserts that the [discovery] ruling threatens to intrude upon and interfere with the decision-making process of the President and executive agencies. . . . [T]hese concerns 'remove this case from the category of ordinary discovery orders where . . . review is unavailable[] through mandamus.'" (fifth and sixth alterations in original) (quoting *Cheney*, 542 U.S. at 382)). For a contrasting case, see *In re Executive Office of the President*, 215 F.3d 20, 23-25 (D.C. Cir. 2000), a pre-*Cheney* case denying mandamus relief in which the district court held that the White House is subject to the Privacy Act.

120. *See, e.g.*, *In re* U.S. Dep't of Educ., 25 F.4th 692, 705-06 (9th Cir. 2022) (granting mandamus relief to the former Secretary of Education and holding that she could not to be compelled to sit for a deposition because compelling testimony implicates separation of powers); *In re* Flynn, 973 F.3d 74, 78-81 (D.C. Cir. 2020); *In re* Clinton, 973 F.3d 106, 111-21 (D.C. Cir. 2020) (granting mandamus relief to former Secretary of State Hillary Rodham Clinton such that she could not be compelled to sit for a deposition).

121. 926 F.3d 1180, 1207 (9th Cir. 2019); *see also In re* U.S. Dep't of Com., Nos. 18-2856 & 18-2857, 2018 WL 6006885, at *1-2 (2d Cir. Oct. 9, 2018) (denying mandamus relief to Secretary of Commerce Wilbur L. Ross, who had requested that he not be compelled to sit for a deposition); *In re* U.S. Dep't of Com., Nos. 18-2652 & 18-2659, 2018 WL 6006904, at *1 (2d Cir. Sept. 25, 2018) (denying mandamus relief to Acting Assistant Attorney General John Gore and denying a request to halt discovery).

122. *See, e.g.*, *In re* Trump, 958 F.3d 274, 281-89 (4th Cir. 2020) (denying mandamus relief), *vacated as moot sub nom.* Trump v. District of Columbia, 141 S. Ct. 1262 (2021) (mem.).

Cheney's subordination of judicial power to the Executive extends beyond the mandamus context in the lower federal courts. Under the Trump Administration, several lawsuits were filed alleging that President Trump violated the Foreign Emoluments Clause. In one of those suits, a judge in the District of Columbia denied Trump's motion to dismiss for lack of standing and lack of a cause of action.[123] The denial of a motion to dismiss is a nonfinal order and is not appealable in the ordinary course.[124] Trump filed a motion for certification of interlocutory appeal under 28 U.S.C. § 1292(b), which the district judge denied.[125] Such a denial is also not ordinarily appealable (and § 1292(b) motions are rarely granted). Trump next filed a petition for a writ of mandamus asking that the D.C. Circuit direct the district judge to enter an order *granting* the § 1292(b) petition.[126]

In a nonprecedential per curiam opinion,[127] the D.C. Circuit made an unusual move. After citing *Cheney* for the mandamus standard, the court denied the petition without prejudice, expressing some doubt as to whether a court of appeals has jurisdiction to issue a writ of mandamus to order a district court to certify an issue for interlocutory appeal.[128] The court then avoided the question. First, it expressed the belief that both the standing and cause-of-action questions "squarely meet the criteria for certification under Section 1292(b)."[129] The court then "exercise[d] . . . discretion," denied the writ, and "remand[ed] the matter to the district court for immediate reconsideration of the motion to certify and the motion to stay the proceedings."[130] On remand, the district court—perhaps unsurprisingly—granted the motion to certify.[131] The D.C. Circuit's unusual maneuver in the shadow of *Cheney*'s mandamus standard shows the reach that doctrinal changes have, often in soft, subdoctrinal ways.[132]

123. *See* Blumenthal v. Trump, 335 F. Supp. 3d 45, 52-72 (D.D.C. 2018).

124. *See* 28 U.S.C. § 1291 (2018).

125. Blumenthal v. Trump, 382 F. Supp. 3d 77, 80-83 (D.D.C. 2019).

126. *See* Petition for a Writ of Mandamus to the United States District Court for the District of Columbia & Motion for Stay of District Court Proceedings Pending Mandamus, *In re* Trump, 781 F. App'x 1 (D.C. Cir. 2019) (No. 19-5196).

127. *See In re* Trump, 781 F. App'x at 2.

128. *See id.*

129. *Id.*

130. *Id.*

131. *See* Blumenthal v. Trump, No. 17-1154, 2019 WL 3948478, at *2-3 (D.D.C. Aug. 21, 2019).

132. Of course, one could view the D.C. Circuit's unusual move in favor of the President as still another form of separation-of-powers avoidance unto itself, mirroring the process model.

B. Process Model

Courts do not always embed separation-of-powers considerations into existing doctrinal frameworks. Sometimes, courts take precisely the opposite approach and break out separation-of-powers concerns into a discrete step of analysis. The process model of separation-of-powers avoidance is easiest to identify on appeal, where the reviewing court vacates the decision below not because the decision is legally wrong, but because it does not adequately attend to separation-of-powers considerations. Reviewing courts avoid a ruling on the substantive merits by appealing to grand notions of separation of powers. A reviewing court may or may not give helpful guidance for remand. Much like an individual who avoids making eye contact when passing an acquaintance in public, the process model of avoidance looks like *avoidance*. Reviewing courts do not reach the substantive merits of the claim but instead remand the issue back to another court, fully avoiding a separation-of-powers conflict with another branch.

The process model appears to be an ascendant form of separation-of-powers avoidance. More than other models, the cases that I discuss here are relatively recent. On the one hand, the process model may be a response to factually extraordinary clashes between the President and Congress during the Trump Administration. On the other hand, the model now has a foothold and has a doctrinal basis for future use. It is too soon to tell how extensively judges will use this form of avoidance. In defining it, however, we have a language to use in analyzing future cases.

1. The Process Model at the Supreme Court: Trump v. Mazars

The Supreme Court's decision in *Trump v. Mazars USA, LLP* — a suit involving congressional subpoenas of the sitting President's tax documents from certain financial institutions — employs the process model of separation-of-powers avoidance.[133] Three subcommittees of the House of Representatives issued four subpoenas seeking information about President Trump, his children, and his affiliated business, ostensibly to assist Congress in carrying out its legislative responsibilities.[134] The legal issue was whether the subpoenas exceeded the House's authority under the Constitution.[135] It was the first time that issues concerning such a subpoena reached the Supreme Court.[136]

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133. 140 S. Ct. 2019 (2020).

134. *Id.* at 2019-30.

135. *Id.* at 2029.

136. *Id.* at 2031.

To understand the Supreme Court's decision in the context of separation of powers, a bit of background on judicial review of congressional subpoenas is warranted. The Court has held that the Speech or Debate Clause protects the issuance and enforcement of congressional subpoenas.[137] Congress has implied authority to hale individuals before it to aid in its legislative efforts. At times, Congress has subpoenaed executive-branch officials to testify before it. Ordinarily, the two branches engage in bilateral negotiations referred to as "accommodation," where the two sides negotiate and compromise. They may settle on an individual testifying before Congress on agreed-upon topics. Or perhaps, the two sides may agree that some individuals will testify, and others will not. If negotiations break down, Congress can hold an individual in contempt of Congress for failing to comply with a subpoena.[138] Congress must rely on the executive branch—namely, DOJ—to prosecute the crime of contempt of Congress, a crime that the executive branch generally will not itself charge of one of its own officials.[139] Indeed, OLC has issued an opinion that "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege."[140] Congress also has the inherent power—now more theoretical than actual—to bring the recalcitrant witness to the offended House of Congress to show cause why the witness should not be detained and to imprison the individual if necessary.[141]

Although generally within Congress's purview, congressional subpoenas do sometimes find their way into federal court. Outside the context of a congressional subpoena to an executive officer, courts treat challenges of congressional subpoenas with special consideration. Motions by private individuals to enjoin enforcement of a congressional subpoena are "given the most expeditious treat-

137. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 507 (1975).

138. *See* 2 U.S.C. §§ 192, 194 (2018).

139. *See* Kia Rahnama, *Restoring Effective Congressional Oversight: Reform Proposals for the Enforcement of Congressional Subpoenas*, 45 J. LEGIS. 235, 243-44 (2018) (exploring the realistic limitations of Congress relying on the executive branch to prosecute individuals who are in the executive branch for contempt of Congress); JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 181-95 (2017).

140. Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 102 (1984).

141. *See* Theodore Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?*, 31 GEO. WASH. L. REV. 399, 400 & n.3 (1962); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1085-86 (2009). Although the great weight of authority is that Congress has this power (and has exercised it), the OLC has raised doubts about whether the courts would uphold the power. *See* Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Couns. Act, 10 Op. O.L.C. 68, 86-88 (1986).

ment by district courts because one branch of Government [the judiciary] is being asked to halt the functions of a coordinate branch [Congress]."[142] But where Congress seeks presidential material, courts take the opposite approach: slowing down the gears of judicial review to hand the dispute back to the coordinate branches. Where a congressional subpoena of presidential materials is in court, there is a three-way separation-of-powers conflict that involves Congress, the President, and the courts. Congressional subpoenas of presidential material find their way into court in two ways. First, Congress may seek to enforce its subpoena in federal court.[143] Second, in a separate judicial proceeding (for example, a contempt proceeding), an actor associated with the President may raise the issue *defensively*.[144] Although it is a rare posture, the latter is the context that arose in *Trump v. Mazars*.

