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The Presidential Avoidance Canon

Michael K. Velchik
U.S. Senate

Michael K. Velchik*

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ABSTRACT

This Article identifies an overlooked yet potent canon of statutory construction: the presidential avoidance canon. Under this rule, courts will not interpret a generally applicable statute to apply to the President, his close advisers, or the Executive Office of the President (EOP), absent a clear statement. Even where a statute explicitly applies to the EOP, courts may narrowly construe the law to exempt those EOP components whose sole function is to advise and assist the President.

Applying this rule, courts have narrowly construed the Administrative Procedure Act, the Freedom of Information Act, the Privacy Act, the Federal Records Act, the Presidential Records Act, the Civil Rights Act of 1964, anti-nepotism laws, and inspector general reporting requirements. Unlike other canons of construction, which subtly influence interpretation, this canon has driven courts to conclusions starkly at odds with the plain texts of these statutes.

Despite its significant impact, the presidential avoidance canon has received little scholarly attention. This Article fills the gap in the literature by tracing the history, logic, and potential applications of this canon of construction. It identifies the development of this canon in Supreme Court precedents from the Jefferson, Johnson, and Nixon administrations. It documents how courts and the Department of Justice have applied the doctrine to landmark legislation. It then extrapolates the logic of this canon to new contexts, including the Federal Tort Claims Act, the Whistleblower Protection Act, the Inspector General Act, the Computer Fraud and Abuse Act, and the Hatch Act. It concludes by discussing the canon's scope, justification, and utility.

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* Legislative Director & Senior Counsel, U.S. Senate. The author previously served in the White House Counsel's Office from 2019 to 2021. I thank Dan Epstein, Eric Hamilton. The views expressed in this article are the author's alone and do not necessarily represent those of the U.S. government.

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I. INTRODUCTION

When interpreting statutes, courts apply various canons of construction.[1] These are "generally accepted concrete rules of statutory

1. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 737–38 (2006) (interpreting a statute in light of "our own canons of construction" and requiring a clear statement from Congress "to authorize an unprecedented intrusion into traditional state authority"). Scholars have characterized these canons as "rules of unwritten law, even as they govern the interpretation of written law." William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084 (2017).

construction."[2] Many have Latin names.[3] Various treatises enumerate them.[4] However these canonical lists arguably omit the most potent canon of all: the presidential avoidance canon.[5]

Under this rule, courts will not interpret a generally applicable statute to apply to the President, his close advisers, or the Executive Office of the President (EOP), absent a clear statement.[6] Even where a statute explicitly applies to the EOP, courts have narrowly construed the statute to exempt those EOP components whose sole function is to advise and assist the President.[7] The Supreme Court has described this canon as rooted in the separation of powers.[8] This canon also recognizes that the President is unique, so it may, therefore, be inappropriate to interpret all generally applicable rules as constraining the

2. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16 (1997).

3. *See, e.g.*, Yates v. United States, 574 U.S. 528, 545 (2015) (describing and applying the *eiusdem generis* canon).

4. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); SHAMBIE SINGER & NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2022); PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES (6th ed. 1920); CARLETON KEMP ALLEN, LAW IN THE MAKING (1927); HENRY CAMPBELL BLACK, CONSTRUCTION AND INTERPRETATION OF LAW (2d ed. 1911); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS (3d ed. 1880); HENRY HARDCASTLE, A TREATISE ON THE CONSTRUCTION AND EFFECT OF STATUTE LAW (3d ed. 1901); FORTUNATUS DWARRIS, GENERAL TREATISE ON STATUTES: RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION (1885); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88–91 (1765) (describing how to interpret different types of statutes). Because of their prominence, some legislatures have even opted to codify some of these canons. *See, e.g.*, OKLA. STAT. tit. 25, § 32. *See generally* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010). For empirical work on the canons of construction, *see, e.g.*, Abbe R. Gluck & Lisa S. Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons*, 65 STAN. L. REV. 901 (2013) (studying the use of canons by members of Congress); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1398 (2018) (studying the use of canons by judges).

5. We call this the "presidential avoidance canon" for two reasons: first, because it describes how courts avoid applying generally applicable statutes to the president and his close advisers; and second, because some applications may be considered as a species of constitutional avoidance. One could also analogize to the *expressio unius* canon, saying courts will interpret the inclusion of a general class of government officials to exclude the president and his close advisers. *Cf.* N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017) (explaining the "*expressio unius est exclusio alterius*").

6. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of" an act.); Nixon v. Fitzgerald, 457 U.S. 731, 748 n.27 (1982) (requiring an explicit statement from Congress before applying generally applicable statutes to the President).

7. *See infra* section III.B.

8. *See Franklin*, 505 U.S. at 800–01.

President.[9] Applying this rule of construction, courts and the Executive branch have narrowly construed many statutes, including the Administrative Procedure Act (APA), the Freedom of Information Act (FOIA), the Privacy Act, the Federal Records Act, the Presidential Records Act, Title VII of the Civil Rights Act, the "Bobby Kennedy" anti-nepotism statute, the Federal Advisory Committee Act (FACA), and congressional notification laws.[10] In each case, courts have avoided applying generally applicable statutes to the President and his close advisers, absent a clear statement. Indeed, courts have even avoided such interpretations in the face of clear statements.

Perhaps more than any other canon of construction, this rule does real work. It does not merely place a thumb on the scale in close questions.[11] It is not restricted to breaking ties when a judge finds a statute to be "ambiguous."[12] Instead, this canon has compelled courts to interpret statutes in ways that are diametrically opposed to the plain text.[13] Despite the clear power this canon wields in statutory interpretation, it has received no specific treatment in scholarly analysis. This Article fills the gap in the literature by tracing the history, logic, and potential application of this canon.

Part II begins with the original understanding of the presidential avoidance canon. It describes how Chief Justice Marshall, while riding circuit, analyzed whether a judge was authorized to issue a subpoena *duces tecum* to a sitting President. The Chief Justice recognized the gravity of interpreting a generally applicable law to apply to a sitting President. He therefore memorialized his reasoning in a written opinion describing his cautious analysis before issuing the subpoena.

Part III describes how the Department of Justice (DOJ) Office of Legal Counsel (OLC) and courts have developed this rule into one of the most formidable canons of construction. It describes OLC opinions and litigation over the APA, FOIA, the Privacy Act, recordkeeping laws, Title VII, ethic laws, FACA, and the Intelligence Community Inspector General Act. This body of law illustrates the great lengths to which courts will go to construe statutes to exempt the President,

9. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020) ("The President is the only person who, alone, composes a branch of government.")

10. *See infra* Part III. Technically, the Freedom of Information Act and Privacy Act were amendments to the Administrative Procedure Act.

11. *Cf.* Sebelius v. Auburn Reg'l. Med. Ctr., 568 U.S. 145, 156 (2013) (describing the canon of construction where a legislatures' use of different terms in different parts of a statute should be accorded different meanings. This canon, however, "like other canons of construction," operates as "'no more than [a] rul[e] of thumb' that can tip the scales when a statute could be read in multiple ways.") (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992)).

12. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (deferring to the agency's interpretation when the statute is "ambiguous").

13. *See infra* Part III.

his close advisers, and the EOP generally. This Part emphasizes the outsized role that legislative history played in decisions by OLC to initially apply generally applicable statutes to the President before courts invoked the canon of construction to pare back these overbroad readings.

Part IV applies the logic of these decisions to additional contexts, including the Federal Torts Claims Act (FTCA), the Whistleblower Protection Act, the Inspector General Act, the Computer Fraud and Abuse Act, and the Hatch Act. The logic of the decisions in Part III, if applied evenhandedly to these new contexts, would suggest that White House staffers may commit torts with impunity, that White House staffers do not enjoy standard whistleblower protections, that Inspectors General may not audit or investigate misconduct in the White House, that Congress forgot to criminalize hacking into White House servers, and that the Hatch Act may not cover some White House officials.

