Constitutional Avoidance and Presidential Power

Aneil Kovvali*

Recent developments have brought renewed attention to statutes designed to constrain and discipline the President. The federal anti-nepotism statute, the federal conflict of interest statute, the Federal Advisory Committee Act, and the Freedom of Information Act all appear set to endure unusual stress in the coming years. Troublingly, these statutes have already been given limited constructions that weaken their power to restrain the President. Under the constitutional avoidance canon, courts construe statutes so as to avoid constitutional questions. Citing the avoidance canon and the President's actual (or merely arguable) constitutional prerogatives, courts have limited the scope of statutes meant to discipline the presidency. Constitutional avoidance is a time-honored principle, but its application in this context is uniquely troubling. The President is an active participant in the legislative process, and can use his veto power to protect his prerogatives for himself. As a result, this type of judicial involvement can distort results in a way that is difficult, if not impossible, for Congress to reverse. The President's unique powers also make the application of constitutional avoidance particularly problematic in this context.

I. Constitutional Avoidance

News reports have suggested that various norms will be under unusual strain in the coming years. For example, while the text of the federal anti-nepotism statute, 5 U.S.C. § 3110,

* Associate, Wachtell, Lipton, Rosen & Katz. The views expressed in this Essay are my own, and do not necessarily reflect the views of the firm or its clients.

seems to prevent the President from appointing close relatives to any civilian position, Donald Trump's son in law was recently appointed to a White House position.[1]

While the statutory text seems to cut against such an arrangement, the courts have shown a willingness to distort such texts in a manner that expands presidential flexibility. For example, in *Public Citizen v. United States Department of Justice*,[2] the Supreme Court gave a limited interpretation to the Federal Advisory Committee Act ("FACA"). The FACA was enacted by Congress to bring order to the patchwork of committees, boards, and commissions created to advise executive branch officials.[3] Where it applies, it imposes strict procedural requirements, including the filing of a charter, taking of minutes, and various disclosures.[4] In *Public Citizen*, the Court considered whether FACA applied to advice given by the American Bar Association to the Justice Department regarding prospective judicial nominees.

The Supreme Court adopted a narrow reading of FACA that excluded the American Bar Association's advice. While various considerations led the Court to lean against applying FACA, it was ultimately persuaded by the constitutional avoidance canon: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[5] The Supreme Court noted that the district court below had "declared FACA unconstitutional insofar as it applied" to the

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1 *See, e.g.*, Steve Holland & Emily Stephenson, *Trump's son-in-law Kushner to become senior White House adviser*, Reuters (Jan 10, 2017), *available at* http://www.reuters.com/article/us-usa-trump-kushner-idUSKBN14T251. The Department of Justice's Office of Legal Counsel blessed the arrangement in a memorandum alluding to avoidance principles. *See* Office of Legal Counsel, *Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office*, 41 Op. Off. 1, 13 (Jan. 20, 2017).

2 491 U.S. 440 (1989).

3 *Id.* at 445-46.

4 *Id.* at 446.

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

consultations with the American Bar Association, because it "infringed unduly on the President's Article II power to nominate federal judges and violated the doctrine of separation of powers."[6] Instead of reaching the constitutional question addressed by the district court, the Supreme Court adopted a narrow interpretation of FACA that avoided it by excluding the consultations.[7]

Similarly, in *Association of American Physicians and Surgeons v. Clinton*,[8] the Court of Appeals for the District of Columbia Circuit held that the FACA did not apply to the President's Task Force on National Health Care Reform, a group chaired by then-First Lady Hillary Rodham Clinton. Like the *Public Citizen* Court, the D.C. Circuit was moved by constitutional concerns, stating that "Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes."[9] Instead of addressing whether this principle would make it unconstitutional for Congress to regulate the Task Force, the court adopted a limited reading of the statute, which excluded the Task Force.[10]

II. Presidential Involvement in the Legislative Process

The constitutional avoidance canon appears to be well entrenched, though it has been heavily criticized.[11] But it is particularly problematic in this context, given the President's involvement in the legislative process. The President's veto power over legislation allows him to

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6 *Id.* at 466.

7 *Id.* at 467.

8 997 F.2d 898 (1993).

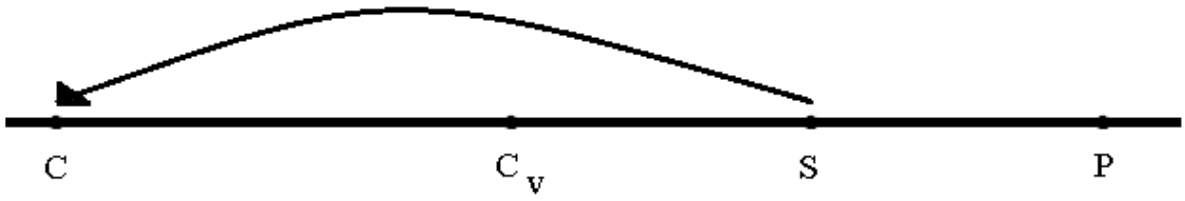
9 *Id.* at 909.