The *Mazars* opinion discussed the traditional, nonjudicial methods that Congress and the President use to resolve their disputes, the "hurly-burly, the give-and-take of the political process between the legislative and the executive."[145] The opinion marshaled both historical examples from the time of the Founding—involving Presidents Washington and Jefferson—and more modern examples—involving Presidents Reagan and Clinton. The theme was clear. The President and Congress generally handle these disputes between themselves, and the Court was put in a difficult position.

> Such longstanding practice "is a consideration of great weight" in cases concerning "the allocation of power between [the] two elected branches of Government," and it imposes on us a duty of care to ensure that we not needlessly disturb "the compromises and working arrangements that [those] branches . . . themselves have reached."[146]

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142. *Eastland*, 421 U.S. at 511 n.17.

143. *See, e.g.*, Comm. on the Judiciary v. McGahn, 968 F.3d 755 (D.C. Cir. 2020) (en banc); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

144. *See, e.g.*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

145. *Id.* at 2029 (quoting *Executive Privilege—Secrecy in Government: Hearings on S. 2170, S. 2378, and S. 2420 Before the Subcomm. on Intergovernmental Rels. of the S. Comm. on Gov't Operations*, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns.)).

146. *Id.* at 2031 (alterations in original) (quoting NLRB v. Noel Canning, 573 U.S. 513, 524-26 (2014)).

The Court then vacated the decision below for not adequately considering separation-of-powers concerns.[147] In other words, the decision below was not "separation of powers-y" enough. The Court provided a nonexhaustive list of four considerations for the court below: (1) "whether the asserted legislative purpose warrants the significant step of involving the President and his papers;"[148] (2) "to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective;"[149] (3) "courts should be attentive to the nature of the evidence offered by Congress;"[150] and (4) "courts should be careful to assess the burdens imposed on the President by a subpoena."[151]

The Supreme Court's vacatur delayed resolution of the case by more than a year. *Mazars*'s protracted path through the judicial system shows what courts may gain in using the process model of avoidance. Even if the executive and legislative branches cannot resolve their issues, time alone may allay separation-of-powers concerns and protect the judiciary. After the Supreme Court's remand, the case returned to the D.C. District Court.[152] Eventually, President Trump was no longer President, but the House still sought tax documents from Mazars and circulated a fifty-eight-page memo explaining the legislative need for the subpoenaed material.[153]

Although the House was still before the court, the President was no longer sitting opposite—the former President was. For the district court, this made all the difference: it was no longer a "clash between rival branches of government."[154] The district court flipped its analysis and asked how the Supreme Court's *Mazars* factors apply to a congressional subpoena of personal records for

147. *Id.* at 2036. On the one hand, it is not altogether extraordinary for an appellate court to remand a case for further proceedings and to leave it in the hands of lower courts to apply a new standard. What is extraordinary, however, is how nebulous the Court's guidance is in this context and how nebulous—or sometimes nonexistent—an appellate court's guidance is beyond the direction to consider more fully the separation-of-powers consequences of a particular decision.

148. *Id.* at 2035.

149. *Id.* at 2036.

150. *Id.*

151. *Id.*

152. *See* Trump v. Mazars USA, LLP, 560 F. Supp. 3d 47, 50 (D.D.C. 2021) ("After more than two years and a roundtrip through the federal judiciary, this case returns to where it began.").

153. *Id.* at 51; *see also* Trump v. Mazars USA, LLP, 39 F.4th 774, 779 (D.C. Cir. 2022) (noting two significant changes since the Supreme Court's decision: (1) President Trump is no longer president, and (2) the Committee's chairwoman prepared a detailed explanation of the legislative purposes of the subpoena).

154. *Mazars*, 560 F. Supp. 3d at 65.

a *former* president and applied what it dubbed "*Mazars* lite."[155] Recall that when the Supreme Court considered the case, the Court noted that the tripartite separation-of-powers conflict—with the sitting President and Congress battling in the Supreme Court over a congressional subpoena—was the first of its kind.[156] Time shifted the conflict into one with a deeper doctrinal pedigree: the enforcement of a congressional subpoena. "Once separation of powers principles no longer factor into the analysis—or are at least greatly diminished," the district judge wrote, "the court's treatment of the . . . [s]ubpoena . . . resembles the treatment of any ordinary congressional subpoena."[157]

The D.C. Circuit took a different approach. At least rhetorically, it still applied a "heighted separation-of-powers scrutiny" to the case involving a former President.[158] But the court made clear that the sitting President did not oppose the former President's efforts to challenge the House Oversight Committee's subpoena.[159] The court then proceeded to apply the *Mazars* test, taking account of the changed circumstances.[160] What is particularly interesting is that the court recognized that further negotiations were likely to be fruitless.[161] It seems that, with this ruling in hand, the accommodation process resumed.[162] But litigation continued.[163]

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155. *Id.*

156. *Mazars*, 140 S. Ct. at 2031.

157. *Mazars*, 560 F. Supp. 3d at 75.

158. *Mazars*, 39 F.4th at 779, 787.

159. *Id.* at 788.

160. *Id.* at 788-808.

161. *Id.* at 812 ("[W]e see no reason to order the parties to negotiate further before we assess the validity of the Committee's subpoena. . . . The accommodation process has proven unsuccessful.").

162. Press Release, House Comm. on Oversight & Reform, Chairwoman Maloney's Statement on Oversight Committee Securing Agreement to Obtain Former President Trump's Financial Records (Sept. 1, 2022), https://oversight.house.gov/news/press-releases/chairwoman-maloney-s-statement-on-oversight-committee-securing-agreement-to [https://perma.cc/K5G4-FYEZ] (reporting that an agreement had been reached concerning President Trump's tax records).

163. On the eve of the date that the parties had agreed for Mazars to turn over the tax records, former President Trump sought a stay from the Supreme Court. The Chief Justice granted a temporary administrative stay to consider the issues, Trump v. Comm. on Ways and Means, No. 22A362, 2022 WL 16556568, at *1 (U.S. Sup. Ct. Nov. 1, 2022) (mem.), and ultimately the Court denied the petition, Trump v. Comm. on Ways and Means, 143 S. Ct. 476, 476-77 (2022) (mem.).

2. *Overlapping Avoidance:* Karnoski v. Trump

In invoking the process model of separation-of-powers avoidance, reviewing courts do not always provide lower courts with a roadmap on remand. Recall *Karnoski v. Trump*, a case involving President Trump's ban on military service by transgender individuals.[164] There, the district court sought to require the President to invoke the basis for the privilege in holding back particular documents. The court of appeals employed separation-of-powers avoidance in three overlapping parts of its opinion. First, it used *Cheney* to hold that the district court erred in requiring the President to *invoke* the privilege to cloak documents behind it.[165] Second, it used *Cheney*'s mandamus holding, granting the writ because "the district court did not fulfill its obligation to explore other avenues, short of forcing the Executive to invoke privilege."[166]

Third, in granting the writ, the Ninth Circuit vacated the district court's opinion and gave it instructions on remand in the same tone as the Supreme Court's decision in *Trump v. Mazars*. "On remand," the Ninth Circuit ruled, "the district court should give due deference to the presidential communications privilege, but also recognize that it is not absolute."[167] Nowhere in its opinion does the Ninth Circuit claim that the district court erred in its substantive decision. Instead, the issue is about process: did the district court adequately consider the separation-of-powers considerations attendant to the President being in court?

Appeals like *Karnoski* and *Mazars* highlight the friction between the judicial and executive branches when the President is in court. In some ways, each appeal can be seen as kicking the can down the road. Neither decision proscribes the courts below from issuing a decision adverse to the President. Instead, they preserve the status quo ante. On the one hand, this generally inures to the benefit of the President because she does not have to turn over documents to the plaintiffs or to Congress at least for the time being. On the other hand, the courts do not disclaim authority or jurisdiction to resolve the case. In both cases, litigation proceeded *after* President Biden was sworn in, the effect of which was to protect limited judicial capital when the separation-of-powers conflicts abate.

3. *Managerial Avoidance*

The focus thus far has been on the ways in which judges avoid separation-of-powers conflict in formal opinions. But judges at all levels of the judiciary

164. 926 F.3d 1180 (9th Cir. 2019).

165. *Id.* at 1204-05.

166. *Id.* at 1207 (internal quotation marks omitted).

167. *Id.* at 1205.

exert tremendous influence over cases in more informal ways through case management.[168] Managerial judging includes an array of tools that are integral to the judicial process, including orders that may appear as just a docket entry, orders that go to timing, pre- and post-trial case management, administrative orders, and the like.[169] These modes of case management often lack the reasoning and transparency of formal opinions, but they are no less potent; managerial rulings may, in practice, be dispositive.

One significant managerial tool that is closely linked to separation-of-powers avoidance is deciding whether to expedite a case or to stay proceedings below.[170] Some attention has been paid to the Supreme Court's decisions about whether to expedite cases involving significant separation-of-powers conflict.[171] Commentators have noted that the Court's decisions to expedite such cases indicate the judiciary's willingness to involve itself in resolution of the dispute. This is not always the case. As the *Mazars* case itself demonstrates, when the Court expedites a case for review and then applies the process model of avoidance, the Court can cool separation-of-powers conflict by delaying ultimate resolution.

Lower-court managerial decisions are no less important than the Supreme Court's decisions in this respect. Although not a universal practice, courts of appeals have declined to expedite cases with significant separation-of-powers conflict, which has the effect of giving Congress and the Executive more time to reach an accommodation. For example, under the George W. Bush Administration, there was a conflict between Congress and the President regarding the forced resignations of seven U.S. Attorneys.[172] The House Judiciary Committee investigated the forced resignations. As part of its process, the Committee sought testimony from certain White House officials.[173] The White House agreed to make certain individuals available but restricted the subjects on which they could

168. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (revealing the managerial tools judges use to exert influence over a case); Ahdout, *supra* note 26, at 960 (describing the ways in which judges can use managerial powers to check executive action).