Part V discusses the scope, justification, and utility of the canon. It compares how courts have formulated this rule of construction and offers a restatement, which tries to capture how courts have applied this rule in practice. It argues that the canon is justified on at least three independent bases: first, as a species of the broader constitutional avoidance canon; second, as an application of statutory rules of construction that read competing statutory provisions in harmony with one another; and finally, as a product of the President's unique role in our system of government and thus "corner case" for statutes of general applicability. Several prominent applications of the presidential avoidance canon can be explained as examples of the constitutional avoidance canon. There are other applications, however, which do not implicate constitutional questions and therefore, can only be justified on statutory grounds. Thus, merely describing these cases as examples of the constitutional avoidance canon is underinclusive. It is also overinclusive to the extent that it fails to focus the inquiry on the unique issues raised by applying statutes to the president. Such a broad label also fails to evoke the complex and intertwined history of how OLC and courts have interpreted interrelated statutory provisions. In fact, there is now a robust and growing tradition of case law refusing to apply generally applicable statutes to the President and his close advisers, even in the face of explicit language. Congress has reacted by enacting laws with super clear statements. This, in turn, has only raised the standard for what constitutes a clear statement sufficient to justify interpreting a generally applicable statute to cover the president and White House staff. It is therefore important to recognize these apparently disparate lines of cases under a single doctrine with a clear formulation: the presidential avoidance canon.

The precise contours of this argument require some background about the organizational structure of the White House. The term

"White House" is not legally significant.[14] Rather, it is the minimally descriptive name for a building that, by metonymy, has come to stand for the President and his advisers at varying levels of generality.[15] These employees are organized under the umbrella organization called the "Executive Office of the President" (EOP),[16] which currently encompasses fourteen components.[17]

Courts distinguish between the "advise-and-assist" components, whose sole function is to advise the President in the fulfillment of his unique constitutional, statutory, and ceremonial duties, and the remaining components, which are functionally more similar to traditional executive branch agencies.[18] The "advise-and-assist" components are: The White House Office (WHO),[19] National Security Council (NSC),[20] Executive Residence,[21] National Space Council (NSpC),[22] Council of Economic Advisers (CEA),[23] Office of Administration (OA),[24] President's Intelligence Advisory Board (PIAB),[25] Office of the Vice President (OVP),[26] and ostensibly, the Office of National Cyber Director (ONCD).[27] The remaining components are: the Council on Environmen-

14. *See, e.g.*, Memorandum from William H. Rehnquist, Assistant Att'y Gen., Off. of Legal Couns., on Power of Cong. Comm. to Compel Appearance or Testimony of "White House Staff," to John D. Ehrlichman, Assistant to the President for Domestic Aff. (Feb. 5, 1971) at 1 n.1 ("The term 'White House staff' is not used in any precise or technical sense.'").
15. For example, Chief Justice John G. Roberts, Jr. once quipped: "I vividly remember my first day on the White House staff. My office, of course, was in the Old Executive Office Building. I didn't rate one in the West Wing; but don't try to tell me or any of the rest of us working there that we weren't working in the White House." *Reagan Lecture*, C-SPAN, at 5:25 (Mar. 8, 2006), https://www.c-span.org/video/?191523-1/reagan-lecture [https://perma.cc/5E45-JNX6].
16. *Cf.* Alexander v. F.B.I., 691 F. Supp. 2d 182, 185–86 (D.D.C. 2010), *aff'd*, ("The Executive Office of the President was created during the administration of President Franklin Roosevelt to house the immediate advisors to the President . . . The bureaucratic babushka doll does not stop there though.").
17. *See generally* HAROLD C. RELYEA, CONG. RSCH. SERV., No. 98-606, The Executive Office of the President: A[ ] Historical Overview [sic] (2008).
18. *See, e.g.*, Kissinger v. Rep. Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).
19. 3 U.S.C. § 105. The highest-ranking staffers are known as commissioned officers titled "Assistant to the President," "Deputy Assistant to the President," and "Special Assistant to the President," in that order.
20. 50 U.S.C. § 3021.
21. 3 U.S.C. §§ 105, 110, 114.
22. Exec. Order no. 14,056, 86 Fed. Reg. 230 (2021); Establishment of United States Space Command as a Unified Combatant Command, 83 Fed. Reg. 65,483 (Dec. 18, 2018); Reviving the National Space Council, 82 Fed. Reg. 31,429 (June 30, 2017).
23. 15 U.S.C. § 1023.
24. 3 U.S.C. § 107.
25. President's Intelligence Advisory Board and Intelligence Oversight Board, 73 Fed. Reg. 11,805 (Feb. 29, 2008).
26. *See* 3 U.S.C. § 106.
27. 6 U.S.C. § 1500. This office was recently created by President Biden; no court has yet adjudicated whether its sole function is to advise and assist the President.

tal Quality (CEQ),[28] the Office of Management and Budget (OMB),[29] the Office of National Drug Control Policy (ONDCP),[30] the Office of Science and Technology Policy (OSTP),[31] and the Office of the United States Trade Representative (USTR).[32] As described more fully below, courts have applied the presidential avoidance canon by creating and using the advise-and-assist distinction when confronted with generally applicable statutes that, by their terms, seem to apply to executive branch agencies generally or the EOP explicitly.

II. ORIGINS OF THE CANON

The origin of this canon can be traced through three important cases involving (A) President Jefferson, in the trial of Aaron Burr, (B) President Johnson, concerning his enforcement of the Reconstruction Acts, and (C) President Nixon, concerning allegations that he retaliated against a federal employee for his testimony to Congress.

A. President Jefferson

The presidential avoidance canon originated with Chief Justice Marshall.[33] While riding circuit, the Chief Justice presided over the trial of Aaron Burr for treason.[34] During the trial, he was presented with a motion to issue a subpoena *duces tecum* to President Jefferson.[35]

The Chief Justice described this as a question of first impression.[36] He noted that, "[w]hen this subject was suddenly introduced, the court felt some doubt concerning the propriety of directing a subpoena to the chief magistrate."[37] Even though counsel for the United States did not oppose the subpoena, "[t]he court, however, . . . thought it necessary to state briefly the foundation of its opinion, that such a subpoena may issue."[38] In other words, Chief Justice Marshall exercised caution before applying a generally applicable law to the President of the United States.

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28. 42 U.S.C. §§ 4342, 4372.
29. 31 U.S.C. § 501.
30. 21 U.S.C. § 1702.
31. 42 U.S.C. § 6611.
32. 19 U.S.C. § 2171.
33. *Cf.* Orin S. Kerr, *Decryption Originalism: The Lessons of Burr*, 134 HARV. L. REV. 904 (2021) (This piece analyzes the oral arguments and opinion from United States v. Burr where the court extensively discussed the application of the Fifth Amendment. The article utilizes this information to construct an originalist understanding of the Fifth Amendment.).
34. United States v. Burr, 25 F. Cas. 30 (Marshall, Circuit Justice, C.C.D. Va. 1807).
35. *Id.*
36. *Id.* at 34 ("If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the president, that decision is unknown to this court.").
37. *Id.* at 35.
38. *Id.* at 34.

The Chief Justice began with the text of the Constitution and the applicable statute.[39] The Sixth Amendment requires that the defendant "in all criminal prosecutions" enjoy "a right . . . to compulsory process for obtaining witnesses in his favor."[40] The applicable statute in effect at the time provided:

> and every such person or persons accused or indicted of the crimes aforesaid, (that is, of treason or any other capital offence,) shall be allowed and admitted in his said defence to make any proof that he or they can produce by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial as is usually granted to compel witnesses to appear on the prosecution against them.[41]

Chief Justice Marshall interpreted this provision to be "declaratory of the common law" and, looking to "immemorial usage," stated that "any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses."[42] He noted that these two generally applicable provisions contained "no exception whatever."[43]

The Chief Justice noted that, "[t]he exceptions furnished by the law of evidence" generally excused only "those . . . whose testimony could not be received."[44] Under English law, there was also a traditional exception for the king, because "it was said to be incompatible with his dignity to appear under the process of the court."[45] The Chief Justice, however, distinguished between the king of England and the President of the United States, citing two differences. First, under the English constitution, "the king can do no wrong, . . . no blame can be imputed to him, [and] . . . he cannot be named in debate."[46] In contrast, the President of the United States "may be impeached, and may be removed from office on high crimes and misdemeanors."[47] Second, "the crown is hereditary, and the monarch can never be a subject," whereas "the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of

39. *Id.* at 34 (looking to "the provisions of the constitution, and of the statute, which give to the accused a right to the compulsory process of the court").
40. *Id.* at 33 (quoting U.S. CONST. amend. VI). In the opinion, he refers to this as the "eighth amendment to the constitution." *Id.* He could have also cited Article III, section 3 of the Constitution for the proposition that access to evidence should be broadly construed in cases of treason. It states, in cases of "Treason against the United States," (the charge against Burr) "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3.
41. *Burr*, 25 F. Cas. at 33.
42. *Id.* at 33.
43. *Id.* at 34.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

the people again."[48] Instead, the President was more analogous to "the first magistrate of a state" or cabinet members, who were generally amenable to judicial process at the time.[49]

