

The Canon of Constitutional Avoidance and Executive Branch Legal Interpretation in the War on Terror

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A common thread runs throughout many of the most controversial episodes of executive branch legal interpretation in the war on terror, including the initial “torture memorandum” issued by the Justice Department’s Office of Legal Counsel, the President’s signing statement regarding the McCain Amendment’s ban on the mistreatment of detainees, and the Justice Department’s defense of the National Security Agency’s warrantless wiretapping program. Each involved the interpretation of a federal statute, and each employed a rule known as the canon of constitutional avoidance to support its interpretation.

This paper assesses the legitimacy of the avoidance canon in executive branch statutory interpretation generally, and in the above-mentioned war-on-terror episodes in particular. To do that, Part I proposes an analytical framework for thinking about this issue as a general matter, emphasizing the importance of considering both the theoretical underpinnings of the avoidance canon and the institutional context within which it is being used. Part II then applies that framework to the three episodes mentioned above, and shows how each entailed a serious abuse of the avoidance canon.

I. GENERAL CONSIDERATIONS AFFECTING THE LEGITIMACY OF CONSTITUTIONAL AVOIDANCE IN THE EXECUTIVE BRANCH

The avoidance canon, as it is colloquially known, provides that “[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.”¹ Although it has been the target of considerable academic criticism over the last fifteen years, it appears frequently in judicial opinions and has long been embraced by the Supreme Court as a “‘cardinal principle’ of statutory interpretation.”² Interestingly, avoidance also appears quite frequently in the work of the executive branch, including in the examples cited above and also in the more routine work of a variety of administrative agencies like the Federal Communications Commission (FCC), the Environmental Protection Agency (EPA), and the Federal Energy Regulatory Commission (FERC). Virtually without exception,

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¹ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

² *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

however, the question whether the avoidance canon should apply at all in the executive branch receives no real attention. Instead, the validity of the avoidance canon is typically taken as “settled,”³ its accepted status in the courts treated as sufficient to justify its use in the executive branch as well.⁴

What these executive invocations of avoidance tend not to provide is any consideration of whether the *reasons* supporting the judicial use of avoidance are relevant in the executive branch. Are those reasons specific to the federal judiciary—for example, do they seek to facilitate judicial deference to legislative majorities, to minimize counter-majoritarianism, or to respect the “case or controversy” limitations of Article III—or do they relate to other substantive norms not confined to the courts? Similarly absent is any sustained examination of interpretive context. As described by the courts, the avoidance canon applies only in circumstances of statutory ambiguity.⁵ Can executive branch actors ever overcome ambiguity by calling upon sources of statutory meaning not available to courts, thus rendering the avoidance canon unnecessary? In short, determining whether the avoidance canon is appropriate in any particular instance of executive branch legal interpretation should entail considering both the *theory* underlying the canon and the *context* in which it will be deployed.

A. TWO THEORIES OF AVOIDANCE: JUDICIAL RESTRAINT AND CONSTITUTIONAL ENFORCEMENT

Assessing whether the avoidance canon should apply in the executive branch starts with a consideration of how the courts have developed and justified the canon. The cases and the academic commentary supply two theories of the canon, each of which is worth considering.

Two related but distinct rules travel under the avoidance canon’s banner. The first, which Adrian Vermeule calls “classical avoidance,” provides that, when faced with statutory ambiguity, courts should avoid interpretations that render statutes *actually unconstitutional*.⁶ This rule essentially implements the familiar presumption that Congress intends to legislate within constitutional boundaries. The second avoidance rule, which Professor Vermeule calls “modern avoidance,” came to prominence in the early twentieth century and is the more commonly invoked rule today. As noted above, modern avoidance directs courts to construe ambiguous statutes to avoid not only actual unconstitutionality, but *serious constitutional doubts* as well.

The move from classical to modern avoidance is commonly associated with the Supreme Court’s decision in *United States ex rel. Attorney General v. Delaware & Hudson Company*.⁷ In that case, the Court became concerned that classical avoidance

³ See, e.g., *Limitation on the Detention Authority of the Immigration and Naturalization Service*, 2003 WL 21269067 (Op. Off. Legal Counsel, Feb. 20, 2003) (“It is settled, of course, that where there are two or more plausible constructions of a statute, a construction that raises serious constitutional concerns should be avoided.”).

⁴ See, e.g., *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. Off. Legal Counsel 253, 265 (1996) (noting the courts’ use of the avoidance canon and then stating that “[t]he practice of the executive branch is and should be the same.”).

⁵ See *Clark v. Martinez*, 125 S. Ct. 716, 726 (2005) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.”); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001) (“[C]anon of constitutional avoidance has no application in the absence of statutory ambiguity.”).

⁶ See Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1949 (1997).

⁷ 213 U.S. 366 (1909).

entails providing what amounts to an advisory opinion. Its reasoning was as follows: A court is faced with a statute that could mean either X or Y. Although both readings are plausible, conventional tools of statutory interpretation suggest that X is the best reading. But X also raises serious constitutional concerns. The court proceeds to examine those constitutional concerns and concludes that X is indeed unconstitutional. At that point, classical avoidance directs the court to read the statute to mean Y instead, thus arguably transforming its pronouncement of X's unconstitutionality into an advisory opinion.⁸ To avoid those and related problems, the Court in *Delaware & Hudson* and later cases embraced the modern rule that courts should construe statutes not just to avoid actual unconstitutionality, but also to avoid serious constitutional doubts.⁹

The critical point here is that the modern avoidance canon emerged out of a set of concerns specific to the federal judiciary—the rule against advisory opinions and, more broadly, concerns about the countermajoritarian nature of judicial review. I call this account of modern avoidance, which is the dominant account in current doctrine, the *judicial restraint theory* of avoidance. In a nutshell, the judicial restraint theory casts modern avoidance as an attempt to implement the presumed congressional intent underlying classical avoidance (*viz.*, that Congress intends to pass statutes that comply with the Constitution) in a manner consistent with the institutional limitations of the federal judiciary (*viz.*, the need to avoid advisory opinions and, more broadly, to respect legislative supremacy). Whatever we think of the reasoning underlying the judicial restraint theory, clearly it has no purchase outside the judiciary. Thus, if the avoidance canon is understood on these terms, it would seem entirely out of place in the executive branch.