169. *See* Ahdout, *supra* note 26, at 960-73; Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1942 (2022).

170. *See, e.g.*, Fulton Cnty. Special Purpose Grand Jury v. Graham, No. 22-12696, 2022 WL 3581876 (11th Cir. Aug. 22, 2022) (staying proceedings below pending resolution of Senator Lindsey Graham's emergency motion to enjoin grand-jury proceedings).

171. *See, e.g.*, *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the Senate Committee on the Judiciary*, U.S. SENATE COMM. ON THE JUDICIARY 4 n.14 (Sept. 29, 2021), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [https://perma.cc/TWX3-4PRF] (statement of Stephen I. Vladeck).

172. *See* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 55-57 (D.D.C. 2008).

173. *Id.* at 58.

be questioned. The Committee suspected that several of those individuals may have provided incomplete or inaccurate testimony and thus sought to get the former White House Counsel, Harriet Miers, and the then-White House Chief of Staff, Joshua Bolten, to testify.[174]

The White House claimed executive privilege to keep Miers and Bolten from testifying. It argued that White House Counsel and Chief of Staff were "alter egos" of the President and thus could not be compelled to appear before Congress at all. The Committee, for its part, wanted Miers and Bolten to appear and claim privilege as the need arose. After a fruitless accommodation process, the House subpoenaed both officials and sought to enforce that subpoena in court.[175]

The district court held that Miers and Bolten could not cloak themselves in absolute privilege and would have to testify before Congress.[176] The D.C. Circuit then issued a stay pending appeal.[177] On the one hand, the House had an advantage in negotiations because it had the winning opinion below. On the other hand, the Executive had the advantage of time because the decision below had been stayed and because the case was not on an expedited schedule. Nonetheless, during the stay, the parties were able to reach resolution amongst themselves: Miers and Bolten agreed to testify under oath before Congress. The parties then sought to dismiss the appeal.[178]

This simple stay order—coupled with a merits decision that telegraphed the relative strength of the parties—reoriented an accommodation process that had, to that point, failed.[179] Of course, this kept the judicial branch in the conflict halfway: the court of appeals retained jurisdiction of the case, but it both stayed the decision below and declined to expedite its role. In this way, it was able to hand the process back to the political branches to try once more with the looming threat of a new status quo.

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174. *Id.* at 59-60.

175. *See id.* at 61-64.

176. *Id.* at 100-01.

177. Comm. on the Judiciary v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam).

178. Comm. on the Judiciary v. Miers, No. 08-5357, 2009 WL 3568649, at *1 (D.C. Cir. Oct. 14, 2009).

179. This is, in some ways, the structural constitutional analog to Alexander M. Bickel's individual-rights argument in *The Passive Virtues*. *See* Bickel, *supra* note 33, at 60 (recommending that courts avoid "resolv[ing] issues on which the political processes are in deadlock . . . so that the political institutions may make their decision before the Court is required to pass judgment on its validity").

C. Fortified Model

Sometimes federal courts fortify existing doctrine in the name of the separation of powers. The clearest example is doctrine concerning congressional standing, one of the most elusive justiciability rules. It appears that the Supreme Court has approached the doctrine of congressional standing to embody avoidance, closing the door to Congress for all practical purposes while still claiming some residuum of jurisdiction under yet-to-be-achieved circumstances.

Congressional standing is a notoriously tricky subdoctrine of standing with unclear bounds. The Supreme Court has *never* held that Congress has standing to sue.[180] Even where the Supreme Court has been directly presented with the question whether Congress has standing, it has avoided the issue.[181] In some ways, the tension is clear. On the one hand, it is an affront not to recognize a coequal branch's standing when the executive branch is given the benefit of lax standing rules to pursue its claims. On the other hand, Congress is not charged with executing the laws; and it seems an affront to the Executive to permit Congress to tread on the Executive's constitutional turf. But the Supreme Court's reticence to opine on congressional standing directly is not the separation-of-powers avoidance that I mean to capture in this Section. Instead, it is what the Court has said about standing that shows separation-of-powers avoidance in action.

In *Raines v. Byrd*, the Court articulated the guidepost for lower federal courts to apply in congressional-standing cases.[182] The Court dismissed a constitutional challenge by a group of congresspeople to the Line Item Veto Act.[183] In the course of holding that the congresspeople did not have standing, the Court reasoned: "[O]ur standing inquiry has been *especially rigorous* when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[184] On

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180. Although the Supreme Court has held that Congress does not have authority to sue, lower courts have used the recognized residuum of jurisdiction to permit congressional standing in some circumstances. *See* Ahdout, *supra* note 26, at 983-84; Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 192 (D.D.C. 2019) (holding that the House has standing to enforce a congressional subpoena against the former White House counsel); Windsor v. United States, 797 F. Supp. 2d 320, 326 (S.D.N.Y. 2011) (granting Bipartisan Legal Advisory Group's intervention motion).

181. *See generally* Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1 (2015) (exploring the cases that presented the Supreme Court the opportunity to decide the bounds of congressional standing).

182. 521 U.S. 811, 818-30 (1997) (emphasis added).

183. *Id.* at 813.

184. *Id.* at 819-20 (emphasis added).

its face, this statement is quite broad. It appears to be a jurisdictional manifestation of the constitutional-avoidance interpretive principle. It would seem to contemplate a "more rigorous" standing inquiry wherever a plaintiff alleges a facial challenge to a statute or challenges some executive action as exceeding constitutional bounds. But this is not the case. Those bringing facial challenges on First Amendment grounds must meet a lower threshold to press their claims.

One need not look beyond challenges to the Line Item Veto Act to know that the "especially rigorous" standard is not what it says. In *Clinton v. City of New York*, a challenge to the Line Item Veto Act that was brought one year after *Raines* was decided, the Court held the Act was unconstitutional.[185] This time, the President exercised his authority under the Act by (1) canceling a provision of the Balanced Budget Act of 1997, which waived the federal government's statutory right to recoup taxes that states had levied against Medicaid providers,[186] and (2) canceling a provision of the Taxpayer Relief Act of 1997, which permitted certain food refiners to defer the recognition of capital gains if they sold their stock to eligible farmers' co-ops.[187]

Although the plaintiffs had pressed the same theory as in *Raines*—that Congress's passage of the Line Item Veto Act violates the structural constitution[188]—the Court never quoted *Raines*'s statement on standing nor even suggested that the standing analysis might be more rigorous in this case than in others. Two classes of plaintiffs brought suit in this case, and the Court held that *both* had standing[189] even though on the merits the Court still held that the congressional action was unconstitutional. Appellee New York City Health and Hospitals Corporation argued that without the provision of the Balanced Budget Act of 1997, it would have to pay the State of New York about four million dollars for each of the years at issue.[190] But this remittance depended on New York law, not on the federal law at issue, which at least makes the standing question a closer one than would appear on the face of the Court's opinion.[191] The private party's standing claim is even closer. The Court reasoned that the Snake Rivers farmers' cooperative had secured a "statutory bargaining chip" when it persuaded Congress to

185. 524 U.S. 417, 428-36 (1998).

186. *Id.* at 422-24.

187. *Id.* at 424-25.

188. This is what Jamal Greene refers to as a "pure public law dispute, one in which the central interests on both sides of the case are those of public institutions rather than private citizens." Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 140 (2014).

189. *Clinton*, 524 U.S. at 421.

190. *Id.* at 426.

191. *See, e.g.*, Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (per curiam); Warth v. Seldin, 422 U.S. 490 (1975).

include a capital-gains-recognition deferral in the Taxpayer Relief Act of 1997.[192] When the President canceled this provision, the Snake Rivers farmers' cooperative showed a likelihood of economic injury because it was in the process of negotiating qualifying transactions.[193] Those transactions' profitability turns on a number of negotiations with third parties,[194] and it is at least a close question whether today an individual would be able to challenge Congress's statutory repeal of a tax benefit.

The distinction between *Raines* and *Clinton* is a natural experiment of sorts.[195] We see how the exact same Court, with the exact same Justices, deals with two challenges to the exact same statute within a very short time. The only difference is the parties before the Court. In one, it was members of Congress, and in the other, it was private citizens and a municipality. And yet, the Court's treatment of the cases is completely different. In both cases, the merits *could* "force" the Court "to decide whether an action taken by one of the two other branches of the Federal Government was unconstitutional."[196] But only *Raines* would require the Court to mediate between members of two other branches and formally choose sides between the two *as parties*. Although *Raines*'s reasoning was informed by the merits, the case has taken on a life of its own. It is now the starting point for courts deciding whether Congress has standing.[197]

A further point indicates that something else is going on here. Outside of the context of legislator standing, the Supreme Court has invoked *Raines*'s "especially rigorous" language only once. Although the Court has invalidated the actions of another branch on occasions too numerous to count,[198] it only saw fit to invoke this heightened standing requirement in one case: *Clapper v. Amnesty International USA*, a sensitive national security case.[199] Although not limited to Congress by its terms, then, it seems that *Raines* is actually about keeping Congress out *as a party*. If separation-of-powers avoidance as a means of avoiding

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192. *Clinton*, 524 U.S. at 432.

193. *Id.*

194. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 412-13 (2013) (holding that an injury was too speculative where the statute created an increased likelihood of surveillance but where actual surveillance was not demonstrated).

195. To any economists reading this: I understand that the sample size is too limited for this to be a real natural experiment. I use the term rhetorically.

196. Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

197. *See* Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 847 (2018).

198. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (holding that Section 4 of the Voting Rights Act is unconstitutional).

199. 568 U.S. at 408.

judicial compulsion of a coordinate branch has real bite, then restricting Congress's ability to be a party in court is a powerful way of bringing it to fruition.

One other data point fortifies this reading of *Raines*. In *Seila Law LLC v. Consumer Financial Protection Bureau (CFPB)*, the Court invalidated the removal structure of CFPB on separation-of-powers grounds with a decidedly different standard of standing.[200] The majority stated that

> a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a "counterfactual world" in which the Government had acted with constitutional authority. In the specific context of the President's removal power, we have found it sufficient that the challenger "sustain[s] injury" from an executive act that allegedly exceeds the official's authority.[201]

Far from being "especially rigorous," the standing analysis is especially forgiving in removal-power cases because it invites private plaintiffs to bring separation-of-powers challenges.

On the one hand, the Court's standing rules are relaxed in the removal context, where an ultimate merits decision would result in holding that a congressionally created agency is at least in part unconstitutional.[202] On the other hand, the Court's standing rules are "especially rigorous" in *Raines*, which similarly asked the Court to hold a coordinate action as unconstitutional.[203] What, then, should we take *Raines* to mean? When Congress and the President are both before the courts as *parties*, the Court is in an awkward position of mediating between the coordinate branches.[204] It seems as though the Supreme Court's stance on congressional standing is refracted through the lens of avoidance: the deep

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200. 140 S. Ct. 2183, 2192 (2020).

201. *Id.* at 2196 (alteration in original) (citations omitted).

202. There may be some now-rebuked precedent for this. *See* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1133 (2009) ("[F]or several decades in the middle of the century, Congress was allowed to authorize legal challenges to government action by parties whose only cognizable interest was . . . that the government abide by the law.").

203. Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

204. For an interesting colloquy on whether Congress should be able to represent its own interests in court, compare Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 914 (2012), which argues that Congress should be "a more active participant in federal litigation," with Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 571 (2014), which argues that Congress cannot constitutionally defend federal statutes in court. *See also* Jonathan David Shaub, *Interbranch Equity*, 25 U. PA. J. CONST. L. (forthcoming 2023), https://ssrn.com/abstract=4224894 [https://perma.cc/H7YW-5QFA] (arguing against the exceptionalism of having Congress and the Executive appear in court adverse to one another).

desire not to thrust itself directly into a conflict between the President and Congress where it *must* pick a winner and a loser.

Thus far, lower courts have not consistently incorporated *Raines*.[205] The D.C. Circuit, sitting en banc, held that the House had standing to enforce a subpoena against former White House Counsel Don McGahn.[206] The majority applied a straightforward standing analysis, reasoning that the Committee's informational injury—the deprivation of McGahn's testimony—was concrete as required by Article III.[207] In dissent, Judge Griffith wrote that the majority's approach "treats a direct dispute between the Legislative and Executive Branches as if it were any old case."[208] Judge Griffith's characterization is not wrong; the majority did apply ordinary standing cases to this supremely awkward dispute. Dislodging separation-of-powers avoidance from standing may better address his concerns. It is not that Congress can *never* constitutionally have standing in cases involving the executive branch, but that courts should use means to *avoid* having that conflict before them. Where negotiations between the two branches fail and time cannot transform the conflict, there may be a role for courts to play in refereeing the dispute.

III. AVOIDANCE AS JUDICIAL RESTRAINT

At this point, one might ask whether separation-of-powers avoidance is a judicial tool or instead a feature of the constitutional separation of powers itself. Although the distinction is nuanced, it is deeply consequential. This Article's normative focus is not on avoidance within the judicial branch but on how a lack of understanding about avoidance's effects on the separation of powers travels outside of the judiciary. To start that conversation, this Part argues that separation-of-powers avoidance is a judicial practice through which much constitutional doctrine is refracted. To make this argument, this Part uses the judiciary's own words and actions.[209] It would be impossible to advance a single unifying theory or explanation for a judicial practice that has historical roots and has been applied and molded by judges across geographic and hierarchical jurisdictions

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205. *See, e.g.*, Crawford v. U.S. Dep't of the Treasury, 868 F.3d 438, 453-54 (6th Cir. 2017) (applying *Raines* as part of the "particularization" analysis of standing); Comm. on the Judiciary v. McGahn, 968 F.3d 755, 762-63 (D.C. Cir. 2020) (en banc) (applying *Raines* and the "especially rigorous" standard as part of the backdrop to standing analysis).

206. *McGahn*, 968 F.3d at 760-61.

207. *Id.* at 764.

208. *Id.* at 782 (Griffith, J., dissenting).

209. Like in recent work by Curt Bradley and Eric Posner, some of the evidence for this argument comes from what is left unsaid but is presumed by the opinions. *See* Bradley & Posner, *supra* note 23.

over time.[210] Indeed, such a theory is not necessary to understand avoidance's consequences for our constitutional order. This Part's aim is thus relatively modest: to show that separation-of-powers avoidance is, at least in part, a judicial phenomenon. Whether judges are motivated by Article III,[211] prudential considerations, capacity constraints,[212] or broader structural concerns, separation-of-powers avoidance is a judicial practice, not a practice that all governmental actors can, should, or must follow. Indeed, courts deploy their limited capital in this context only where circumstances warrant it, and that usually includes some incursion on judicial power that is distinct from the separation-of-powers issue directly before the deciding court.

The notion that judicial restraint should or does play a role in judicial decision-making is not new.[213] In *The Passive Virtues*, Bickel commended the principle of avoidance as a tool for courts to stay out of the political fray while still exerting influence.[214] In this way, Bickel argued, avoidance would retain and expand judicial influence.[215] And in his critique of the statutory canon of constitutional avoidance, Fred Schauer recognizes a judicial-preservation justification behind the adoption of that canon.[216] A chorus of scholars has added its voices to this rich colloquy. My aim here is not to retread those important contributions

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210. Even in a single case, judges may disagree over the reasons why avoidance is necessary. For example, in *Goldwater v. Carter*, members of Congress sued the President for allegedly failing to consult over the use of war powers. The Supreme Court, in a fractured decision, vacated the decision below with directions to dismiss the suit. *See* Goldwater v. Carter, 444 U.S. 996 (1976) (having multiple opinions with reasoning ranging from broad separation-of-powers concerns to the political-question doctrine to judicial-capacity concerns).

211. This can include the view of avoidance as a resistance norm that aims to keep courts out of these disputes until and unless it is necessary, so long as that resistance norm emanates from Article III. *See* Young, *supra* note 39, at 1552.

212. *See* Bradley & Posner, *supra* note 23, at 1035 (explaining that lower federal courts use the political-question doctrine differently than the Supreme Court and often because of capacity-related reasons, defining capacity broadly as "issues of competence—such as a court's ability to gather facts, interpret the law, and predict the consequences of its decisions—and to the court's political standing or legitimacy").

213. It goes at least as far back as James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893).

214. *See* Bickel, *supra* note 33, at 49-51.

215. *See id.* at 77 ("[T]he techniques of avoidance enable the Court to exert immense influence. It can explain the principle that is in play and praise it; it can guard its integrity. The Court can require the countervailing necessity to be affirmed by a responsible political decision, squarely faced and made with awareness of the principle on which it impinges.").

216. *See* Schauer, *supra* note 29, at 71-72. Fred Schauer argues that such a motive is less potent for invalidating statutes than in treading lightly with the executive branch because Congress does not execute legal decisions. To the extent that Congress would "defy" a judicial order, it would pass legislation. *Id.* at 91.

but instead to amplify the message that judges themselves have shared in their opinions employing—and distinguishing—separation-of-powers avoidance.

This Part begins with a brief discussion of what separation-of-powers avoidance is *not*: a constitutionally required jurisdictional limit on federal-court authority. It then moves on to discuss avoidance in the language of judicial prioritization. By comparing cases in which courts invoke avoidance with those in which courts do not, it becomes clearer that judicial priorities can outweigh avoidance's import in specified contexts. Those contexts, it turns out, are linked by a desire to vindicate judicial priorities like the administration of the criminal-justice system or proper judicial functioning. This conclusion lends support to the notion that avoidance is not a compelled feature of the separation of powers but, instead, a doctrine motivated by *something* judicial.

A. Avoidance and Jurisdiction

Separation-of-powers avoidance is not a jurisdictional limit on Article III courts.[217] Whether employing the embedded or process model, courts have been careful not to disclaim jurisdiction over cases refracted through the lens of avoidance. Indeed, courts have retained jurisdiction over cases in which Congress and the Executive resume the accommodation process on a court's own encouragement.[218] Although judges may prefer for these issues to be hashed out in the "hurly-burly" political process, the continued existence of that process does not affect the court's jurisdiction or ability to issue orders to the parties.

One might expect that if courts were to take a decisive position on their power to resolve a case, it would be in the context of justiciability.[219] Despite the fact that the Supreme Court has fortified congressional-standing doctrine and

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217. Although beyond the scope of this Article, the fact that avoidance is not a jurisdictional limit on federal courts has potentially far-reaching consequences about the ability of courts to adjudicate a direct separation-of-powers clash between Congress and the President.

218. *See, e.g.*, Comm. on the Judiciary v. Miers, 542 F.3d 909, 910-11 (D.C. Cir. 2008) (retaining jurisdiction after accommodation resumed between the House Committee and former White House Counsel); Trump v. Mazars USA, LLP, 39 F.4th 774, 785-86, 811-12 (D.C. Cir. 2022) (retaining jurisdiction while the former president's former accounting firm resumed negotiations and accommodation process with House Committee); Trump v. Mazars USA, LLP, 560 F. Supp. 3d 47, 58 (D.D.C. 2021) (discussing the district court's instruction to the former president's former accounting firm to assess the possibility of accommodations). *But see* Ward v. Thompson, No. CV-22-08015, 2022 WL 4386788, at *11 (D. Ariz. Sept. 22, 2022) (dismissing suit brought by state political-party representatives to quash congressional subpoena on the basis of sovereign immunity).

219. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49 (6th ed. 2009) (referring to justiciability requirements as helping to "define the role of the federal courts in our constitutional structure").

has never held that Congress has standing to pursue a legal challenge, the Court has not closed the doors to the possibility of adjudicating such a dispute.[220] Indeed, the standard it articulates is that the standing inquiry is "especially rigorous when reaching the merits . . . would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[221] By adopting this standard instead of an inflexible rule, the Court has preserved its ability to adjudicate a case where Congress is a plaintiff so long as the circumstances warrant it. And lower courts have used the space that the Supreme Court has left open to exercise jurisdiction over suits involving congressional plaintiffs.[222] One might even view this as an equilibrium of sorts between the Supreme Court and lower courts as to how congressional standing operates in practice: the Supreme Court may be able to avoid adjudicating a dispute between Congress and the Executive as parties, but it still allows lower courts the space to explore adjudication in those suits.[223]

B. Avoidance and Judicial Priorities

Courts deploy avoidance, then, not as a limit on their jurisdiction but as a prudential measure. And it turns out that judges use avoidance techniques much in the way of a balancing test that asks: When should courts deploy judicial capital? When is it worth compelling a coordinate branch officer to act?

Part II began with a discussion of executive privilege and the judiciary's desire to avoid being placed in the "awkward" position of having to adjudicate a claim of executive privilege.[224] In the civil context, courts have generally adhered to a desire to avoid awkward interactions with the Executive in privilege determinations and straightforwardly apply *Cheney*.[225] Nonetheless, courts endure this awkwardness in the criminal context. Can this distinction be justified by

220. See *supra* Section II.C.

221. Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

222. *See, e.g.*, Comm. on the Judiciary v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020) (holding that the House has jurisdiction to enforce congressional subpoenas in court); U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 4, 15 (D.C. Cir. 2020) (holding that Congress has standing to litigate its Appropriations Clause claim, but not its Administrative Procedure Act claim); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57-58 (D.D.C. 2015) (holding that the House had standing to challenge the president's drawing of funds from the Treasury to fund the Affordable Care Act without an appropriations bill).

223. *Cf.* Bradley & Posner, *supra* note 23 (explaining that the political-question doctrine functions differently in lower courts than in the Supreme Court and may reflect an equilibrium in the hierarchical judiciary).

224. Cheney v. U.S. Dist. Ct., 542 U.S. 367, 389-90 (2004).

225. *See supra* notes 73-82 and accompanying text (exploring how *Cheney* and its progeny affect mundane civil-discovery disputes).

some external constraint in the Constitution? On the one hand, courts may have more expansive discovery rules involving the President because of constitutional criminal-procedure requirements. But those are not the constitutional provisions that judges cite when curbing executive privilege. Courts rely on language relating to judicial power and duty: "fair adjudication of a particular criminal case in the administration of justice"[226] is the "primary constitutional duty of the Judicial Branch."[227] In criminal cases, federal courts are not brought in to referee some exogenous claim of executive privilege. Instead, courts see adjudication of the executive-privilege claim as central to the exercise of judicial power and, in that way, worthy of judicial capital.

It is important to note just how extraordinary it is that courts have distinguished *Cheney*'s application from the criminal context in the language of the judicial role. Indeed, since *Marbury v. Madison*, the judiciary has insisted that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[228] without regard for whether a suit is civil or criminal in nature. But once courts embedded avoidance into executive-privilege doctrine, they needed a way to distinguish that doctrine where judicial power is really at stake.

And so even in civil cases, when presidential privileges impede judicial functioning, that too justifies adjudication where avoidance would otherwise apply. In *Nixon v. Administrator of General Services*, former President Nixon argued that the appointment of a special master—a judicial officer—to review presidential communications violated the presidential-communications privilege.[229] Not so, the Court held. "[I]n the case of the general privilege of confidentiality of Presidential communications, its importance must be balanced against the inroads of the privilege upon the effective functioning of the Judicial Branch."[230] When the judicial branch itself had reason to take a position in the separation-of-powers conflict, it did so. Where the separation-of-powers conflict is exogenous to the judicial branch but just so happens to be fought out in the federal courts, avoidance comes into adjudication.[231]

The confluence of these indicators is that separation-of-powers avoidance is just that: *avoidance*. It is a legal interpretive tool that the courts use to avoid a separation-of-powers conflict—in the form of compelling a coordinate officer—

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226. United States v. Nixon, 418 U.S. 683, 713 (1974).

227. *Id.* at 707; *see In re* Sealed Case, 121 F.3d 729, 762 (D.C. Cir. 1997) (recognizing that the criminal case at bar "forces us to engage in the difficult business of delineating the scope and operation of the presidential communications privilege").

228. 5 U.S. (1 Cranch) 137, 177 (1803).

229. 433 U.S. 425, 440 (1977).

230. *Id.* at 447.

231. *See* Part II.

that does not squarely involve the judicial branch. Avoidance is not an inexorable constitutional command; indeed, judges have disregarded it. It is instead a judicial tool that courts use to allocate their limited capital. And that use of capital seems to be justified only where there is some incursion on judicial power that is distinct from the separation-of-powers issue directly before the court.

* * *

The story of separation-of-powers avoidance is at least partly one involving judicial capital. Separation-of-powers avoidance's normative justification within the federal court system is complicated. On the one hand, there is a way in which this story fits into the Madisonian ideal of separation of powers.[232] Judges take on high-level governmental actors — most often housed within the executive branch — when they are looking out for judicial power.[233] If the consideration is not one of judicial aggrandizement but instead one of preservation, it seems that separation-of-powers avoidance may be even more justified.

On the other hand, the costs of separation-of-powers avoidance are high. Avoidance in this area inures to the benefit of government officials generally and the executive branch in particular.[234] If avoidance's motivation is judicial and not constitutionally mandated, then there are significant rule-of-law concerns when the deck is stacked in federal court against individuals and institutions with potentially meritorious claims against the government. Even if that is justifiable in the ordinary course, when the institution challenging the Executive is Congress — particularly to clarify the scope of Congress's unilateral authority — an Executive-favoring distortion disrupts the balance of power between two branches that have nothing to do with Article III. That problem is the subject of Part IV's prescriptions.

232. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition.").

233. One exception to this is the relaxed standard for mandamus in cases involving the government, where courts subordinate judicial power to (generally) executive power. *See supra* Section II.A.2.

234. The executive branch is, after all, the part of the federal government charged with the responsibility of appearing in court and with executing the law when there is no judicial resolution.

IV. AVOIDING AVOIDANCE OUTSIDE THE JUDICIARY

Separation-of-powers boundaries are decided in real time, not by courts but by congressional and executive action (and inaction).[235] Through election, expression, and silence, the theory goes, the public can affirm or rebuke those actions and resulting boundaries. Yet, Congress and the Executive often use judicial opinions as the starting point in their negotiations. And the public uses judicialized language to legitimate (or rebuke) governmental action. Whether or not separation-of-powers avoidance is defensible within the courts, doctrine interpreted through an avoidance lens does not necessarily contain its attributed constitutional content.[236] Instead, such doctrines reflect separation of powers *through a judicial lens*. When these judicial decisions are taken outside of the courtroom, they create distortions in constitutional interpretation and constitutional language.

Once we see that certain doctrines are interpreted exclusively, primarily, or even only in certain contexts through the lens of avoidance, we can see the limits of their utility in governance. This Part explores two primary implications that revealing separation-of-powers avoidance contemplates. First, I argue that bilateral negotiations between Congress and the President should eschew doctrine interpreted through the avoidance lens. I offer a limited and context-dependent defense of departmentalism during separation-of-powers conflict between Congress and the President. Second, I argue that public and legal discourse should recalibrate their overreliance on judicial opinions. When we are called upon to evaluate separation-of-powers conflict—like whether the President is right to

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235. *See, e.g.*, Charlie Savage, *U.S. Discloses Decades of Justice Dept. Memos on Presidential War Powers*, N.Y. TIMES (Sept. 16, 2022), https://www.nytimes.com/2022/09/16/us/politics/war-powers-justice-dept-president.html [https://perma.cc/XMR5-VPRF] (reporting the release of OLC memos concerning war powers and explaining that these memos help us better understand the on-the-ground reality of war-powers distributions).

236. When the three branches participate in the separation of powers, it is often difficult to discern the distinction between constitutional content and prudential content. This Article is primarily concerned with the judicial overlay on top of separation-of-powers doctrine. But other branches also have the power to refract separation of powers through their own lens. OLC has expressly recognized this distinction in its opinion on the separation of powers. *See* The Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 135 (1996) ("[A]lthough the general principle marks the boundary of the *law* of separation of powers, it is inappropriate for the Executive to regard this as defining the outer limit of proper separation of powers *policy* objections to legislation."). For an argument that when branches collide there is no principled way to distinguish between relevant powers, see generally M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001); and M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

withhold documents from Congress—we, too, should question our doctrinal priors.