The Chief Justice acknowledged the implications of his ruling on the separation of powers. "If . . . the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects."[50] Yet in the case of a subpoena, the Chief Justice found it "apparent that this demand is not unremitting" and that this had not proven problematic for ministers in England.[51] To the extent that the President required some "guard . . . to protect him from being harassed by vexatious and unnecessary subpoenas," that protection was to come from "the conduct of a court after those subpoenas have issued," rather than "in any circumstance which is to precede their being issued."[52] Nevertheless, "the law does not discriminate between the president and a private citizen" and so there is "no foundation" for interpreting this power to except the President.[53] Thus, the Chief Justice held that "[a] subpoena *duces tecum* . . . may issue to any person to whom an ordinary subpoena may issue."[54]

The *Burr* precedent stands for the proposition that courts should not be so hasty to apply generally applicable statutes to the President. Indeed, recognizing the gravity of the question, Chief Justice Marshall made the conscious decision to record his reasoning, beginning with the text of the Constitution, comparing the President to his closest analogs in England at the time the Constitution was adopted, and acknowledging—but ultimately rejecting—the potential effect his ruling would have on the President's ability to "take care that"the laws be faithfully executed.[55] Although Chief Justice Marshall ultimately applied a generally applicable statute to the President, the manner in which he arrived at this conclusion evinces respect for the separation of powers. The *Burr* case may, therefore, provide an early precedent for a limited form of the presidential avoidance canon.

Recent Supreme Court cases have confirmed the substance of the *Burr* ruling. In *United States v. Nixon*, a criminal prosecution, the Supreme Court held that under the generally applicable Federal Rule of Criminal Procedure 17(c), a federal prosecutor could enforce a

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. U.S. CONST. art. II, § III.

subpoena *duces tecum* for confidential presidential communications.[56] In *Clinton v. Jones*, the Supreme Court held that the Constitution does not preclude issuing a subpoena to a sitting President to testify in a federal civil case.[57] Similarly, in *Trump v. Vance*, the Supreme Court held that Article II and the Supremacy Clause did not categorically preclude a state court from issuing a criminal subpoena to a sitting President.[58] Yet, in *Trump v. Mazars USA, LLP*, the Court clarified that a congressional subpoena to a third party for financial records of a sitting President raised separation of powers concerns.[59] All four cases cited *Burr*.[60] The result is that sitting and former Presidents may generally be sued in their personal or official capacities under the *Federal Rules of Criminal Procedure*. The one notable exception is DOJ OLC's position that the separation of powers precludes the federal government from indicting or prosecuting a sitting President under federal criminal law.[61]

Burr stands for a weak version of the presidential avoidance canon: Chief Justice Marshall exhibited restraint before interpreting a generally applicable statute to the President. Following the growth of the Executive Branch and other historical developments, however, the Supreme Court would later develop a strong version of the presidential avoidance canon: that generally applicable statutes should not be construed to apply to the President, absent a clear statement. We now turn to that formulation.

B. President Johnson

The second important precedent is *Mississippi v. Johnson*.[62] In that case, the State of Mississippi filed suit in the Supreme Court asserting original jurisdiction to enjoin President Johnson from enforcing

56. United States v. Nixon, 418 U.S. 683, 716 (1974); *Cf.* Gravel v. United States, 408 U.S. 606, 626–27 (1972) (explaining that the Speech and Debate Clause of the Constitution only protects members of Congress and their aids from subpoenas when their actions are in furtherance of legislative acts); U.S. CONST. art. I, § 6, cl. 1.
57. Clinton v. Jones, 520 U.S. 681 (1997).
58. Trump v. Vance, 140 S. Ct. 2412 (2020).
59. Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).
60. *See generally Vance*, 140 S. Ct. at 2421; *Mazars USA, LLP*, 140 S. Ct. at 2026; *Jones*, 520 U.S. at 695; *Nixon*, 418 U.S. at 702.
61. Memorandum Opinion from Randolph D. Moss, Assistant Att'y Gen. Off. Of Legal Couns. on a Sitting President's Amenability to Indictment and Crim. Prosecution (Oct. 16, 2000); Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Couns. on the Amenability of the President, Vice President, and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973); *but see* Letter from Ronald D. Rotunda, Albert E. Jenner, Jr. Professor of Law, U. of Ill. to the Hon. Kenneth W. Starr on the Indictability of the President (May 13, 1998) (on file with the National Archives).
62. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867).

the Reconstruction Acts.[63] The state even alleged that jurisdiction was proper under Article III because President Johnson was a citizen of Tennessee.[64]

The literal text of the Constitution and Judiciary Act supported jurisdiction in this case. Under Article III, the Supreme Court has jurisdiction over "Controversies . . . between a State and Citizens of another State" and original jurisdiction in "Cases . . . in which a State shall be a party."[65] The Judiciary Act of 1789 also specified that "the Supreme Court shall . . . have jurisdiction of all controversies of a civil nature . . . between a state and citizens of other states, or aliens, in which . . . case it shall have original but not exclusive jurisdiction."[66] Thus, as civil procedure expert Professor David Currie would later remark, "the case seemed to fall within article III's provisions" and "also appear[ed] to fall within the statutory grant of original Supreme Court jurisdiction."[67]

The Supreme Court held otherwise.[68] Writing for a unanimous court, Chief Justice Chase began by reformulating the question presented as, "[c]an the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?"[69] The Court distinguished between "ministerial" functions and acts requiring "discretion."[70] Examples of ministerial acts included *Marbury v. Madison*,[71] which concerned the Secretary of State's ministerial function of delivering a commission to a duly appointed justice of the peace; and *Kendall v. ex. Rel Stokes*,[72] which addressed the Postmaster-General's ministerial duty to credit a firm under the Solicitor of the Treasury's findings.[73] The Chief Justice contrasted these examples with the "[v]ery different . . . duty of the President . . . to see that the laws are faithfully executed," including the Reconstruction Act.[74] The Court also emphasized that there was no precedent for suing the President to enjoin the enforcement of an unconstitutional law.[75]

63. *Id.* at 497; Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (amended by Act of Mar. 23, 1867, ch. 6, 15. Stat. 2).
64. *See Johnson*, 71 U.S. at 475.
65. U.S. CONST. art. III, § 2.
66. The Judiciary Act of 1789, Ch. 20, § 13, 1 Stat. 73, 78.
67. David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865–1873*, 51 U. CHI. L. REV. 131, 147–48, 148 n.84 (1984).
68. *Johnson*, 71 U.S. at 501.
69. *Id.* at 498.
70. *Id.* at 498–99.
71. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
72. Kendell v. United States *ex. Rel* Stokes, 37 U.S. 524 (1838).
73. *Johnson*, 71 U.S. at 498–99.
74. *Id.* at 499.
75. *Id.* at 500.

The Court therefore concluded it had "no jurisdiction . . . to enjoin the President in the performance of his official duties."[76]

The legacy of this case is complex.[77] The Supreme Court later clarified that litigants may sue officers to enjoin allegedly unconstitutional law.[78] Today, states frequently sue the President to enjoin unconstitutional or otherwise unlawful policies.[79] Yet, the Supreme Court has continued to cite *Mississippi v. Johnson* for the proposition that "[w]e have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty",[80] and the broader point that "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint."[81] For our purposes, we emphasize this last point: even though the text of the Constitution and Judiciary Act appeared to authorize the Supreme Court to exercise jurisdiction over the President in a suit to enjoin allegedly unconstitutional acts, the Court exercised judicial restraint before interpreting these authorities to confer jurisdiction over such a suit involving the President.