There is, however, an alternative account of modern avoidance. On this account, which I call the *constitutional enforcement* theory, the avoidance canon is simply a means of enforcing the underlying constitutional provision. The idea is that as Congress approaches constitutional boundaries, it activates a constitutional interest in keeping government within them. The avoidance canon guards those boundaries by making it more difficult for Congress even to come near them.¹⁰ This account of avoidance is especially forceful in areas where the underlying constitutional provision tends to be underenforced by the judiciary.¹¹ In those circumstances, the avoidance canon provides an indirect means of enforcing whatever norm is embedded in the constitutional provision.

On this alternative account, modern avoidance would seem to apply just as well in the executive branch as in the courts. Enforcing the Constitution is not an exclusively judicial task. The President's oath of office imposes on him a duty to "preserve,

⁸ By modern standards this is probably not a literal advisory opinion. But whatever we now think of *Delaware & Hudson's* advisory opinion concern, that concern is what drove it to embrace modern avoidance.

⁹ See *Delaware & Hudson*, 213 U.S. at 408; *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring).

¹⁰ There are a number of prominent accounts of avoidance along these lines. See, e.g., William Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); Philip Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretations in the Early Warren Court*, 93 Cal. L. Rev. 397, 450-55 (2005); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549 (2000); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

¹¹ The classic work on underenforced constitutional norms is Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

protect and defend the Constitution,”¹² and that duty is not contingent on judicial enforcement. To the contrary, it is especially significant in areas where the constitutional norm is judicially underenforced. The underenforced norms thesis says that when institutional or other factors inhibit robust judicial enforcement of a particular constitutional provision, it falls to the executive branch (and the legislative branch) to enforce the provision more fully. In a similar vein, Akhil Amar and others have argued that the Constitution builds in a preference for the most government-restrictive view of the law adopted by any of the three branches.¹³ On this account, even if the underlying constitutional provision is *not* especially underenforced by the courts, the Constitution is designed to prefer whichever branch’s implementation of the provision is most protective.

Analogizing from these accounts of direct constitutional interpretation to instances of statutory construction, executive use of the avoidance canon would appear entirely appropriate. After all, the fundamental aim of avoidance as envisioned by the constitutional enforcement theory is to implement constitutional norms by resisting congressional forays into constitutionally sensitive areas. On this view, the avoidance canon is a statutory means of enforcing constitutional values. Employing the avoidance canon, then, can be viewed as fulfilling the executive branch’s independent obligation to enforce the Constitution itself.

In sum, the propriety of modern constitutional avoidance in executive branch statutory interpretation depends, first, on which theory of avoidance one chooses. Under the judicial restraint theory, modern avoidance seems inapplicable in the executive branch. The constitutional enforcement theory, in contrast, is not institutionally specific. If it provides a persuasive account of the avoidance canon in the courts, it should be persuasive in the executive branch as well.

B. THE NEED FOR CONGRESSIONAL NOTIFICATION

There is one important condition on the executive’s use of avoidance under the constitutional enforcement theory: Congress should be notified when the executive branch uses the canon. As described above, the enforcement theory views avoidance as a means of resisting congressional incursions on constitutional values by requiring Congress to speak clearly before its enactments will be read to implicate those values. But implicit in—indeed, central to—that view is the presumption that Congress knows (or could know, upon investigation of the public record) when its enactments have been narrowed by way of avoidance. That presumption is invariably correct in the judicial context, since courts announce their interpretations in published opinions.

The executive branch is a different matter, however. Many executive interpretations are not disclosed to the public, at least not intentionally so. But if the executive’s use of avoidance is to be justified under the constitutional enforcement theory, some mechanism for informing Congress seems essential. Indeed, if Congress does not even know that the executive branch has used avoidance to construe a statute narrowly, avoidance cannot be defended as a means of protecting constitutional norms by remanding Congress to the legislative process. Congress, after all, would not even know of the remand.

¹² U.S. Const. art. II, § 1, cl. 8. Similarly, the Take Care Clause requires the President to “take care that the laws be faithfully executed,” *id.* art. II, § 3, which entails an obligation to respect both federal statutes and the Constitution.

¹³ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1504 (1987).

C. INSTITUTIONAL SELF-PROTECTION AND THE RISK OF ABUSE

Assuming one accepts the constitutional enforcement theory of avoidance, and apart from the congressional notice point just discussed, one might still be inclined to think that certain executive uses of the avoidance canon are especially problematic. In particular, one might worry about what could be called “self-dealing” uses of avoidance to enhance executive power. Whereas, for example, the use of avoidance to narrowly construe a speech-restrictive statute would generally benefit a private actor at the expense of the executive branch, in other situations the executive branch might employ avoidance to shield itself from legislative attempts to regulate or restrict the actions of the executive branch itself. In these circumstances, the avoidance canon arguably becomes a means for the executive branch to evade legitimate legislative restrictions. Accordingly, one might argue that it is categorically illegitimate for the executive branch to employ the avoidance canon when the statute in question restricts the actions of the executive branch itself.¹⁴

I disagree. To be sure, executive use of the avoidance canon in the separation of powers area can sometimes carry an air of self-dealing. But that alone does not make it illegitimate. To the contrary, the constitutional design contemplates such self-interested actions. “Ambition,” James Madison explained, “must be made to counteract ambition.” To that end, “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”¹⁵ The avoidance canon provides just such a means for an executive branch motivated to protect itself from legislative intrusions.