A. Bilateral Powers Conflicts: Legislative and Executive

In practice, power boundaries are often determined by governmental behavior.[237] Where Congress and the President work together, for example, more is constitutionally permitted than when the two are at odds.[238] In *Federalist No. 51*, James Madison envisioned vigorous and sustained competition between the branches to keep one another in check.[239] And yet, acquiescence and negotiation—the other side of competition—is the backbone of the ordering between Congress and the President.[240] So integral is this negotiation and accommodation that courts often invoke separation-of-powers avoidance to hand a dispute back to Congress and the President to resolve in the first instance.[241] These opinions then loop back into the accommodation process: Congress and the President use judicial opinions that employ separation-of-powers avoidance to inform their negotiations. This error extends the reach of doctrine that is inflected with Article III concerns into disputes between Article I and Article II.

In other contexts, scholars have recognized that judicial tools and practices are not necessarily suitable outside of federal court. Trevor Morrison has argued that the canon of constitutional avoidance's use may not be justified within the executive branch.[242] Assessing the myriad contexts in which the executive branch engages in statutory interpretation—from presidential signing statements to OLC memos—Morrison argues that reliance on the statutory canon of constitutional avoidance may be misplaced, particularly if the canon is justified on the

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237. There are entire separation-of-powers domains governed by extrajudicial norms and conventions. *See generally* Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008) (recognizing the pervasiveness of constitutional norms outside of the judiciary including, among others, vice-presidential succession, presidential censure, and majority rule in the Senate). The world of constitutional conventions is a rich one on which much is written but that lies beyond the scope of this Article.

238. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

239. *See* THE FEDERALIST NO. 51 (James Madison).

240. *See* United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 130 (D.C. Cir. 1997) ("The Constitution contemplates . . . accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.").

241. *See, e.g.*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (holding that issues involving the constitutional powers of the other two branches should not be judicially resolved until all opportunities for a negotiated settlement are exhausted).

242. Morrison, *supra* note 61, at 1196.

grounds of judicial restraint.[243] Moreover, because the statutory canon of constitutional avoidance is invoked in cases of statutory ambiguity, Morrison contends that executive interpreters should not use it where their knowledge of congressional intent removes that ambiguity.[244] He similarly contends that stare decisis within OLC is not justified by the same considerations that justify stare decisis in the judicial branch.[245]

Likewise, Michael Dreeben, a longtime veteran of the Office of the Solicitor General (OSG), recently argued that justifications for stare decisis do not translate in that office.[246] Dreeben recognizes that courts depend on following precedent—even when it is wrong—for their legitimacy.[247] By contrast, OSG's legitimacy does not depend on following its own precedents.[248] Instead, Dreeben argues that OSG is best served by providing the Supreme Court with its best current understanding of the law.[249] Morrison and Dreeben share the view that when a judicial lens and concomitant justifications are placed on a particular practice—whether an interpretive canon or stare decisis—those practices may not be appropriate within the executive branch.

This Part makes a slightly different argument that builds on the intuitive notions that Morrison and Dreeben share. Not only should we be skeptical of the value of judicial practices to the executive branch (and legislative branch), but we should also question the use of the cases that result from judicial resolution through the lens of separation-of-powers avoidance within the executive branch (and legislative branch). In other words, when an opinion apparently concerning the distribution of power between Congress and the President has a judicial overlay, that opinion has limited value for actual negotiations between Congress

243. *Id.*

244. *Id.*

245. *Id.* at 1219.

246. *See* Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 YALE L.J.F. 541, 542 (2021).

247. *Id.* at 556-57.

248. *Id.*

249. *Id.* at 556.

and the President.[250] This is particularly true in two contexts: the accommodation process and the impeachment process.[251]

One caveat is in order. Much of the foregoing discussion relies on statements in publicly available OLC opinions. Although each branch shares the responsibility of interpreting the Constitution, OLC is not a neutral arbiter of constitutional law.[252] Where you stand depends on where you sit. OLC is no different. Housed within the Justice Department, OLC presents "*OLC*'s best view of the law, not *the* best view."[253] I acknowledge that these opinions are a form of executive advocacy,[254] but they are also the best publicly available record of the constitutional bases on which the executive branch relies in its interactions with Congress.[255]

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250. One might argue that case law has a place in these negotiations if they occur against the backdrop of potential litigation. But much more is resolved through accommodation than gets to court. I would argue that if the threat of litigation or judicial resolution is regularly invoked, then the outsized threat of judicial resolution stifles accommodation.

251. In his vociferous defense of judicial review, even Charles L. Black, Jr., recognizes that when the Constitution commits a power to another branch, that branch may not be bound by judicial holdings. *See* CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 19 (1960) ("[W]here complete discretion is committed to an official by the Constitution, it is up to him what reasons he wants to give himself or others for his discretionary actions, and he may if he wishes include among these reasons his disagreement with the courts on a point of constitutionality."). I make a slightly different point here, that extrajudicial negotiations and practices need not be bound by judicial decision-making.

252. For one particularly interesting example, see Constitutionality of Bill Creating an Off. of Cong. Legal Couns., 1 Supp. Op. O.L.C. 384, 385-92 (1976), which argues that a bill seeking to create a congressional analog to OLC would be constitutional only if the attorneys in that office were appointed by the President, confirmed by the Senate, and removable by the President at will.

253. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1456 & n.32 (2010) (bringing together scholarship showing that different parts of the Justice Department "operate in an advocacy mode"); *see* The Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 128 (1996) ("Our analyses are guided and, where there is a decision of the Court on point, governed by the Supreme Court's decision on separation of powers. At the same time, the executive branch has an independent constitutional obligation to interpret and apply the Constitution. That obligation is of particular importance in the area of separation of powers, where the issues often do not give rise to cases or controversies that can be resolved by the courts." (footnote omitted)).

254. *See generally* Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017) (describing and analyzing the place of OLC opinions in executive-branch practice).

255. *Cf.* Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515, 538-59 (2021) (arguing, as a descriptive matter, that OLC opinions confer advantages on the executive in bilateral conflicts with Congress, by "[c]reating a [f]irst-[m]over [a]dvantage," declaring the law, "[c]haracterizing [h]istory," "[g]enerating [p]olitical [c]over," and "discouraging compromise").

1. *Accommodation Without Avoidance*

Many recent conflicts between Congress and the President have arisen in the context of congressional oversight of the White House. When Congress subpoenas testimony or information from or involving the executive branch, the two branches ordinarily engage in negotiations known as "accommodation."[256] That process generally results in some sort of compromise; perhaps the executive branch will turn over a portion of documents or permit testimony as to a scope of information. Sometimes, negotiations break down, like in the case of former White House Counsel Don McGahn's refusal to testify to Congress during the Trump Administration.[257] In the mine run, accommodation is *the* process that dictates what exactly the executive branch will turn over. As with any negotiation, the parties' opening offers matter to the ultimate resolution. And OLC has used doctrine warped through the lens of separation-of-powers avoidance to justify a stingy opening offer.

Because of the gap created by avoidance, there is something of a constitutional desert in executive privilege. Much like a police department filling in qualified immunity's content using immunity decisions,[258] OLC has filled in executive privilege's content using doctrine refracted through avoidance. But OLC and Congress are in better constitutional positions to understand and analyze — or at least make arguments concerning — executive privilege's role without relying on doctrine refracted through an avoidance lens.

Recall *Cheney*, which held that the district court must sua sponte narrow civil-discovery requests of the President. That decision does not reflect executive privilege's constitutional minimum. Instead, the disposition in the case was quite expressly motivated by avoiding "plac[ing] courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy" and the "difficult questions of separation of powers and checks and balance."[259] Nonetheless, the executive branch uses judicial reticence to test the limits of separation of powers to keep Congress from taking its own position.

OLC starts with the premise that "[e]ven when Congress operates within the appropriate scope of its oversight authority, the Constitution places additional

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256. *See* United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 130 (D.C. Cir. 1977) ("The Constitution contemplates . . . accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.").

257. *See* Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 153 (D.D.C. 2019); Testimonial Immunity Before Cong. of the Former Couns. to the President, 43 Op. O.L.C. at *2 (May 20, 2019).

258. *See supra* Section I.A.2.

259. Cheney v. U.S. Dist. Ct., 542 U.S. 367, 389 (2004).

separation-of-powers constraints on inquiries directed at the White House."[260] After describing *Cheney* at some length, OLC equates "the President's interests in autonomy and confidentiality when fashioning orders authorizing civil discovery directed at the White House" to "congressional oversight requests for information from the White House."[261] Because congressional inquiries also implicate autonomy and confidentiality, OLC maintains that "the separation of powers concerns recognized in *Cheney* support *significant limitations on the timing and scope of congressional oversight inquiries directed to the White House*."[262]

The OLC opinion goes even further, stating, "If anything, the concerns underlying the Court's decision in *Cheney* apply with even greater force to congressional inquiries. Congress is the President's constitutional 'rival' in a manner distinct from the Judiciary."[263] Although this is OLC's most recent statement on the issue, it is not the sole one to rely on *Cheney* to insulate an executive official from testimony.[264] In another testimonial-immunity opinion, OLC argues that Congress's subpoena power should be even more circumscribed than the courts in a criminal case. OLC argues that in the criminal system, there are "various constraints, albeit imperfect, to filter out insubstantial legal claims"[265] and "minimize the damage to the President's ability to discharge his duties, such as prosecutorial discretion."[266] By contrast, Congress is not subject to such constraints. Indeed, it has power to "summon[]" at will "the President (or one of his immediate advisers) . . . to appear before it to respond at a hearing conducted entirely on the terms and in the manner Congress chooses."[267]

The fact that Congress is the President's constitutional "rival"—and that the executive branch can choose whether to investigate or prosecute—is precisely why *Cheney* should *not* serve as the negotiating baseline between the two branches. Congress may choose to be more rivalrous by subpoenaing an executive actor or even holding that actor in contempt. Just as courts may choose to protect themselves and their authority by *avoiding* conflict with the Executive, Congress may choose to protect its powers by taking the Executive head on.