C. President Nixon

The first clear articulation of a strong presidential avoidance canon is *Nixon v. Fitzgerald*.[82] The plaintiff had previously served as a government employee in the Office of the Secretary of the Air Force.[83] In 1968, he testified before Congress about cost overruns that were embarrassing to the Johnson Administration.[84] He was later removed from office, and Congress held hearings to investigate whether his removal was

76. *Id.* at 501.
77. *See* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613 (1997) (characterizing the outcome as "surprising" by modern standards). Some have suggested that Mississippi v. Johnson is better understood as an early example of the political question doctrine. *See, e.g.*, Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1164 (2020); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1401 n.123 (2010); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 551 n.122 (1966); *cf.* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867) (also declining injunctive relief to Georgia in a suit against the Secretary of War and a military general.).
78. *Ex parte* Young, 209 U.S. 123 (1908) (permitting suits for injunctive relief against officials acting in their official capacity).
79. *See, e.g.*, Trump v. Hawaii, 138 S.Ct. 2392 (2018); Biden v. Texas, 142 S.Ct. 2528 (2022).
80. Franklin v. Massachusetts, 505 U.S. 788, 802 (1992).
81. Nixon v. Fitzgerald, 457 U.S. 731, 753 & n.34 (1982).
82. *Nixon*, 457 U.S. 731.
83. *Id.* at 733.
84. THE ECONOMICS OF MILITARY PROCUREMENT, S. REP. NO. 29-493, at 24 (1969).

retaliation for his prior testimony.[85] The plaintiff later sought reemployment in the Nixon Administration and initiated proceedings for reinstatement before the Civil Service Commission.[86] He eventually filed suit in federal court, which the government appealed to the U.S. Supreme Court to determine the scope of immunity available to the President.[87]

The plaintiff sued former President Nixon in a *Bivens* action[88] under the First Amendment and "in two statutory actions under federal laws of general applicability."[89] The first guaranteed federal employees' rights "to petition Congress . . . or to furnish information to . . . Congress."[90] The second criminalized, inter alia, the obstruction of Congressional proceedings.[91] The Court assumed without deciding that these statutes provided a cause of action in this case.[92] Thus, the holding of *Bivens* and the literal texts of these statutes applied to the President.

The Court, however, per Justice Powell, held that "a former President . . . is entitled to absolute immunity from damages liability predicated on his official acts."[93] In reaching this conclusion, the Court emphasized that Congress had not "taken *express* legislative action to subject the President to civil liability for his official acts."[94] As a result, the Court characterized its holding as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[95] Citing *Mississippi v. Johnson*, Justice Powell explained "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint."[96]

In clarifying its holding, the Court explained that "the President is absolutely immune from civil damages liability for his officials acts in the absence of explicit affirmative action by Congress."[97] This is the first time the Court explicitly required a clear statement before applying a generally applicable law to a current or former President. In a

85. The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearing Before the Subcomm. on Econ. in Gov't of the J. Econ. Comm., 91st Cong. (1969).
86. *Fitzgerald*, 457 U.S. at 734–38.
87. *Id.* at 739–41.
88. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a private cause of action against federal officers acting within the scope of their employment who allegedly violate the U.S. Constitution).
89. *Fitzgerald*, 457 U.S. at 749 & n.27.
90. 5 U.S.C. § 7211.
91. 18 U.S.C. § 1505.
92. *Fitzgerald*, 457 U.S. at 741 n.20.
93. *Id.* at 749.
94. *Id.* at 748 (emphasis added).
95. *Id.* at 749.
96. *Id.* at 749–53 (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418–19 (1833)).
97. *Id.* at 748 n.27.

footnote, the court noted that the case only presented the question of whether the President was liable under the implied causes of actions arising under *Bivens* and the two federal statutes.[98] In effect, the Court assumed the existence of three causes of actions, and acknowledged that, in principle, they applied to the President's conduct, but narrowly construed these provisions to exclude the President, absent a clear statement.[99]

To support its conclusion, the Court cited the President's "unique position in the constitutional scheme"[100] and the "singular importance of his duties."[101] The Court further noted the practical concerns with allowing such suits to proceed: "In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages."[102] The Court concluded by acknowledging the many other checks on presidential misconduct, including "impeachment," "constant scrutiny by the press," "vigilant oversight by Congress," "a desire to earn reelection," "the need to maintain prestige," and "a President's traditional concern for his historical stature."[103]

Justice White dissented, joined by three other Justices.[104] In his view, "[a]ssuming the correctness of the lower court's determination that the two federal statutes create a private right of action, I find the suggestion that the President is immune from those causes of action to be unconvincing."[105] In other words, the majority had narrowly construed these statutes as inapplicable to the President, despite the fact that the plain text of the statutes covered his actions. Justice White also made the fair point that these statutes in particular—aimed at preserving the ability of Congress to obtain information from Executive Branch employees—were uniquely aimed at limiting presidential interference with civil servants' testimony to Congress.[106] It is not as if these were generic statutes, inapplicable to the President's situation. On the contrary, they particularly applied to the President, who is arguably the most frequent subject of congressional investigations. The Court, nonetheless, applied the presidential avoidance canon to interpret these implied causes of actions to exclude the conduct of a former President.

98. *Id.*
99. *Id.*
100. *Id.* at 749.
101. *Id.* at 751.
102. *Id.* at 752–53.
103. *Id.* at 757.
104. *Id.* at 764 (White, J., dissenting).
105. *Id.*
106. *Id.* at 786.

III. APPLICATIONS OF THE CANON

Following this line of cases, courts have consistently applied this rule of construction, often even more forcefully than the Executive Branch itself. This section details the application of this canon of construction to a variety of laws: (A) the Administrative Procedure Act, (B) the Freedom of Information Act, (C) the Privacy Act, (D) the Federal Records Act and Presidential Records Act, (E) Title VII of the Civil Rights Act of 1964, (F) anti-nepotism laws, and (G) the Intelligence Community Inspector General Act.

A consistent theme that emerges from these episodes is the following fact pattern: White House officials insist on their unique institutional needs; OLC resists an expansive interpretation, often by citing legislative history; courts later vindicate the President's unique constitutional needs; and finally, OLC acquiesces in this judicial interpretation by issuing a revised opinion based on statutory text and separation of powers concerns.[107]

A. Administrative Procedure Act

The Administrative Procedure Act (APA)[108] established the framework for our modern administrative state by requiring agencies to satisfy specific procedures for publication,[109] rulemaking,[110] and adjudication.[111] The Act applies to "agenc[ies]," defined as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia."[112] This definition literally encompasses both the White House generally and the President specifically. At the time of its passage, Professor Kenneth Culp Davis—the leading authority on

107. It is curious and inexplicable to note how much resistance OLC has imposed on administrations of both political parties; one would have thought OLC would be institutionally biased in favor of expansively interpreting the President's constitutional prerogatives. *See* Adoree Kim, Note, *The Partiality Norm: Systematic Deference in the Office of Legal Counsel*, 103 CORNELL L. REV. 757, 760 (2018) (presenting empirical and qualitative evidence that "OLC is deeply deferential to the President and to presidential action."). A possible explanation for this phenomenon may be that legislative history was more relevant to statutory interpretation when OLC first examined these issues. A second possibility is that OLC was more concerned with the litigation risk and the downstream harms following a judicial ruling curtailing Executive Branch prerogatives.

108. Administrative Procedure Act of 1946, Pub. L No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

109. *Id.* at § 3.

110. *Id.* at § 4.

111. *Id.* at § 5.

112. *Id.* at § 2; *cf.* 5 U.S.C. § 551.

administrative law in his day—argued that the act applied to the White House.[113]

As early as 1973, OLC advised the White House Counsel the President was not an "agency" within the meaning of the APA.[114] In a memorandum, OLC noted that the APA's definition of agency

> is literally broad enough to include the President. However, because the definition does not by its terms include or exclude the President, the conventional rule of statutory construction that words in a statute should be given their plain meaning suggests that the Office of the President is not included in the definition.[115]

The first ten pages of the memorandum analyzed the APA's legislative history.[116] It then discussed some anomalous implications of interpreting the APA to cover the President, including the absurd result that the President's foreign policy statements would be subject to notice-and-comment rulemaking requirements.[117] The memorandum concluded with constitutional considerations.[118]

Courts would ultimately confirm this analysis. In a series of opinions, courts have held that this Act does not apply to the President or the Executive Office of the President. In *Franklin v. Massachusetts*, a plaintiff challenged the President's reapportionment determination as arbitrary and capricious under the APA.[119] The Supreme Court acknowledged "[t]he President is not explicitly excluded from the APA's purview, but he is not explicitly included, either."[120] The Court imposed a clear statement rule, saying:

> Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement

113. *See, e.g.*, Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 794 (1967); *Administrative Procedure Act*: Hearings on S. 1663 Before the Subcomm. on Admin. Prac. and Proc. of the S. Judiciary Comm., 88th Cong. 244, 248 (1964) (testimony of Professor Davis).

114. Memorandum from Roger C. Cramton, Assistant Att'y Gen. Off. of Legal Couns. on Application of the Freedom of Info. Act to Certain Entities Within the Exec. Off. of the President, to the Hon. John W. Dean, III, Couns. to the President, (Jan. 30, 1973).

115. *Id.* at 30.

116. *Id.* at 1–10.