Yet there must be limits. In particular, to conclude that the constitutional enforcement theory provides a generally workable justification for avoidance in the executive branch is emphatically not to say that *all* executive uses of avoidance are beyond reproach. There remains a risk that executive actors will abuse the avoidance canon by employing it in circumstances where, by its own terms, it does not apply. Specifically, they might impose avoidance on a statute that is not sufficiently ambiguous to trigger the canon, and/or they might rely on a marginal or even fanciful constitutional “concern” to drive the analysis. For obvious reasons, the risk of such abuse is especially acute in “self-protective” areas. Faced with legislation purporting to impose limits on the executive branch, executive officials will have an institutional incentive to resist those limits however they can. The avoidance canon is particularly attractive for those purposes, since it enables the executive branch to evade the congressional limitations in question without having to commit to a (perhaps politically costly) position that the limits are actually unconstitutional. In order to repel congressional encroachments upon executive power in a “quieter” fashion, the executive branch may thus be tempted to abuse the avoidance canon by fabricating statutory ambiguity and trumping up constitutional concerns.

¹⁴ For example, H. Jefferson Powell has argued in a short essay that executive branch lawyers “should never [use the avoidance canon] when the issue involves the commander-in-chief power or other questions about the separation of powers between Congress and the President.” H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 Ind. L.J. 1313, 1314-15 (2006); *see id.* at 1315 (“It is an error for the executive branch to employ the avoidance canon when the statute at issue implicates legislative-executive separation of powers issues generally, and emphatically so when the statute bears on, or seeks to structure, the exercise of the President’s authority as commander-in-chief.”).

¹⁵ The Federalist No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961); *see Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (stating that the purpose of separation of powers is to “ensure the ability of each branch to be vigorous in asserting its proper authority”).

Abuse is not inevitable, however, and the risk of abuse need not impeach all self-protective uses of the avoidance canon. Instead, we should focus on whether individual applications of avoidance in the executive branch—particularly those that serve the executive’s own institutional interests—are consistent with the canon’s basic predicates of genuine statutory ambiguity and legitimate constitutional concerns. If those predicates are not met in a particular case, then we will have identified an abuse of the avoidance canon as applied in that case. As we will see in Part II, there is a strong argument that each of the war-on-terror episodes cited at the beginning of this paper involved an abuse of this sort.

D. THE IMPORTANCE OF INTERPRETIVE CONTEXT

The risks of abuse just mentioned points to a final general consideration—the precise institutional context within which the executive employs the avoidance canon. The avoidance canon is a tool for managing statutory ambiguity by assigning a particular consequence to the ambiguity. Whether it is appropriate to assign that consequence depends on the interpreter’s ability to resolve the ambiguity by other, more direct means. Thus, determining whether it is appropriate for executive officials to use the avoidance canon requires considering the information available to them about the statute in question.

Statutory interpretation in the executive branch often takes place in a much more information-rich context than does judicial statutory interpretation. By appearing before and corresponding with the congressional committees that drafted a statute, for example, agency and other executive branch officials may be both more familiar with the considerations that went into the statute’s drafting and better able to place certain parts of the legislative record in the proper context.¹⁶ This informational superiority may, in turn, bring clarity to otherwise ambiguous statutory language. When that occurs, there is no need for the avoidance canon. That is, although the plain text of a statute might appear ambiguous, and although one possible reading of the statute would raise constitutional doubts sufficient to trigger the avoidance canon, the relevant executive actor may be in a position to resolve the statutory ambiguity without recourse to the avoidance canon. In such circumstances, executive use of the avoidance canon is not only unnecessary but inappropriate.¹⁷ In short, even if one accepts the constitutional enforcement theory as providing a generally sound theoretical grounding for the executive’s use of the avoidance canon, specific uses of the canon must also be evaluated in light of the statutory information available to the executive interpreters in question.

II. SPECIFIC WAR-ON-TERROR EXAMPLES OF AVOIDANCE IN THE EXECUTIVE BRANCH

Having established a general analytical structure for evaluating executive branch uses of the avoidance canon, we can now turn to some specific examples. I focus here

¹⁶ See generally Peter L. Strauss, *When the Judge is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 Chi.-Kent L. Rev. 321 (1990).

¹⁷ This point assumes a general approach to executive branch statutory interpretation that looks not only to the text itself but also to legislative history and other extratextual sources. Although the use of legislative history in the courts is a topic of considerable academic debate, there may be reasons to accept such use in the executive branch even if one opposes it in the courts. In any event, there is a long and continuing practice of executive officials employing legislative history when interpreting statutes.

on the three examples identified at the beginning of the issue paper: the Office of Legal Counsel's (OLC's) Bybee Memorandum regarding statutory prohibitions on the use of torture, President Bush's signing statement regarding the McCain Amendment, and the Justice Department's defense of the National Security Agency's (NSA's) warrantless wiretapping program. In each of these examples, as demonstrated below, the executive's use of the avoidance canon is highly problematic.