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260. Cong. Oversight of the White House, 45 Op. O.L.C. at *2 (Jan. 8, 2021).

261. *Id.* at *25.

262. *Id.* at *26 (emphasis added).

263. *Id.*

264. *See* Immunity of the Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena, 38 Op. O.L.C. 5, 5 (2014) (determining that the Assistant to the President and Director of the Office of Political Strategy and Outreach is immune from congressional subpoenas to testify over matters related to his position, based in part on *Cheney*).

265. *Id.* at 15 (quoting Cheney v. U.S. Dist. Ct., 542 U.S. 367, 386 (2004)).

266. *Id.*

267. *Id.*

One could counter that OLC—or an executive-branch legal actor whose role is representation in court, such as Federal Programs or Civil Appellate—is right to situate arguments in the context of litigation. If accommodation ultimately breaks down, then Congress's backstop—litigation—would go only as far as avoidance would permit. There are three responses to this argument. First, most conflict between Congress and the President is resolved outside of court. If litigation is far from the rule and, indeed, the rarest of exceptions, then its influence on the accommodation process is problematic, even if litigation is the ultimate backstop. Second, Congress has internal tools to enforce its interests, such as the power of the purse and contempt power.[268] Of course, Congress has used the power of the purse to considerable success. But it has rarely used its contempt power. Nonetheless, these unilateral powers are not tethered to litigation risk. Finally, if Congress—as a party to litigation—is made aware of avoidance's impact on doctrinal development, then it can zealously advocate a different status quo.[269] It can demonstrate that avoidance generally inures to the Executive's benefit, even if only because the Executive is in court far more often than is Congress. Congress might then argue that avoidance should be cabined to the realm of nondirect conflict between the Executive and Congress in court. Although this Article has not taken a normative position on avoidance in the judicial branch, there are compelling reasons to conclude that avoidance should operate differently in a true interbranch suit than it would in a proxy interbranch suit.

2. *Impeachment Without Avoidance*

One of the strongest checks that the Constitution builds in is Congress's power to impeach officials for high crimes and misdemeanors.[270] Today, it seems, the impeachment power is exercised more as a signaling device than as one intended to remove an executive official from office. Nonetheless, the powers of impeachment and removal belong to Congress. Indeed, there is little in the way of case law concerning impeachment precisely because the Supreme Court

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268. *See* CHAFETZ, *supra* note 139, at 45-77, 152-231 (exploring also Congress's "soft powers," including the power of public speech or debate).

269. Congress has been more litigious in recent years than in the past. *See, e.g.*, Ahdout, *supra* note 26, at 982-84. And there have been increasing calls for Congress to create avenues—such as a congressional cause of action—to litigate against the Executive in certain contexts. There is reason to think that true interbranch suits might operate differently than suits involving one branch and a private party. *See, e.g.*, Benske, *supra* note 25, at 855-68; Shaub, *supra* note 204 (manuscript at 6-7); Huq, *supra* note 27, at 1510-13.

270. *See* U.S. CONST. art. I, §§ 2, 3; *id.* art. II, § 4.

has held that impeachment processes are political questions that the Constitution commits to the Senate.[271] With this backdrop in mind, it seems *a fortiori* that doctrine refracted through the lens of avoidance has no place in congressional impeachment of the President or executive-branch officials. Nonetheless, OLC has relied on judicial doctrine to fortify the executive branch's position in advance of impeachment proceedings.[272]

In the lead-up to President Trump's first impeachment over his denial of military aid to Ukraine, OLC issued a series of opinions seeking to strengthen the President's position. After Congress put on its "impeachment hat," but before the House formally initiated impeachment proceedings against Trump, the House sought to gather information concerning the incident. And yet, OLC claimed that exclusion of agency counsel from congressional deposition in the impeachment context violated executive privilege based on a series of cases dealing with the aftermath of the Watergate scandal that are refracted through the avoidance lens.[273]

OLC first begins with executive privilege in the criminal context. Recall that the standard for setting aside executive privilege in a criminal proceeding is lower than in the civil-discovery context.[274] Interpreting *United States v. Nixon*,[275] the D.C. Circuit held that material cloaked in the presidential communications privilege "should not be treated as just another source of information," but should be provided to a grand jury after a demonstration of the material's importance to the investigation and a showing that the evidence is not available from another source.[276] OLC then concludes that because a grand jury must make such a showing for the federal judiciary to compel production of materials, Congress, too, must make such a showing in the impeachment context.[277]

The standard that courts have set for overcoming executive privilege in the context of criminal investigations is about the judiciary and its special role in the criminal context. The Court has decided that confrontations with the executive branch are justified in service of "the primary constitutional duty of the Judicial

271. *See* Nixon v. United States, 506 U.S. 224 (1993) (concerning the impeachment of Chief Judge Walter Nixon, who sat on the District Court for the Southern District of Mississippi).

272. *See, e.g.*, House Comms.' Auth. to Investigate for Impeachment, 44 Op. O.L.C. at *2 (Jan. 19, 2020); Exclusion of Agency Couns. from Cong. Depositions in the Impeachment Context, 43 Op. O.L.C. at *2-4 (Nov. 1, 2019) [hereinafter *Exclusion of Agency Counsel*].

273. *See Exclusion of Agency Counsel*, 43 Op. O.L.C. at *2-3.

274. *See supra* notes 99-108 and accompanying text.

275. 418 U.S. 683 (1974).

276. *In re* Sealed Case, 121 F.3d 729, 755 (D.C. Cir. 1997).

277. *See Exclusion of Agency Counsel*, 43 Op. O.L.C. at *3.

Branch to do justice in criminal prosecutions."[278] The showing that parties must make — need and the lack of availability — is tethered to the *judicial* role in administering fair criminal proceedings. And yet, OLC "believe[s] that a congressional committee must likewise make a showing of need that is sufficient to overcome the privilege in connection with an impeachment inquiry."[279]

Transposing the judicial standard for criminal prosecutions into the impeachment context diminishes congressional agency in a space where courts have recognized Congress has heightened, constitutionally committed agency.[280] Doctrine refracted through the avoidance lens is particularly inappropriate where Congress is openly wearing its impeachment hat.

B. Legal Discourse

Judicial opinions serve a central role in legal discourse and content. Outside of the separation-of-powers context, there is a robust literature that engages with the idea that judicial pronouncements of the law are not necessarily coterminous with underlying law itself.[281] From constitutional rights to statutory construction, scholars have recognized the gap between judicial enforcement and legal content. The judiciary nonetheless has outsized influence over legal discourse.[282] This influence is particularly troubling in the separation-of-powers context because of the public's role in democratic legitimation. The political branches' legitimacy derives from and is dependent upon the electorate, so it is vital that the electorate have the right tools — and legal benchmarks — to hold the political branches to account. Yet, contemporary discourse does not consider the gap between doctrine and law in the structural constitution. If the public is to be a real force in the constitutional order, then it matters how we talk about the Constitution and what we claim the Constitution provides.

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278. *Nixon*, 418 U.S. at 707; *see also supra* Section III.B (discussing avoidance in the criminal context).

279. *Exclusion of Agency Counsel*, 43 Op. O.L.C. at *3.

280. *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (holding that the Constitution bars judicial review of Congress's exercise of its impeachment power).

281. *See supra* note 9.

282. *See* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) ("The process of forming public opinion in the United States is a continuous one with many participants — Congress, the President, the press, political parties, scholars, pressure groups, and so on. The discussion of problems and the declaration of broad principles by the Court is a vital element in the community experience through which American policy is made.").

This Section makes two interrelated but distinct arguments. First, public discourse ought not rely on doctrine refracted through the lens of avoidance. A prescription, however, may be more theoretical than real when the public is asked to calibrate its understanding of governance in this way. The second prescription may be the more practical one. Legal discourse and legal scholarship should begin to account for the space between doctrine and law in this context. In other words, legal scholars, lawyers, and law teachers should begin to question our collective doctrinal myopia when we talk about separation of powers and should recognize the possibility that the structural constitution's content may be different from what doctrine instructs.

1. The Judicialization of the Constitution

The judiciary's words have outsized effect on legal articulation. Kermit Roosevelt III terms the phenomenon "constitutional calcification."[283] Judicial opinions erroneously instantiate legal concepts, Roosevelt explains, because of the expectation of perfect judicial enforcement: people believe that "[a] governmental action is constitutionally sound if and only if a court would uphold it, and unconstitutional if and only if a court would strike it down."[284] There are, of course, myriad reasons why courts are imperfect enforcers ranging from jurisdictional limits on judicial power to the practice that courts consider only those arguments that are actually presented by the parties before them. Nonetheless, "when a stable jurisprudential regime has persisted for a period of time," Roosevelt argues, "decision rules can start to be mistaken for constitutional operative propositions."[285] Judicial outputs are thus calcified into our legal lexicon.

Roosevelt's argument builds on insights about the scope of individual constitutional rights.[286] But this gap between judicial language and underlying law

283. *See* Roosevelt, *supra* note 9.

284. *Id.* at 1651.

285. *Id.* at 1693; *see* Berman, *supra* note 255, at 529 ("Although public opinion formation is unpredictable, it is clear that both historical precedent and law play a major role in its formation. . . . The public, like the Supreme Court, generally gives weight to tradition and precedent, and might view the agent who resists the precedent as the transgressor." (internal quotation marks omitted)).