117. *Id.* at 10–12; United States v. Kirby, 74 U.S. (7 Wall.) 482, 487 (1868) (providing background on the absurdity doctrine); *see also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) (providing an in-depth analysis on the absurdity doctrine). This result is even more absurd today given how courts have interpreted the APA's notice and comment requirements. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

118. Memorandum from Roger C. Cramton, Assistant Att'y Gen. Off. of Legal Couns. on Application of the Freedom of Info. Act to Certain Entities Within the Exec. Off. of the President, to the Hon. John W. Dean, III, Couns. to the President (Jan. 30, 1973) (indicating that CEA might also not be an "agency" subject to FOIA).

119. Franklin v. Massachusetts, 505 U.S. 788 (1992).

120. *Id.* at 800.

> by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.[121]

This conclusion was consistent with the D.C. Circuit's ruling the year prior in *Armstrong v. Bush*.[122] In that case, private parties sued President Bush, the NSC, and the Archivist of the United States to enjoin them from erasing materials on the NSC computer system during the last two weeks of the Reagan Administration.[123] The court acknowledged that the APA's definition of "agency"[124] "expressly excludes Congress and the courts but not the President."[125] Yet, the court reasoned "that the textual silence, when read against the backdrop of the legislative history of the APA and the canons of construction applicable to statutes that implicate the separation of powers, points in the opposite direction—*i.e.*, that Congress did not intend to subject the President to the APA."[126]

B. Freedom of Information Act

An even stronger case is found in the judicial interpretation of the Freedom of Information Act ("FOIA"),[127] which allows individuals to request copies of government records, subject to certain redactions.[128] This Act originally defined an agency as "each authority of the Government of the United States," subject to certain exceptions.[129] Shortly after its enactment in 1966, the D.C. Circuit held in *Soucie v.*

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121. *Id.* at 800–01 (citing Nixon v. Fitzgerald, 457 U.S. 741, 748 n.27 (1982)); *cf.* De Rieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 n.13 (Temp. Emer. Ct. App. 1974) (suggesting in dicta that the President is an agency under APA); Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 761 (D.D.C. 1971) (three-judge panel) (same).
122. Armstrong v. Bush, 924 F.2d 282, 289 (D.C Cir. 1991).
123. *Id.* at 289.
124. 5 U.S.C. § 701(b)(1).
125. *Armstrong*, 924 F.2d at 289.
126. *Id.* (relying upon the clear statement rule articulated in United States v. Bass, 404 U.S. 336, 349 (1971), the court explained that "although [this] 'clear statement' rule was originally articulated to guide interpretation of statutes that significantly alter the federal-state balance, there are similar compelling reasons to apply the rule to statutes that significantly alter the balance between Congress and the President.").
127. The Freedom of Information Act, 5 U.S.C. § 552 (the statute makes agency records available to members of the public upon request, subject to certain exemptions); For a historical overview of FOIA in the EOP, *see generally* David Cohen, *FOIA in the Executive Office of the President*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 203 (2018); H.R. REP. NO. 93-1380, at 14–15 (1974); S. REP. NO. 93-1200, at 15 (1974).
128. 5 U.S.C. § 552.
129. Citizens for Resp. &Ethics in Washington v. Off. of Admin., 566 F.3d 219, 222 (D.C. Cir. 2009) ("In the original statute, 'agency' was defined broadly as any 'authority of the Government of the United States…'"); Main St. Leg. Serv., Inc. v. Nat'l. Sec. Council, 811 F.3d 542, 546 (2d Cir. 2016).

David that the Office of Science and Technology ("OST"),[130] a component of the EOP, was subject to the Act.[131] In doing so, it established the judicial gloss that FOIA applied to "any administrative unit with substantial independent authority in the exercise of special functions."[132] Following *Soucie*, OLC advised the White House Counsel "that the White House Office, Domestic Council, National Security Council and Council on International Economic Policy are not 'agencies' under the Administrative Procedure Act, and therefore are not subject to the Freedom of Information Act."[133] This conclusion was "based on the legislative history of the APA," and confirmed by the need "to avoid serious constitutional doubts" that would be raised by a contrary interpretation.[134]

Congress amended FOIA in 1974,[135] re-defining "agency" as: "includ[ing] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (*including the Executive Office of the President*), or any independent regulatory agency."[136] Despite this explicit language, courts have held that FOIA

130. OST is the predecessor to the current Office of Science and Technology Policy (OSTP).

131. David v. Soucie, 448 F.2d 1067 (D.C. Cir. 1971); *See* Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993) (formulating this decision into a three-factor test).

132. *Soucie*, 448 F.2d at 1073.

133. Memorandum from Roger C. Cramton, Assistant Att'y Gen. Off. of Legal Couns. on Application of the Freedom of Info. Act to Certain Entities Within the Exec. Off. of the President, to the Hon. John W. Dean, III, Couns. to the President (Jan. 30, 1973) (indicating that CEA might also not be an "agency" subject to FOIA).

134. *Id.* at 2. Curiously, OLC flagged the public relations concerns implicit in this legal determination: "[A]lthough it is our opinion that, as a matter of law, the Freedom of Information Act does not apply to the White House Office . . . it occurs to us that you may not wish to adopt such a categorical position publicly if there are alternate methods of justifying non-disclosure." *Id.* at 3.

135. Pub. L. No. 93-579, 88 Stat. 1896. *See* Letter from Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns., to James T. Lynn, Dir., Off. of Mgmt. and Budget, (Apr. 14, 1975) ("The new definition of 'agency' was designed principally to clarify and expand the coverage of the term (1) by explicitly referring to government corporations and government-controlled corporations, and (2) by explicitly referring to the Executive Office of the President.") (citing S. REP. NO. 93-1200, at 14–15). Scalia also cited the following language from S. REP. NO. 93-1200: "With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1970)." The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President."). *Id.* at 2.

136. 5 U.S.C. § 552(f)(1) (emphasis added); *see also id.* § 551 (providing additional limits on the definition of "agency" for purposes of that subchapter). Pub. L. No. 93-502, 88 Stat. 1561 (1974); *see also* H.R. REP. NO. 93-1380, 93d Cong. 14 (1974) (noting the expanded definition was not intended to cover "the President's immediate personal staff or units in the Executive Function whose sole function is to advise and assist the President").

does not apply to all components of the EOP.[137] Instead, they have adjudicated on a case-by-case basis whether each component was (a) functionally akin to a stand-alone executive agency, and thus subject to the act, or (b) established in order to advise and assist the President, and thus exempt from the act.[138]

Most notably, the Supreme Court held that records generated by Henry Kissinger during his time as National Security Adviser to President Nixon were not "agency records" within the meaning of FOIA.[139] In particular, the Court held that even if the EOP, as a whole, was an agency subject to FOIA, the EOP subcomponent known as the "Office of the President" (now the White House Office) was not.[140] What is more, at the time the Supreme Court decided this case, the NSC complied with FOIA—it was not until 1996 that the D.C. Circuit held that the statute did not apply to that component of the EOP.[141] Nevertheless, the Supreme Court held that even if the NSC were generally subject to FOIA, the specific documents at issue were generated by Dr. Kissinger in his capacity as a close adviser to the President.[142] In other words, Dr. Kissinger had dual functions as (a) head of the National Security Council and (b) Assistant to the President. Even if records generated in the former capacity were subject to FOIA, the latter were not—even though the text of FOIA does not distinguish between components of EOP or the dual capacities of these employees.

Following this reasoning, lower courts have held, on a case-by-case basis, that "advise-and-assist" components of EOP are not subject to FOIA, but that other components of EOP are.[143] The D.C. Circuit has refined the in *Soucie* test into the following three-part test:

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137. The conference report stated that by "the term '[EOP]' the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or united in the Executive Office whose sole function is to advise and assist the President." S. REP. NO. 93-1200, at 15 (1974) (Conf. Rep.); H. REP. NO. 93-1380, at 15 (1974 (same)).

138. *See, e.g.*, Ryan v. Dep't. of J., 617 F.2d 781, 788 (D.C. Cir. 1980).

139. Kissinger v. Rep. Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).

140. *Id.* at 156 ("The FOIA does render the 'Executive Office of the President' an agency subject to the Act. The legislative history is unambiguous, however, in explaining that the 'Executive Office' does not include the Office of the President.").

141. Armstrong v. Exec. Off. of the President, 90 F.3d 553, 558 (D.C. Cir. 1996).

142. *Kissinger*, 445 U.S. at 156 ("The RCFP requesters have argued that since some of the telephone notes made while Kissinger was advis[or] to the President may have related to the National Security Council they may have been National Security Council records and therefore subject to the Act . . . We need not decide when records which . . . merely 'relate to' the affairs of a[ ] FOIA agency become records of that agency. To the extent Safire sought discussions concerning information leaks which threatened the internal secrecy of White House policymaking, he sought conversations in which Kissinger had acted in his capacity as a Presidential adviser, only.").