A. THE BYBEE MEMORANDUM

In the Bybee Memorandum,¹⁸ OLC addressed the constraints imposed by a federal criminal statute implementing the international Convention Against Torture. The statute makes it a crime for any person "outside the United States [to] commit[] or attempt[] to commit torture."¹⁹ The overall thrust of the Bybee Memorandum was to construe the statute narrowly so that it prohibited only a small set of particularly brutal actions. In addition, though, the Bybee Memorandum concluded that the statute would raise serious constitutional problems if it were construed to apply to *any* interrogation ordered by the President pursuant to his constitutional authority as Commander in Chief. Enter the avoidance canon:

In light of the President's complete authority over the conduct of war, without a clear statement otherwise, we will not read a criminal statute as infringing on the President's ultimate authority in these areas. We have long recognized, and the Supreme Court has established a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative construction is available... . This canon of construction applies especially where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government.

In the area of foreign affairs, and war powers in particular, the avoidance canon has special force... . We do not lightly assume that Congress has acted to interfere with the President's superior position as Chief Executive and Commander in Chief in the area of military operations... .

The President's power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. A construction of Section 2340A that applied the provision to regulate the President's authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would

¹⁸ Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, at 34 (Aug. 1, 2002) [hereinafter Bybee Memorandum], subsequently withdrawn and replaced by Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, (Dec. 30, 2004). The Bybee Memorandum gets its name from its ostensible author, then-Assistant Attorney General (and now-federal judge) Jay S. Bybee. As just noted, after being issued on August 1, 2002, it was withdrawn and replaced by a more modest memorandum on December 30, 2004. I do not discuss the Bybee Memorandum here for purposes of establishing current OLC views on the law of torture, but simply as an illustration of the ways OLC has employed the avoidance canon.

¹⁹ 18 U.S.C. § 2340A.

raise serious constitutional questions... . Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.²⁰

In the two years since it was leaked to the public, the Bybee Memorandum has been withered by criticism.²¹ Focusing just on its use of the avoidance canon, the Memorandum perfectly illustrates the ways in which the canon can be abused, especially in circumstances of institutional "self-protection." First, although the avoidance canon is limited to cases of statutory ambiguity, the torture statute does not appear ambiguous on the point in question. By its terms it contains no suggestion that presidentially-ordered torture is somehow exempt from its prohibitions.²² Thus, there is no ambiguity for the avoidance canon to engage. Second, the constitutional vision driving the Bybee Memorandum's analysis is seriously flawed. Indeed, the Memorandum failed even to cite, much less discuss, the most significant separation of powers precedent of the post-World War II era—Justice Jackson's concurring opinion in the *Steel Seizure Case*.²³ In these respects, even if one is inclined to accept (pursuant

²⁰ Bybee Memorandum at 34-35. The Memorandum went on to conclude, in the alternative, that if Section 2340A must be read to apply to interrogations ordered by the President, it would be unconstitutional. See *id.* at 36-39. That conclusion rests on the same problematic constitutional analysis that I discuss in the text.

²¹ See, e.g., W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 68 (2005) ("The overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the [Bybee Memorandum] was so faulty that the lawyers' advice was incompetent."); Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the Senate Committee on the Judiciary, 109th Cong. 158 (2005) (statement of Harold Hongju Koh, Dean, Yale Law School) ("[I]n my professional opinion, the [Bybee Memorandum] is perhaps the most clearly erroneous legal opinion I have ever read."); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. Times, June 25, 2004, at A14 (quoting, *inter alios*, Cass Sunstein describing the legal analysis as ... very low level, . . . very weak, embarrassingly weak, just short of reckless"); Eric Lichtblau, *Justice Nominee Is Questioned on Department Torture Policy*, N.Y. Times, Jul. 27, 2005 (reporting that Timothy Flanigan, who had been Deputy White House Counsel when Bybee Memorandum was issued, stated during hearings regarding his (later withdrawn) nomination to be Deputy Attorney General that he found the Memo "sort of sophomoric").

²² 18 U.S.C. § 2340A(a) & (b) reads in full:

- (a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
- (b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—
 - (1) the alleged offender is a national of the United States; or
 - (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

All agree that the statute's reference to "whoever" includes U.S. government officials. That point is reinforced by the statute's definition of torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control." See *id.* § 2340(1). Moreover, the rule requiring a clear statement before a statute will be read to apply to the President does not apply here, since the question is not whether the President himself may be prosecuted for violating the statute, but whether any government official may be prosecuted under the statute for actions ordered or authorized by the President.

²³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For a collection of statements regarding the influence of Justice Jackson's analytical framework, see Trevor W. Morrison, *Hamdi's*

to the constitutional enforcement theory) that the avoidance canon does have a place in executive branch statutory interpretation, the Bybee Memorandum stands as a prominent example of the ways in which the canon can be abused.

In addition, the fact that Congress was not notified of the Bybee Memorandum when it was issued highlights the importance of congressional notification.²⁴ The Memorandum was written in August 2002, but did not become publicly known until it was leaked to the press almost two years later.²⁵ Until the leak, members of Congress were presumably unaware that this extremely significant executive branch opinion had relied on the avoidance canon to “conclude that [the statutory prohibition on torture] does not apply to the President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.”²⁶ Such secret uses of avoidance are at odds with the operating premises of the constitutional enforcement theory—that the avoidance canon functions as a means of notifying Congress that it was not sufficiently clear about its intentions to force the (purportedly) constitutionally doubtful construction in question. Put simply, the lack of timely congressional notification stands as an independent and fatal flaw in Bybee Memorandum’s use of avoidance.