10 *Id.* at 911. The court also made brief comments on the anti-nepotism statute in the course of rebutting an argument that the First Lady of the United States could not be an officer or employee of the government. *See id.* at 905.

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

defend his constitutional prerogatives for himself, and means that the constitutional avoidance canon can have an unusually distortive effect in this context.[12]

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



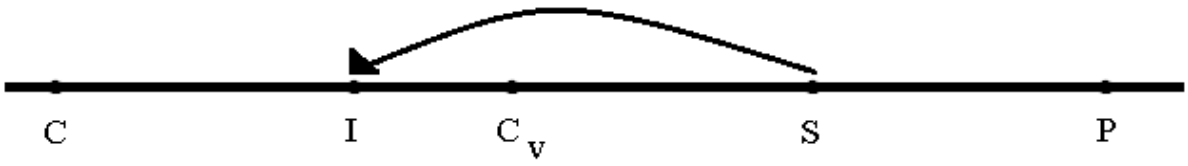
[12] These issues do not apply to the use of the canon to protect judicial instead of presidential prerogatives. *See, e.g.*, Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 300-01 (2001) (avoiding the constitutional issues that would be raised if Congress stripped courts of jurisdiction). Unlike the President, courts do not have any other power to affect the content of legislation. Constitutional avoidance in that context can also be an expression of judicial humility. Indeed, the greatest assertion of judicial power was based on the Supreme Court adopting the opposite approach, and construing a statute in a manner calculated to raise constitutional issues. *See* Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 456 (1989) (arguing that the Court adopted a questionable statutory interpretation in *Marbury v. Madison*, 5 U.S. 137 (1803)).

[13] Figures like this one were used to capture dynamics in ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 215 (1999).

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

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

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



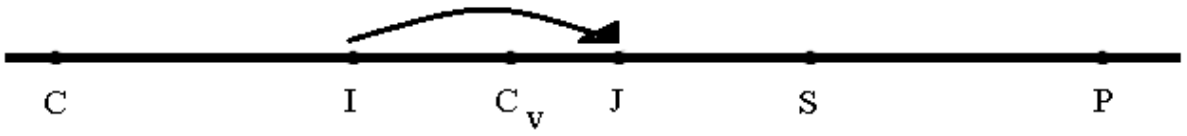
If the President attempted to veto this legislation, his veto would be overridden: "I" is closer to "C_v" than "S," meaning that the member of Congress whose vote will decide whether the presidential veto is sustained would prefer that the legislation remain intact.

This example demonstrates that, in the context of presidential power, the veto serves functions normally filled by the constitutional avoidance canon. It serves to resist intrusions on the relevant constitutional value, forcing Congress to back away from its preferred outcome "C" to a more moderate outcome "I," and it demands an unusual degree of agreement within Congress before a more intrusive measure can be adopted.[15] And this conclusion flows from the

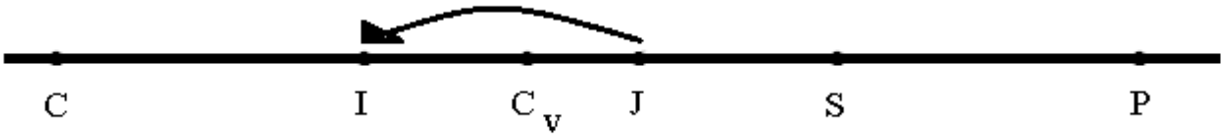
[15] *See, e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1212 (2006) (describing normative justifications for the avoidance canon as advanced by Professors Ernest Young and William Eskridge); Philip P. Frickey, *Getting from Joe to Gene (McCarthy):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

President's *formal* powers alone. The President also has informal tools for shaping legislation.[16] These informal tools amplify the effect.

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



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



But this new statute would be vulnerable to a presidential veto.[17] Since "J" is closer to "C_v" than "I," the member of Congress whose vote will decide whether the presidential veto is sustained would prefer that the legislation be struck down.

In sum, the judicial interpretation has the effect of making it impossible for Congress to achieve its desired outcome of "I."[18] Importantly, if the courts insist on this outcome because of

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

[17] *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2119-22 (2015); Morrison, *supra* note 15 at 1234.