143. *Id.* (Office of the President is not subject to FOIA); Main St. Legal Servs., Inc. v. Nat'l Sec. Council, 811 F.3d 542 (2d Cir. 2016) (NSC not subject to FOIA); *Armstrong*,

> When we apply *Soucie* to those who help the President supervise others in the executive branch, we think it is necessary to focus on three interrelated factors. We must ask [1] how close operationally the group is to the President, [2] what the nature of its delegation from the President is, and [3] whether it has a self-contained structure.[144]

In some circumstances, courts have gone out of their way to exempt records held by agencies otherwise subject to FOIA where those records would reveal otherwise non-public activities in advise-and-assist components of the EOP.[145] This is done on the grounds that requesters may not use FOIA "to require the effective disclosure of the President's calendars in [a] roundabout way."[146] Such prophylactic interpretations of FOIA—which, again, by its plain terms explicitly applies to the EOP—illustrate how far courts will go when invoking the presidential avoidance canon.

It is of note that OLC has often been asked to opine on whether specific components of the EOP are subject to FOIA prior to judicial adjudication.[147] In the case of the Office of the Vice President, OLC

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90 F.3d at 558 (same); Leg. Eagle, LLC v. Natl. Sec. Council Recs. Access and Info. Sec. Mgt. Directorate, CV 20-1732 (RC), 2021 WL 1061222, at *1 (D.D.C. 2021) (NSC Records Access and Information Security Management Directorate not subject to FOIA); Citizens for Resp. & Ethics in Washington v. Off. of Admin., 566 F.3d 219, 222 (D.C. Cir. 2009) (Office of Administration not subject to FOIA); Nat'l Sec. Archive v. Archivist of the U.S., 909 F.2d 541, 545 (D.C. Cir. 1990) (White House Counsel's Office not subject to FOIA); Taitz v. Ruemmler, No. 11-5306, 2012 WL 1922284, at *1 (D.C. Cir. 2012) (same); Jud. Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 216 (D.C. Cir. 2013) (OVP not subject to FOIA); Meyer v. Bush, 981 F.2d 1288, 1298 (D.C. Cir. 1993) (Task Force not subject to FOIA); Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1043 (D.C. Cir. 1985) (CEA not subject to FOIA); Sweetland v. Walters, 60 F.3d 852, 854 (D.C. Cir. 1995) (Executive Residence not subject to FOIA); *cf.* Ctr. for Int'l Envt'l Law v. Off. of U.S. Trade Rep., 718 F.3d 899, 899 (D.C. Cir. 2013) (assuming without deciding that USTR is subject to FOIA); Pac. Legal Found. v. Council on Envt'l Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (CEQ subject to FOIA); Sierra Club v. Andrus, 581 F.2d 895, 902 (D.C. Cir. 1978), (*rev'd on other grounds*, 442 U.S. 347 (1979) (OMB subject to FOIA)); Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (OSTP subject to FOIA).

144. Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993) (holding Presidential Task Force within EOP was not "agency" within meaning of FOIA).

145. *See, e.g.*, Doyle v. Dep't of Homeland Sec., 959 F.3d 72 (2d Cir. 2020) (holding White House visitor logs in custody of DHS were not "agency records" subject to FOIA); *Jud. Watch, Inc*., 726 F.3d 208 (same); Prop. of the People, Inc. v. Off. of Mgmt. and Budget, 394 F. Supp.3d 39 (D.D.C. 2019) (meetings between OMB and NSC could be redacted under the deliberative process privilege).

146. *Judicial Watch, Inc*., 726 F.3d at 225 (D.C. Cir. 2013); *cf. Prop. of the People*, *Inc*., 394 F. Supp.3d at 47 (agencies may redact calendar entries that would allow a requester "to indirectly 'reconstruct' [White House] calendars through requests to an entity . . . whose records are subject to [FOIA]").

147. *See, e.g.*, Memorandum from Robert L. Saloschin & Thomas C. Newkirk, Freedom of Info. Comm., Off. Of Legal. Couns., on Privacy—Persons Writing to the President—Freedom of Information Act (5 U.S.C. § 552e (1976)), to Couns. for the Pres. (Oct. 17, 1977). ("It is our position that the President and his immediate staff are not agencies or part of agencies within the meaning of the Freedom

correctly advised that the office was exempt from FOIA.[148] OLC has not always been so prescient, however.

Consider the application of FOIA to the NSC.[149] Since its inception, NSC has always complied with FOIA and the Federal Records Act.[150]

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of Information Act . . . and thus private letters addressed to the President are not agency records subject to the Freedom of Information Act so long as they are maintained by the President or his staff."); *see also* Memorandum from Walter Dellinger, Acting Assistant Att'y Gen., Off. of Legal Couns., on Status of NSC as an "Agency" under FOIA, to Alan J. Kreczko, Special Assistant to the President and Legal Adviser, Nat'l Sec. Council (Sept. 20, 1993), (NSC not "agency" subject to FOIA); Memorandum from John M. Harmon, Assistant Attorney General, Off. of Legal Couns. to Robert J. Lipschutz, Couns. to the President (1978), (NSC "agency" subject to FOIA) (withdrawn in 1993 by Dellinger Memorandum); Letter from Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns. to James T. Lynn, Dir., Off. of Mgmt and Budget (Apr. 14, 1975) (1974 amendments do not affect definition of agency for purposes of FOIA and Privacy Act); Memorandum from Roger C. Cramton, Assistant Att'y Gen. Off. of Legal Couns. on Application of the Freedom of Info. Act to Certain Entities Within the Exec. Off. of the President, to the Hon. John W. Dean, III, Couns. to the President (Jan. 30, 1973) (President, WHO, Domestic Council, NSC, Council on International Economic Policy, and possibly Council of Economic Advisers not "agencies" subject to APA or FOIA).

148. Memorandum from Walter Dellinger, Assistant Att'y Gen., Off. of Legal Couns. on Whether the Office of the Vice President is an "Agency" for Purposes of the Freedom of Information Act, to Couns. and Dir. of Admin. Off. of the Vice President (Feb. 14, 1994) (concluding that OVP is not subject to FOIA); *Judicial Watch, Inc.*, 726 F.3d at 216 n.9 (OVP not subject to FOIA); Wilson v. Libby, 535 F.3d 697, 708 (D.C. Cir. 2008) (same); Schwartz v. United States Dep't of Treasury, No. 00-5453, 2001 WL 674636 (D.C. Cir. May 10, 2001), *aff'g* 131 F. Supp. 2d 142, 147–48 (D.D.C. 2000) (same); *cf. Meyer*, 981 F.2d at 1295.

149. *See generally* Douglas Cox & Ramzi Kassem, *Off the Record: The National Security Council, Drone Killings, and Historical Accountability*, 31 YALE J. ON REGUL. 363, 373–83 (2014) (summarizing the history of the application of FOIA, Federal Records Act, and Presidential Records Act to NSC); Catherine F. Sheehan, Note, *Opening the Government's Electronic Mail: Public Access to National Security Council Records*, 35 B.C. L. Rev. 1145, 1151–61 (1994) (similar); Cohen, *supra note* 126, at 217–23 (summarizing history of the application of FOIA to NSC). NSC was established by the National Security Act of 1947, 50 U.S.C. § 3021. It became part of the EOP in 1949. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of titles 10 and 50 of the U.S. Code); Reorganization Plan No. 4 of 1949, 14 Fed. Reg. 5227, 63 Stat. 1067 (transferring NSC to the Executive Office of the President). It is assigned "[t]he function . . . to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security." 50 U.S.C. § 3021(a).

150. Cox & Kassem, *supra* note 148, at 376–77 (2014) ("Following the passage of the FRA in 1950 and both the original FOIA in 1966 and the FOIA amendments in 1974, the NSC considered itself an 'agency' subject to the FRA's documentation requirements and the FOIA's disclosure requirements. This was based on the plain language of the statutory definition of 'agency,' passed in 1974, which expressly includes establishments within the Executive Office of the President.") (citing 5 U.S.C. § 552(f)(1)).