B. THE PRESIDENT’S SIGNING STATEMENT REGARDING THE MCCAIN AMENDMENT

The use of presidential signing statements has become an extremely controversial practice. I do not propose to join that larger debate here. Instead, I want to focus on one particular signing statement to highlight the ways in which the avoidance canon may be abused in this context.

As discussed above, executive actors may often face circumstances where, owing to their past negotiations and other interactions with Congress, they know precisely what was, and was not, intended by a particular statutory provision. The avoidance canon becomes inapplicable in such circumstances, because the executive officials’ intimate knowledge of congressional intent and purpose removes the statutory ambiguity needed to trigger the canon. Thus in the signing statement context, if the bill on the President’s desk was the subject of close negotiations between executive and congressional leaders, the President may know precisely what is meant by each provision. If a court or other uninvolved third party were to read the bill, it might deem certain provisions ambiguous. But the executive branch’s relationship to the bill is different—not that of an uninvolved third party treating the text like a cold record, but that of an intimately involved participant in the production of the text itself.²⁷

The issue for the use of the avoidance canon in signing statements, then, is whether the President’s potentially more detailed, intimate familiarity with the statute’s intended meaning and purpose removes the ambiguity needed to trigger avoidance. Consider President Bush’s statement on signing the 2006 Defense Appropriations bill. The bill included the McCain Amendment, which provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of

Habeas Puzzle: Suspension as Authorization?, 91 Cornell L. Rev. 411, 413-14 (2006).

²⁴ See *supra* Part I.B.

²⁵ See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002*, Wash. Post, Jun. 8, 2004, at A01 (discussing a “newly obtained memo,” which was the Bybee Memorandum).

²⁶ Bybee Memorandum, *supra* note 18, at 34—35.

²⁷ See generally, Clinton Rossiter, *The American Presidency* 110 (2d ed. 1960) (discussing the modern President’s extensive involvement in the legislative process).

nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”²⁸ That fairly absolutist language notwithstanding, President Bush’s signing statement reserved substantial leeway for the executive branch: “The executive branch shall construe [the relevant provisions] relating to detainees[] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power”²⁹ Although the statement is not explicit on this point, the premise of the reservation is evidently that serious constitutional questions would be raised by a categorical statutory prohibition on certain conduct that a President might order in his capacity as Commander in Chief. To avoid those concerns, the signing statement reads an implicit exception into the McCain Amendment’s prohibitions.

As with the Bybee Memorandum, the McCain Amendment signing statement is premised on a highly controversial vision of expansive, unilateral presidential power under Article II of the Constitution. Here, though, I want to set aside the problems with the underlying constitutional analysis and focus specifically on the avoidance canon. On that point, the question is whether the President’s invocation of avoidance-style reasoning in the signing statement was an appropriate response to ambiguous legislation, or was instead an attempt effectively to rewrite the statute. Even if one were to look only at the rather unambiguous text of the McCain Amendment, this could well look like a case of statutory rewriting, not interpretation. But the point I want to stress is that the President had much more than the text to guide him, and that the extratextual evidence makes his statement even harder to justify.

Senator McCain made clear in public statements that a fundamental aim of the Amendment was to prohibit categorically the torture and other cruel, inhuman, or degrading treatment of detainees in the war on terror.³⁰ The Administration understood the McCain Amendment to do just that, and for that reason spent several months resisting and even threatening to veto it.³¹ The impasse was ultimately broken when the Administration changed course and decided to support the Amendment, but *not* because of any suggestion that it could be construed to avoid imposing substantial limitations on the executive branch. Rather, the change came partly because there were clearly enough votes in Congress to overcome a veto, and partly because the Administration had obtained a number of concessions on related matters, including a

²⁸ Title X, Division A, § 1003(a) of H.R. 2863 (2005). The McCain Amendment further provides that “‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” *Id.* § 1003(d).

²⁹ President’s Statement on Signing of H.R. 2863, The “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006” (Dec. 30, 2005), available at: <http://www.whitehouse.gov/news/releases/2005/12/print/20051230-8.html>.

³⁰ See, e.g., 151 Cong. Rec. S11063-64 (daily ed. Oct. 5, 2005) (noting that “the prohibition against cruel, inhumane, and degrading treatment has been a longstanding principle in both law and policy in the United States” but that recently “confusion about the rules [had] become[] rampant again,” with “so many different legal standards and loopholes that our lawyers and generals are confused”; proposing the McCain Amendment to “restore clarity on a simple and fundamental question: Does America treat people inhumanely? My answer is no. And from all I have seen, America’s answer has always been no.”).

³¹ See Eric Schmitt, *Senate Moves to Protect Military Prisoners Despite Veto Threat*, N.Y. Times, Oct. 6, 2005, at A1; Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, Wash. Post, Oct. 6, 2005, at A01.

set of provisions severely restricting the federal courts' jurisdiction to review enemy combatant detentions at Guantanamo Bay.³² In other words, the McCain Amendment became law as part of a negotiated bargain whose cost to the executive branch was the Amendment's categorical prohibition on cruel, inhuman, or degrading treatment of prisoners. The President himself appeared to accept this bargain at a press conference announcing his newfound support for the Amendment.³³

Viewed in this context, the President's subsequent signing statement reads like a unilateral alteration of the legislative bargain. As Senators McCain and Warner explained in a public response to the signing statement, "the President understands Congress's intent in passing by very large majorities legislation governing the treatment of detainees included in the 2006 Department of Defense Appropriations and Authorization bills. *The Congress declined when asked by administration officials to include a presidential waiver of the restrictions included in our legislation.*"³⁴

Thus, even assuming that the bare text of the McCain Amendment might permit the narrowing construction announced in the President's signing statement (which it almost certainly cannot), the Administration's intimate involvement in the negotiations that produced the Amendment leaves no room for doubt as to its meaning. And in the absence of any actual uncertainty about the Amendment's meaning, the signing statement's avoidance-inspired construction is indefensible. Indeed, invoking avoidance in those circumstances is tantamount to rewriting the legislation itself. And that the President may not do.