286. *See* Sager, *supra* note 9, at 1221 ("Where a federal judicial construct is found not to extend to certain official behavior because of institutional concerns rather than analytical perceptions, it seems strange to regard the resulting decision as a statement about the meaning of the constitutional norm in question. After all, what the members of the federal tribunal have actually determined is that there are good reasons for stopping short of exhausting the content of the constitutional concept with which they are dealing; the limited judicial construct which they have fashioned or accepted is occasioned by this determination and does not derive from a

is not limited to the individual-rights space.[287] Whether heuristically or deterministically, individuals and extrajudicial legal interpreters still rely on judicial opinions to set the benchmarks for legal discourse.[288]

The academy places heavy emphasis on the fact that judges are constrained and legitimated, in part, by their obligation to give reasons for their decisions. But these reasons are quickly lost in public discourse. If the public has a role to play through elections in legitimating the actions of our public actors, then the public is assessing our political actors using the wrong tools.

At the very least, the public should be skeptical of relying on courts or doctrine to inform beliefs about the constitutional propriety of executive or congressional action. Beyond that, however, the public should consider information such as a history of accommodation and the structural tilt that avoidance creates. For example, if an executive actor refuses to comply with a congressional subpoena, but there is a history of accommodation for similar executive-branch actors, that should matter. An executive actor may be able to win her case in court, particularly if it raises a question of first impression or if a judge invokes the process model of avoidance. But the public should consider a long history of acquiescence that makes a lawsuit extraordinary. In other words, the public should be aware of the mass beneath the tip of the iceberg.

Separation-of-powers avoidance can have systemic, nonbenign effects on the law. Thus far, avoidance has generally inured to the benefit of executive-branch actors, in part because delay generally inures to the executive branch's benefit and the executive branch is the one charged with representing the United States in court. The public should consider the Executive's doctrinal advantage when assessing close structural questions. Although I do not recommend a presumption in favor of Congress, I think the public should be aware that there is a thumb on the scale in favor of the Executive in separation-of-powers doctrine.

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judgment about the scope of the constitutional concept itself."); Fallon, *supra* note 9, at 60 (recognizing a gap between "the meaning of constitutional norms and the tests by which those norms are implemented"); Monaghan, *supra* note 9, at 2-3 (recognizing a judicially created "constitutional common law subject to amendment, modification, or even reversal by Congress"); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26-28 (2000) (exploring the difference between documentarians—who focus on the text of the Constitution—and doctrinalists—who focus on judicial elaboration of the Constitution).

287. *See* Nelson, *supra* note 9 (discussing the history of judicially imposed, purpose-based restrictions on legislative power).

288. *See, e.g.*, The Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 135 (1996) (relying on the Supreme Court's holding in *INS v. Chadha*, 462 U.S. 919 (1983), to delineate the extent of congressional power); Morrison, *supra* note 19, at 1603 ("For the executive branch actor . . . it becomes critical to disaggregate judicial doctrine into statements of constitutional meaning and statements about how the courts will enforce that meaning.").

Finally, Congress may want to create publicly accessible counterweights to judicial and OLC opinions.[289] From at least 1919-1969, Congress did resolve legal questions through its own legal offices.[290] But those opinions were sealed.[291] If Congress resurrects a similar practice, it may want to publish those documents so that the public can consider Congress's views of the law.[292]

At this stage, it seems naive and, at best, highly optimistic to urge nuance in public discourse concerning the Constitution in what has been dubbed the "post-truth era." But it is still important to recognize the mismatch between how judicial opinions are used politically and publicly, and their underlying content, and the implications that mismatch has for democratic legitimation. Perhaps the more realistic prescription rests with the legal academy, lawyers, and law teachers.

2. *A Shift to the Legal Lexicon*

The legal community should respond to separation-of-powers avoidance by recognizing the gap between content and doctrine in the structural constitution. The notion of constitutional calcification builds on insights that are well explored in the legal canon. Although Chief Justice Marshall declared in *Marbury v. Madison* that for every right, there is a remedy,[293] no one graduates law school thinking Marshall's statement is descriptively true. Yet typical classes concerning the separation of powers rely on judicial opinions without discounting the judiciary's role as a participant in the separation of powers. Just as legal scholarship

289. What a congressional counterpart to OLC would look like lies beyond the scope of this Article, but Congress has actively considered the idea. *See* SELECT COMM. ON THE MODERNIZATION OF CONG., FINAL REPORT, H.R. REP. No. 116-562, at 232 (2020) (recommending that the Government Accountability Office study the feasibility and effectiveness of a Congressional Office of Legal Counsel).

290. *See* Beau J. Baumann, *(Re)establishing a Congressional OLC*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 23, 2023), https://www.yalejreg.com/nc/reestablishing-a-congressional-olc-by-beau-j-baumann [https://perma.cc/V9NA-VRA3] [hereinafter Baumann, *(Re)establishing a Congressional OLC*]; *see also* Beau J. Baumann, *The Turney Memo*, 97 NOTRE DAME L. REV. 155 (2022) (discussing how a 1929 memorandum by legislative counsel C.E. Turney anticipated nondelegation disputes and offered key guidance to the Senate).

291. *See* Baumann, *(Re)establishing a Congressional OLC*, *supra* note 290.

292. Congress is already messaging the public in new and creative ways. *See, e.g.*, Luke Broadwater, *Timothy J. Heaphy Led the House Jan. 6 Investigation. Here's What He Learned*, N.Y. TIMES (Feb. 19, 2023), https://www.nytimes.com/2023/02/19/us/politics/timothy-heaphy-jan-6-committee.html [https://perma.cc/QRJ3-QUQQ] (noting that the January 6th Commission employed a former president of a broadcasting company to work on messaging the Commission's information to the public).

293. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

and law teaching has accommodated the notion that courts cannot and do not express the full content of constitutional rights, legal scholarship and law teaching should similarly accommodate the notion that courts cannot and do not always express the true bounds of the constitutional separation of powers.

One area where the legal academy has accommodated this space is in the context of the right-remedy gap.[294] Although we have a system of constitutional rights that protect individuals from undue governmental incursion, courts cannot provide a remedy for every rights violation.[295] Whether relief is barred by something as innocuous as a statute of limitations that has run or by more complex doctrines like sovereign immunity, there are recognized limits on individuals' ability to vindicate their constitutional rights. Scholars have accordingly adjusted course. Dick Fallon and Dan Meltzer argue that courts exist not merely to provide a remedy for every right's violation but to provide for a system of remedies that keeps the government in constitutional bounds.[296] John Jeffries recognizes the potential benefits of a right-remedy gap: if courts are not bound to remediate every violation, then they may be more inclined to recognize rights in the first instance.[297] Scholarship, in other words, accommodates the features of adjudication that create space between doctrine and law.

Caleb Nelson has recognized a similar mismatch in the statutory-interpretation space.[298] Nelson emphasizes the application of judicial limitations to statutory interpretation. Although courts cannot invalidate a certain subset of statutes based on improper congressional motive, that does not, according to Nelson, mean that the Constitution allows Congress to legislate with improper motives. Although they may not be judicially enforceable, constitutional limits may indicate that Congress has acted ultra vires.

The judicialization of the structural constitution is also cause for concern and scholarship about the structural constitution must catch up to its rights-based

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294. *See, e.g.*, Jeffries, *supra* note 57 (discussing the role and desirability of merits-first adjudication in constitutional torts cases); Fallon & Meltzer, *supra* note 10 (articulating a general theory of constitutional remedies).

295. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that partisan-gerrymandering claims are nonjusticiable political questions).

296. *See* Fallon & Meltzer, *supra* note 10, at 1736.

297. *See* Jeffries, *supra* note 10, at 90 ("Put simply, limiting money damages for constitutional violations fosters the development of constitutional law. Most obviously, the right-remedy gap in constitutional torts facilitates constitutional change by reducing the costs of innovation. The growth and development of American constitutionalism are thereby enhanced. More importantly, the fault-based regime for damages liability biases constitutional remedies in favor of the future.").

298. *See* Nelson, *supra* note 9.

counterparts.[299] If there is indeed a manifest and systemic drift away from compelling coordinate officers in court, then when we—as scholars, teachers, and lawyers—talk about our government actors and assess the constitutionality of their actions, we should account for that space. Scholarship should expressly account for how the Constitution—and constitutional interpretation—works on the ground and the systemic distortions that reliance on doctrine may cause. Even if constitutional-law classes continue to rely on doctrine, law teachers should raise questions about institutional barriers to neutral structural interpretation.

CONCLUSION

Judicial power is implicated whenever separation-of-powers disputes are in the courts. It is important to assess how Article III adjudication can affect doctrine and outcomes for structural disputes. Separation-of-powers avoidance is one tool that judges use to cool conflict with coordinate branches, and it is motivated, at least in part, by judicial concerns. This Article has traced the link between avoidance and doctrine in certain constitutional areas and the distortion that is caused when that doctrine is taken outside the courtroom. More importantly, it has shown that just as scholarship has recognized that doctrine is not necessarily coterminous with law for individual rights, so, too, legal discourse must recognize the gap between doctrine and the structural constitution.

Avoidance also prompts broader questions about Article III adjudication of separation-of-powers conflict, particularly in the context of reform efforts. Avoidance is more likely to inure to the benefit of the President and the executive branch generally. Setting aside any deference that courts give to the President *qua* President, the executive branch is the entity that represents the United States in court. If avoidance has a compounding effect, then the executive branch is likely to enjoy its doctrinal fruits. As calls are made for Congress to assert its position in court directly—for example, by passing a congressional cause of action to sue the executive branch or to create a congressional analog to the Solicitor General—those calls must be made with concomitant arguments for courts to recognize and adjust for separation-of-powers avoidance.

299. For one recent critique, see Bowie & Renan, *supra* note 11.