[18] Applying the avoidance doctrine in this context can actually create more distortion than striking down the entire statute as a violation of the constitution. If the statute were struck down,

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

III. Unique Concerns with Presidential Power

Using the avoidance canon to give the President flexibility poses other problems. First, it emboldens the executive branch in potentially dangerous ways. Not all statutory interpretations are policed by the courts. Indeed, "in a great many instances of executive branch statutory interpretation, the question of judicial review does not arise," because the executive's interpretation "does not affect any particular individual, because those affected have no cause of action or lack standing to sue, or because the case is otherwise nonjusticiable."[19] In these contexts, the executive can adopt a self-serving understanding of potential constitutional issues, and use that understanding to reshape statutes as it pleases without judicial discipline.[20] Recent history suggests that this is not a purely theoretical concern.[21] This is an age when serious scholars write that the President is "unbound," and remark that "[w]e live in a regime of executive-centered government, in an age after the separation of powers, and the legally

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the status quo "S" would be restored. There would thus be a broader range of legislation that would survive a presidential veto, since the member of Congress whose vote would decide whether a veto is overridden dislikes "S" more than she dislikes "J." Congress would thus have a freer hand to legislate to the limits of its constitutional authority. While that limit would be to the right of "I," it would be at or to the left of "J."

[19] Morrison, *supra* note 15 at 1196-97.

[20] For this reason, some have urged that the executive branch should not apply the constitutional avoidance canon where presidential power is concerned. *See* H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1315 (2006); *but see* Morrison, *supra* note 15 at 1229-32 (urging that the executive use of the avoidance canon to weaken the statutory prohibition on torture was flawed on other grounds). But as shown above, the canon is problematic in the presidential power context even when it is applied by courts.

[21] *See* Katyal & Schmidt, *supra* note 17 at 2118 n.33 (listing recent aggressive executive interpretations of statutes).

constrained executive is now a historical curiosity."[22] There is little need to further embolden the executive.

Second, the avoidance canon can muddy the essential issues. The limits of presidential power cannot be identified in isolation — they emerge from the dynamics of the relationship between the President and Congress. Per the tripartite scheme articulated in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, the strength of the President's authority depends on Congress's position: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," when he "acts in the absence of either a congressional grant or denial of authority" his authority is in a "zone of twilight," and when he "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[23] Distorting statutory text only makes it more difficult to properly categorize situations: it treats an act incompatible with the text of a statute as if it were an act consistent with a creatively reinterpreted statute.

Third, the canon distorts the balance of power between the branches in a profound sense. Institutionally, Congress must speak in generalities through universally applicable laws, while the President is able to make targeted and discretionary decisions.[24] That is particularly true in the context of statutes like FACA, which are intended to address extemporaneous groups instead of agencies established by statute. Congress cannot anticipate every group that the executive may be inspired to convene at some later time. By requiring Congress to speak with particularity, the constitutional avoidance canon places the burden of prediction on Congress,

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22 ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 4 (2010).

23 343 U.S. 579, 635-37 (1952).

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

when it is often more reasonable to insist that the President anticipate problems and request an accommodation from Congress. Congress has proven willing to entertain such requests.[25]

Finally, presidential power often runs up against other constitutional values, which Congress seeks to enforce through statutory law. When Congress adopted statutes prohibiting torture and limiting surveillance, it was acting in defense of values that find support in the First, Third, Fourth, Fifth, and Eight Amendments to the Constitution.[26] Similarly, ethics statutes defend anti-corruption values that find support in the foreign and domestic Emoluments Clauses.[27] When avoidance is used to narrow these statutes, their underlying constitutional values are diminished in favor of the somewhat unclear[28] constitutional provision vesting the "executive power" in the President.[29]

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

[26] Constitutional avoidance was cited to diminish such statutes, despite their underpinnings. For a succinct treatment, *see* Trevor W. Morrison, *The Canon of Constitutional Avoidance and Executive Branch Legal Interpretation in the War on Terror*, ADVANCE: THE JOURNAL OF THE ACS ISSUE GROUPS 79, 85-94 (2007). Such application of constitutional avoidance runs contrary to one of the canon's strongest normative justifications — its effect of placing the burden of overcoming legislative inertia on the powerful when they seek changes that would harm the powerless. *See* Frickey, *supra* note 15 at 401; Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2210 (2002).

[27] U.S. CONST. art. I § 9 cl. 8, art. II § 1 cl. 7.

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

[29] Indeed, *any* application of the constitutional avoidance canon to defend presidential power suffers from this problem, since it privileges the constitutional provisions that empower the President over provisions that empower Congress.

This competition between constitutional principles suggests another drawback to application of the canon in the structural context. In other contexts, constitutional avoidance can

Conclusion

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

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be a useful tool for delaying a constitutional decision as norms evolve. *See* Frickey, *supra* note 15 at 402-03. Norms around individual rights evolve rapidly. *Compare Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating sodomy laws) *with Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding sodomy laws); *compare W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943) (constitutional right not to salute flag or recite pledge of allegiance) *with Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (no such right). But there is no clear trend in structural norms that would routinely justify delay. *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY xxiv (3d ed. 2004) (describing cycles of expansion and contraction of executive power). Avoidance may be valuable in the context of an emergency, in which the executive might exploit temporarily inflamed passions. But a few years are unlikely to change prevailing attitudes about more routine matters. *Cf. Public Citizen*, 491 U.S. at 466-67.