C. THE JUSTICE DEPARTMENT'S DEFENSE OF THE NSA SURVEILLANCE PROGRAM

Avoidance also played a central—and problematic—role in the Justice Department's defense of the NSA's warrantless gathering of "signals intelligence" within the United States, from communications involving United States citizens.³⁵ One of the core legal issues in this controversy is whether the surveillance complies with the Foreign Intelligence Surveillance Act (FISA), which lays out the basic legal structure governing electronic surveillance within the United States.³⁶ As a general matter, FISA authorizes electronic surveillance within the United States only upon certain specified showings, and only with a court-issued warrant.³⁷ Beyond that, FISA makes it a criminal offense

³² See Senate Amendment 2524, reprinted at 151 Cong. Rec. S12771-72 (daily ed. Nov. 14, 2005).

³³ See Josh White, *President Relents, Backs Torture Ban*, Wash. Post, Dec. 16, 2005, at A01 (quoting President Bush as saying "[w]e've been happy to work with [Senator McCain] to achieve a common objective, and that is to make it clear to the world that this government does not torture and that we adhere to the international convention [on] torture, whether it be here at home or abroad"). Admittedly, in referring only to torture and not to "cruel, inhuman, or degrading treatment," the President did not explicitly embrace the precise terms of the McCain Amendment. But neither did he withhold support for any part of the Amendment. Given his claim to have "been happy to work with [Senator McCain] to achieve a common objective," a reasonable listener would surely have understood the President to be expressing support for the McCain Amendment, not warning that he would soon use a signing statement to nearly nullify it.

³⁴ Sen. John V. Warner (R-VA) and Sen. John McCain (R-AZ), Statement on Presidential Signing Detainee Provisions, Jan. 4, 2006 (emphasis added).

³⁵ For an explanation of "signals intelligence," see Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, Congressional Research Service Mem., at 1 n.1 (Jan. 5, 2006).

³⁶ See 50 U.S.C. §§ 1801 et seq.

³⁷ FISA does permit warrantless domestic electronic surveillance during wartime, but only for the first fifteen days of a war. See 50 U.S.C. § 1811.

to engage in any electronic surveillance not authorized by statute,³⁸ and another provision in the federal code specifies that FISA and certain other provisions governing wiretaps for criminal investigation are the “exclusive means by which electronic surveillance ... may be conducted.”³⁹

Shortly after news broke that the President had authorized the surveillance in question,⁴⁰ the Justice Department offered a formal defense of the program in a letter addressed to members of the House and Senate Intelligence Committees.⁴¹ The letter was later supplemented by a much more detailed white paper sent to the Senate majority leader,⁴² though the basic argument remained the same. It had two essential parts. First, the Department argued that the President has substantial constitutional authority to order warrantless intelligence surveillance even within the United States. Second, and more pertinently for present purposes, the Department asserted that the Authorization for Use of Military Force (AUMF) of September 18, 2001 “confirms and supplements” the President’s inherent constitutional authority in this area.⁴³

The AUMF empowers the President to “use all necessary and appropriate force against those nations, organizations, or persons” he determines to be responsible for the September 11 attacks, but says nothing whatever about surveillance within the United States.⁴⁴ On its face, therefore, the Justice Department’s AUMF argument would appear to conflict with FISA’s express identification of the statutory provisions setting forth “the exclusive means” for conducting domestic electronic surveillance.⁴⁵

The Justice Department attempted to manage the conflict in two ways. First, it relied upon the Supreme Court’s construction of the AUMF in *Hamdi v. Rumsfeld*.⁴⁶ In that case, a divided Court held that the AUMF authorized the executive detention, without charge, of a U.S. citizen alleged to be an enemy combatant. In particular, Justice O’Connor’s plurality opinion concluded that although the AUMF does not mention detention, its authorization of “all necessary and appropriate force” satisfies a separate federal statute known as the Non-Detention Act, which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁴⁷ The Justice Department relied on that conclusion in its defense of the NSA surveillance program. Specifically, the Department argued that if the AUMF’s authorization of “all necessary and appropriate force” satisfies the statutory requirement that citizens be detained only pursuant to a federal statute, it must also be enough to overcome FISA’s identification of the “exclusive means” for conducting electronic surveillance.⁴⁸

³⁸ See 50 U.S.C. § 1809(a)(1) (providing that “a person is guilty of an offense if he intentionally ... engages in electronic surveillance under color of law except as authorized by statute”).

³⁹ 18 U.S.C. § 2511(2)(f).

⁴⁰ The New York Times broke the story in late 2005. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

⁴¹ See Letter from William E. Moschella, Assistant Attorney General, U.S. Dep’t of Justice, to Senator Pat Roberts, Chairman, Senate Select Comm. on Intelligence, et al. (Dec. 22, 2005) (hereinafter “DOJ Letter”).

⁴² See U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) (hereinafter DOJ White Paper), available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>.

⁴³ DOJ White Paper at 10; see *id.* at 2.

⁴⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a) 115 Stat. 224 (2001).

⁴⁵ 18 U.S.C. § 2511(2)(f).

⁴⁶ 542 U.S. 507 (2004).

⁴⁷ 18 U.S.C. § 4001(a) (2000). See *Hamdi*, 542 U.S. at 517-18 (plurality opinion of O’Connor, J.).