In 1978, OLC opined that NSC was subject to FOIA.[151] In reaching this conclusion, it relied primarily on legislative history in the form of a House Report to the 1974 amendment.[152] In 1993, OLC withdrew its prior opinion, noting that "[s]ubequent legal developments . . . lead us to conclude that the analysis in our 1978 opinion is no longer applicable."[153] In particular, it noted that courts had rejected reliance on the legislative history cited in the 1978 opinion.[154] Applying the court's reasoning in *Soucie*, OLC concluded that NSC was not subject to FOIA[155]—a conclusion that the U.S. Courts of Appeals have affirmed.[156]

In *Armstrong v. Executive Office of the President*, the D.C. Circuit addressed, at length, the plaintiffs' arguments that NSC's prior compliance with FOIA counseled in favor of FOIA's application to that entity.[157] The court concluded:

> The NSC's prior references to itself as an agency are not probative on the question before the court—whether the NSC is indeed an agency within the meaning of the FOIA; quite simply, the Government's position on that question has changed over the years . . . In sum, the NSC's past behavior has been inconsistent—both logically and factually—and therefore does not illuminate the legal question here in dispute.[158]

The Second Circuit rejected a similar argument about "[t]he change in OLC positions," concluding that "they do not assist, much less dictate, resolution of this appeal."[159] In a separate concurrence, Judge

151. Memorandum from John M. Harmon, Assistant Attorney General, Off. of Legal Couns. to Robert J. Lipschutz, Counsel to the President (1978); *cf.* H.R. REP. NO. 93-876, 93rd Cong., 8 (1974) (listing NSC, CEA, Office of Telecommunications Policy, Federal Property Council, and OMB as examples of "functional entities" under FOIA amendment).

152. 1993 OLC NSC Opinion at 2 ("*Relying primarily on this [House] Report,* we concluded in our 1978 opinion that Congress intended FOIA's definition of 'agency' to include the NSC.") (emphasis added); *cf.* Rushforth v. Council of Econ. Advisers, 762 F.2d 1038 (D.C. Cir. 1985) (rejecting the argument that specific mention of CEA in the House Report led to the conclusion that the amendment, as enacted, covered CEA); H.R. REP. NO. 93-1380, at 14 (1974) (Conf. Rep.).

153. Memorandum from Walter Dellinger, Acting Assistant Att'y Gen., Off. of Legal Couns., on Status of NSC as an "Agency" under FOIA, to Alan J. Kreczko, Special Assistant to the President and Legal Adviser, Nat'l Sec. Council (Sept. 20, 1993),

154. *Id.*

155. *Id.*

156. Main St. Legal Services, Inc. v. Nat'l Sec. Council, 811 F.3d 542 (2d Cir. 2016); Armstrong v. Exec. Off. of the President, 90 F.3d 553 (D.C. Cir. 1996); *cf.* Freedom of Information Act Requests for Classified Documents, 63 Fed. Reg. 25,736 (May 8, 1998).

157. *Armstrong*, 90 F.3d at 565–66.

158. *Id.* at 566. This decision was the subject of lengthy litigation. *See* R. Kevin Bailey, *"Did I Miss Anything?": Excising the National Security Council from FOIA Coverage*, 46 DUKE L.J. 1475, 1477 & n.13 (1997).

159. *Main St. Legal Servs., Inc.*, 811 F.3d at 553.

Wesley noted Congress had thus far acquiesced in this resolution and considered it a political issue for Congress and the President.[160]

A similar episode played out with the Office of Administration ("OA"). In 1978, a White House Associate Counsel drafted a memorandum concluding that OA was subject to FOIA.[161] For thirty years, OA complied with FOIA and promulgated regulations to ensure compliance.[162] OA later reversed its position, and in 2007, OLC issued an opinion concluding that under *Meyer v. Bush*, OA was not subject to FOIA.[163] In 2009, the D.C. Circuit upheld this determination.[164] In so doing, the Court rejected the argument that OA's prior compliance counseled in favor of extending FOIA to the entity, writing that "The history of OA's positions on the matter is of no moment because we have been clear that past views have no bearing on the legal issue whether a unit is, in fact, an agency subject to FOIA."[165]

Thus, even where statutes explicitly apply to EOP, courts have narrowly interpreted these as excluding "advise-and-assist" components of the EOP, citing separation of powers concerns. They have even done so when agencies mistakenly adhered to these statutory requirements under misimpression for decades, saying that such past practice was not dispositive, and in fact "not probative" of the true merits.[166]

160. *Id.* at 569 (Wesley, J., concurring) ("When Congress last spoke to this question, it seemed poised to make FOIA applicable to all important units of the Executive Office of the President. In an ambiguous last-minute compromise, it drew back from that result, indicating instead that some units were sufficiently advisory, sufficiently close to the President, and sufficiently lacking in independent authority that they should remain exempt from FOIA. For over twenty years, the Executive Branch and the Court of Appeals that most frequently interacts with FOIA as applied to the chief offices of government have concluded that the NSC is one of those exempt units, and as noted above, that conclusion apparently has been accepted by the Congress without much controversy. Whether that conclusion is wise policy, or whether it accurately captures the intent of the Congress in adopting the FOIA amendments, is best considered a political issue for Congress and the President, not for this Court.").

161. Citizens for Resp. and Ethics in Washington v. Off. of Admin., 566 F.3d 219, 222 (D.C. Cir. 2009) (recounting this history).

162. *Id.*

163. Memorandum from Steven A. Engel, Deputy Assistant Att'y. Gen. Off. of Legal Couns., on Whether the Office of Administration Is an Agency for Purposes of the Freedom of Information Act, to Deputy Couns. to the President (Aug. 21, 2007) (concluding that the Office of Administration was not subject to FOIA).

164. *Citizens*, 566 F.3d at 221.

165. *Id.* at 225.

166. *See, e.g.*, Armstrong v. Exec. Off. of the President, 90 F.3d 553, 566 (D.C. Cir. 1996). ("The NSC's prior references to itself as an agency are not probative on the question before the court—whether the NSC is indeed an agency within the meaning of the FOIA."); Citizens for Responsibility and Ethics in Washington v. Off. of Admin., 559 F. Supp. 2d 9, 30 (D.D.C. 2008), *aff'd*, 566 F.3d 219 (D.C. Cir. 2009) ("OA's own assessment of its status under the FOIA and the FRA is not dispositive . . . [W]hile OA's past functioning under the FOIA and the FRA is undisputed, it

Remarkably, despite OLC's historic deference to the President,[167] courts have been even more willing to exclude the President and his close advisers from generally applicable statutes.

C. Privacy Act

The same logic applies to the Privacy Act of 1974,[168] which provides individuals with certain safeguards against invasions of personal privacy.[169] Among other things, the Act requires federal agencies to maintain a system of records for personal identifiable information,[170] to permit private individuals access to information about themselves,[171] and to limit the disclosure of this information to other agencies, unless doing so falls within one of a dozen statutory exceptions.[172] It also provides a civil right of action for violations of the Act.[173] Congress passed this Act forty days after it amended FOIA and incorporated, by reference, that statute's new definition of "agency."[174] Since then, DOJ has consistently taken the position that the Privacy Act (like FOIA) does not apply to advise-and-assist components of the EOP, even though the face of the statute makes no exception for EOP employees.

In 1975, Antonin Scalia, then-Assistant Attorney General for OLC, authored a memorandum applying the Privacy Act to the EOP.[175] He noted that "the legislative history makes it clear that not all portions of [the EOP] are intended to be covered" by the Privacy Act.[176] Consistent with OLC's longstanding (if frustrating) practice, he acknowledged that "specific advice will have to be rendered on a unit-by-unit basis, with full information concerning the precise function and makeup of the particular component of the Executive Office involved."[177] In other words, OLC would not make blanket statements about which

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is also insufficient by itself to establish that OA is, as a matter of law, an agency subject to FOIA.").

167. *See* Kim, *supra* note 106, at 760 (conducting empirical assessment and finding "that the OLC is deeply deferential to the President and to presidential action, while remaining relatively impartial towards the agencies").
168. The Privacy Act of 1974, 5 U.S.C. § 552a.
169. *Id.* at § 552(b).
170. *Id.* § 552a(c).
171. *Id.* § 552a(d).
172. *Id.* §§ 552a(b), 552a(e).
173. *Id.* § 552a(g).
174. *Compare* 5 U.S.C. § 552a(a)(1) ("the term 'agency' means agency as defined in section 552(e) of this title"), *with* 5 U.S.C. § 552(f) ("For purposes of this section, the term . . . agency . . . includes any executive department, military department, Government corporation, Government control corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President) or any independent regulatory agency").
175. Letter from Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns., to James T. Lynn, Director, Off. of Mgmt. and Budget, (Apr. 14, 1975).
176. *Id.* at 1–2 (citing S. REP. NO. 93-1200, at 15).
177. *Id.* at 2.

components of EOP were subject to the Privacy Act and which were not (despite federal officials' ongoing need to comply with all applicable recordkeeping laws). Notably, Scalia linked FOIA and the Privacy Act, emphasizing that "it is essential, of course, that we apply the same conclusion to both the Freedom of Information Act and the Privacy Act."[178]

In discursive dicta, Scalia acknowledged that it was possible for a larger administrative entity (*e.g.*, EOP) to treat its subcomponents (*e.g.*, WHO, OMB) differently for purposes of the federal statutes like the Privacy Act.