⁴⁸ See DOJ Letter at 3; DOJ White Paper at 12–13.

The *Hamdi* analogy is unpersuasive, however. The Non-Detention Act's requirement that U.S. citizens be detained only "pursuant to an Act of Congress" does not, on its face, require an express statement of congressional authorization.⁴⁹ FISA, in contrast, is explicit in its identification of the "exclusive means" for conducting electronic surveillance. To conclude that the AUMF *satisfies* the Non-Detention Act is to conclude that it provides the statutory authority required by that Act; to conclude that the AUMF *overcomes* FISA is to make the very different determination that it impliedly repeals FISA's express exclusivity provision.⁵⁰ The significance of that distinction is confirmed by the Supreme Court's recent decision in *Hamdan v. Rumsfeld*.⁵¹ There, the Court cited *Hamdi* for the proposition that the AUMF "activated the President's war powers," but then held that such activation did not impliedly repeal or amend the limitations on military commissions set forth in the pre-existing Uniform Code of Military Justice (UCMJ).⁵² If *Hamdi* does not support reading the AUMF to repeal or amend the UCMJ, surely it likewise does not support reading the AUMF to repeal or amend FISA.

In any event, it is the Justice Department's second attempt to overcome the tension between FISA and the AUMF that is of greater interest here. For that attempt, the Department turned to the avoidance canon:

Some might suggest that FISA could be read to require that a subsequent statutory authorization must come in the form of an amendment to FISA itself. But under established principles of statutory construction, the AUMF and FISA must be construed in harmony to avoid any potential conflict between FISA and the President's Article II authority as Commander in Chief... . Accordingly, any ambiguity as to whether the AUMF is a statute that satisfies the requirements of FISA and allows electronic surveillance in the conflict with al Qaeda without complying with FISA procedures must be resolved in favor of an interpretation that is consistent with the President's long-recognized [constitutional] authority.⁵³

As with the Bybee Memorandum and the McCain Amendment signing statement, there are a number of difficulties with the use of avoidance here. For one thing, the underlying constitutional theory of exclusive and inviolable executive power is extremely aggressive.⁵⁴ But as with the McCain Amendment signing statement, I want to

⁴⁹ That said, there is substantial force to the idea, endorsed by Justice Souter in his separate opinion in *Hamdi*, that the Non-Detention Act should be construed, in light of its history and purpose, to impose a clear statement requirement, and that the AUMF did not satisfy such a requirement.

⁵⁰ The Supreme Court has long made clear that repeals by implication are disfavored. *See, e.g., Branch v. Smith*, 538 U.S. 254, 273 (2003) ("We have repeatedly stated ... that absent 'a clearly expressed congressional intention,' ... 'repeals by implication are not favored.'") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974), and *Universal Interpretive Shuttle Corp. v. Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 193 (1968)).

⁵¹ 126 S. Ct. 2749 (2006).

⁵² *Id.* at 2755 ("[T]here is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.").

⁵³ DOJ Letter at 4 (citing *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), and *INS v. St. Cyr*, 533 U.S. 289, 300 (2001), for the avoidance point).

⁵⁴ This and other problems with the Justice Department's argument are discussed in a letter submitted to Congress by several constitutional law scholars and former government officials. *See* Letter from

stress an additional problem relating to the executive's knowledge of legislative history, congressional purpose, and statutory context.

To put the point bluntly, it appears that leaders in the White House and the Justice Department knew that, in the period immediately before and shortly after the AUMF was enacted, the congressional leadership did not view the AUMF as authorizing the surveillance in question. Just before the Senate voted on the AUMF, the White House reportedly sought to insert the words "in the United States and" into the resolution, so that it would authorize the President to "use all necessary and appropriate force *in the United States and* against those nations, organizations, or persons" responsible for the September 11 attacks.⁵⁵ But the Senate leadership refused, apparently on the grounds that it did not want to grant the President expansive powers within the United States.⁵⁶

Later in the fall of 2001, the Bush Administration sought and obtained a number of amendments to FISA in the USA PATRIOT Act.⁵⁷ The Administration did not, however, formally request an amendment to authorize the surveillance at issue here. The reason, according to Attorney General Gonzales in a December 2005 press conference, was that the congressional leadership advised the Administration that securing such an amendment "would be difficult, if not impossible."⁵⁸ The Attorney General subsequently clarified his explanation to say that the difficulty in question was not a matter of congressional unwillingness to provide the requisite authority, but concern that passing an amendment conferring the authority would compromise the secrecy, and thus the effectiveness, of the government's surveillance efforts.⁵⁹ Although that claim is somewhat difficult to credit as a matter of mere common sense,⁶⁰ the critical point for

Curtis Bradley et al., to Bill Frist, Majority Leader, United States Senate et al. (Jan. 9, 2006), available at <http://cdt.org/security/20060109legalexpertanalysis.pdf>, and reprinted in *N.Y. Rev. of Books* (Feb. 9, 2006), at 42.

⁵⁵ See Tom Daschle, *Power We Didn't Grant*, *Wash. Post*, Dec. 23, 2005, at A21.

⁵⁶ *Id.*; see also Ron Suskind, *The One Percent Solution: Deep Inside America's Pursuit of Its Enemies Since 9/11*, 17 (New York: Simon & Schuster, 2006) ("Minutes before the vote, the White House officials had pressed for even more—after 'use all necessary and appropriate force,' they wanted to insert 'in the United States,' to, essentially, grant war powers to anything a president deigned to do within the United States. Senators shot that down.").

⁵⁷ Pub. L. No. 107-56, 115 Stat. 272.

⁵⁸ Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) (hereinafter "Gonzales Press Conference"), available at: www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

⁵⁹ See Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act (Dec. 21, 2005) (hereinafter "Gonzales Remarks") "We were advised that it would be virtually impossible to obtain legislation of this type without compromising the program. And I want to emphasize the addition of, without compromising the program. That was the concern.").

⁶⁰ The claim seems to depend on the idea that amending FISA would have "tipped off" the targeted terrorists, who would otherwise have proceeded on the assumption that their telephone communications were effectively immune from surveillance. Yet surely the targeted terrorists have generally proceeded on precisely the opposite assumption—that they are the targets of a wide array of surveillance efforts by the United States and/or its allies. It would be folly to assume otherwise. See Richard A. Clarke & Roger W. Cressey, *A Secret the Terrorists Already Knew*, *N.Y. Times*, Jun. 30, 2006, at A23 ("Terrorists have for many years employed nontraditional communications ... precisely because they assume that international calls ... are monitored not only by the United States but also by Britain, France, Israel, Russia and even many third-world countries.").

The other premise of the claim is that a statutory amendment would necessarily reveal the specific contents of the surveillance program it was authorizing. But statutory authorization need not speak in specific terms about the precise mechanics of the surveillance. The Justice Department itself acknowl-

present purposes is that, even under the Attorney General's clarified explanation, *the Administration knew that the statutory authorization was not forthcoming*. Even if the leaders in the Administration believed that some members of Congress wanted to grant the authority if it could be done with adequate secrecy, an in-principle desire to provide statutory authority is a far cry from statutory authority itself.

Even more problematically, it was apparently only after concluding that it could not obtain an amendment to FISA that the Administration decided to rely on the earlier-enacted AUMF.⁶¹ Yet there is no indication that Congress thought the AUMF authorized the warrantless surveillance in question. Indeed, had anyone in the congressional leadership viewed the AUMF that way, then presumably they would have responded to the Administration's subsequent inquiries about the possibility of amending FISA by saying it was unnecessary, since the AUMF had already accomplished the task. But no one said that. Instead, as noted above, congressional leaders told the Administration that the statutory authorization it sought could not be provided.

Given what Administration leaders knew about the purpose and intended limits of both FISA and the AUMF, the statutory ambiguity needed to trigger the avoidance canon is simply nowhere to be found. Indeed, the Justice Department's invocation of avoidance to support its construction of the AUMF appears nothing less than disingenuous.

Finally, and separately, the NSA example again highlights the need for adequate congressional notification. The NSA surveillance program had been in effect for a number of years by the time the press reported on it in late 2005. During that time, very few members of Congress knew of the program. Of those who did know, there is no indication they were told that the Administration was relying on the avoidance canon to justify the program.⁶² In a July 17, 2003 letter to Vice President Cheney, for example, Senator Rockefeller noted the "profound oversight issues" raised by the NSA program on which he, Senator Roberts, and a few others had just been briefed.⁶³ He went on to state that, "[g]iven the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse, these activities... . Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received."⁶⁴ The letter contains no acknowledgment that the Administration was justifying the NSA's activities by claiming

edged this, insofar as it claimed that the vague and open-ended language of the AUMF authorized the surveillance in question. See DOJ Letter at 2-4, *supra* note 41. If the AUMF itself did not intolerably "tip off" the terrorists, surely the same would be true if it were amended to provide, for example, that the President may "use all necessary and appropriate force against those nations, organizations, or persons [responsible for the September 11 attacks], including intercepting their communications within and without the United States."

⁶¹ See Gonzales Press Conference, *supra* note 58 ("We've had discussions with members of Congress ... about whether or not we could get an amendment to FISA, and we were advised that ... that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program. And ... so a decision was made that because we felt that the authorities were there, that we should continue moving forward with the program.").

⁶² Other parts of the Justice Department's defense of the program, such as its reliance on the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*, obviously post-dated the initiation of the program.

⁶³ Letter from Senator John D. Rockefeller, IV (D-WV), Vice Chairman, Senate Select Committee on Intelligence, to Richard B. Cheney, Vice President, at 1 (Jul. 17, 2003).

⁶⁴ *Id.* at 1-2.

authorization from Congress itself, and it seems highly unlikely that any such statement was included in the briefing. As discussed in Part I.B, however, timely and appropriate notice to Congress is a critical predicate of the constitutional enforcement theory of avoidance. In the absence of such notice, the Justice Department's avoidance-based defense of the NSA program simply cannot get off the ground.

III. CONCLUSION

The propriety of constitutional avoidance in executive branch statutory interpretation is not easily determined. But especially given the canon's prominence of late, the undertaking is worth the effort. As I have tried to show here, the analysis must begin with a consideration of the values underlying the canon. If the canon is understood to serve the judiciary-specific values associated with the judicial restraint theory, then it would appear to have no place in the work of the executive branch. If, on the other hand, the canon is viewed as means of implementing substantive constitutional commitments along the lines suggested by the constitutional enforcement theory, then as a general matter it would seem perfectly appropriate for the executive branch to employ it.

Even if one accepts the constitutional enforcement theory, however, individual applications of the avoidance canon in the executive branch may still be problematic. And as I have tried to show, there are serious problems with each of the executive's most prominent uses of avoidance in connection with the war on terror. The Bybee Memorandum, the McCain Amendment signing statement, and the Justice Department's Defense of the NSA wiretapping program all deploy avoidance in the service of a non-mainstream view of the constitutional allocation of power, and in the absence of the kind of statutory ambiguity required to trigger the canon. They are, in short, perfect examples of abusive avoidance.