> In short, it is our firm view that the 1974 Amendments require no change in the principle which has been applied under the original Act, that it is for the over-unit—the Department or other higher-level 'agency'—to determine which of its substantially independent components will function independently for Freedom of Information Act purposes . . . In our view, this practice of giving variable content to the meaning of the word 'agency' for various purposes can be applied to the Privacy Act as well as the Freedom of Information Act. For example, it may be desirable and in furtherance of the purposes of the Act to treat the various components of a Department as separate 'agencies' for purposes of entertaining applications for access and ruling upon appeals from denials, while treating the Department as the 'agency' for purposes of those provisions limiting intragovernment exchange of records.[179]

The opinion has stood for the proposition that the White House Office is not subject to the Privacy Act. Other administrations have abided by this guidance.[180]

In 2000, Deputy Assistant Attorney General William Treanor of OLC testified before Congress on this question; his testimony, memorialized in a published OLC opinion, has become the definitive articulation of the Privacy Act's application to the EOP.[181] He began by stating that DOJ has consistently taken the position "that the Privacy Act does not apply to the White House Office" dating back to Scalia's opinion in 1975, "less than four months after the Privacy Act was enacted" and "has been reiterated in subsequent [OLC] opinions and briefs filed by the Department in litigation."[182]

The opinion succinctly laid out the Department's reasoning: (1) "the Privacy Act, by its terms, applies only to 'agencies;'" (2) "the Privacy Act defines the term 'agency' to mean the same thing as the term means in the [FOIA];" (3) "the Supreme Court has concluded that the White

178. *Id.* at 2.
179. *Id.* at 3.
180. *See, e.g.*, Jones v. Exec. Off. of Pres., 167 F. Supp. 2d 10, 18 (D.D.C. 2001) ("EOP notes that its Privacy Act interpretation, under which the White House Office is exempt from coverage, comports with the interpretation adopted by every presidential administration since the Privacy Act's enactment.").
181. William Treanor, Deputy Assistant Att'y Gen. Off. of Legal Couns., Statement Before the Subcomm. On Crim. Just., Drug Pol'y and Hum. Res. Comm. on Reform U.S. H.R. (Sept. 8, 2000).
182. *Id.* at 178.

House Office is not an 'agency' within the meaning of the FOIA."[183] Ergo, the Privacy Act, like FOIA, does not apply to the White House Office.[184] By the same logic: since FOIA has been interpreted to apply only to non-advise-and-assist components of EOP, so does the Privacy Act only apply to non-advise-and-assist components.

Courts have ultimately concurred with OLC's approach, treating the Privacy Act as adopting FOIA's definition of agency.[185] In doings so,

183. *Id.* (citing 5 U.S.C. § 552).

184. Nevertheless, some forms requesting FBI background checks to evaluate presidential nominations appear to contemplate that White House officials who advise and assist the president may be subject to the Privacy Act. *See*, *e.g.*, Email from Andrew Oldham, to Lola A. Kingo, Senior Nominations Couns. Off. of Legal Couns. (May 22, 2017, 07:48).

185. *See, e.g.*, Wilson v. Libby, 535 F.3d 697, 708 (D.C. Cir. 2008) (Offices of President and OVP exempt from Privacy Act); Davis v. Billington, 681 F.3d 377, 386 (D.C. Cir. 2012) (same); Broaddrick v. Exec. Off. of President, 139 F. Supp. 2d 55, 60 (D.D.C. 2001), *aff'd sub nom*. Broaddrick v. Exec. Off. of the President, 38 Fed. Appx. 20 (D.C. Cir. 2002) (EOP not subject to Privacy Act); Wilson v. Libby, 498 F. Supp. 2d 74, 89 (D.D.C. 2007), aff'd, 535 F.3d 697 (D.C. Cir. 2008) (OVP not subject to Privacy Act); Jud. Watch, Inc. v. Nat'l Energy Pol'y Dev. Grp., 219 F. Supp. 2d 20, 55 (D.D.C. 2002) (OVP not subject to Privacy Act); Sculimbrene v. Reno, 158 F. Supp. 2d 26, 35 (D.D.C. 2001) (White House Office not subject to Privacy Act); Dale v. Exec. Off. of the President, 164 F. Supp. 2d 22, 26 (D.D.C. 2001) (White House does not constitute "agency" for purposes of Privacy Act); Tripp v. Exec. Off. of the President, 200 F.R.D. 140, 146 (D.D.C. 2001) (WHO not subject to Privacy Act); Flowers v. Exec. Off. of President., 142 F. Supp. 2d 38, 43 (D.D.C. 2001) (EOP not subject to Privacy Act); Jones v. Exec. Off. of President, 167 F. Supp. 2d 10, 19 (D.D.C. 2001) (White House Office not subject to Privacy Act); Falwell v. Exec. Off. of the President, 113 F. Supp. 2d 967 (W.D. Va. 2000) (Office of the President not subject to Privacy Act); Barr v. Exec. Off. of the President, No. 99-CV-1695, 2000 WL 34024118, at *3 (D.D.C. Aug. 9, 2000) ("President's immediate personal staff" not subject to Privacy Act); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 147–48 (D.D.C. 2000) (OVP not subject to Privacy Act); *but see* Alexander v. Fed. Bureau of Investigation, 971 F. Supp. 603, 607 (D.D.C. 1997) ("[T]his court holds that under the Privacy Act, the word 'agency' includes the Executive Office of the President, just as the Privacy Act says."); *cf.* William Treanor, Deputy Assistant Att'y Gen. Off. of Legal Couns., Statement Before the Subcomm. On Crim. Just., Drug Pol'y and Hum. Res. Comm. on Reform U.S. H.R. (Sep. 8, 2000) (describing *Alexander* as "incorrectly decided").

Notably, DOJ filed an Emergency Petition for Writ of Mandamus following *Alexander*, but this was not granted on the basis that "District Court decisions do not establish the law of the circuit, nor, indeed, do they even establish 'the law of the district.'" *In re* Exec. Off. of the President, 215 F.3d 20, 24 (D.C. Cir. 2000) (quoting Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991)). The D.C. Circuit also made clear that "the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to the position that the Privacy Act does not cover members of the White House." *Id.* at 24–25. On remand, the District Court revised its opinion. *See* Alexander v. Fed. Bureau of Investigation, 691 F. Supp. 2d 182, 189 (D.D.C. 2010), *aff'd*, 456 Fed. Appx. 1 (D.C. Cir. 2011) ("Aside from this Court's June 12, 1997, decision, every court to have considered whether the White House Office is subject to the Privacy Act has found that it is not . . . Subsequent case law now makes clear that this Court's prior interpretation of the Privacy Act in *Alexander* is no longer

they have also acknowledged the constitutional questions involved in extending the Act to the EOP—suggesting that the presidential avoidance canon is a species of constitutional avoidance.[186]

D. Recordkeeping Laws

This is also consistent with how both Congress and the courts have differentially treated components of the EOP for recordkeeping purposes. The Federal Records Act of 1950 (FRA)[187] generally governs recordkeeping requirements for federal agencies,[188] but for certain components of EOP, it is displaced by the Presidential Records Act of 1978 (PRA).[189] The latter applies to "Presidential records," which are defined as materials "created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President."[190] This incorporates the advise-and-assist component distinction first developed in case law.[191] The PRA does not apply to "official records of

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the correct one . . . In light of the Court of Appeals' decisions . . . along with the persuasive reasoning of the other district courts to have considered the question, this Court too concludes that the Privacy Act does not apply to the White House Office, and thus the Exec. Off. of the President is entitled to judgment as a matter of law.").

186. *See, e.g.*, *Barr* v. Exec. Off. of the President, No. 99-CV-1695, 2000 WL 34024118, at *3 (D.D.C. Aug. 9, 2000) ("This construction of the term 'agency,' applying the FOIA definition equally to the Privacy Act, properly avoids constitutional questions.").

187. 44 U.S.C. §§ 3101 *et seq.* The statute mandates that "[t]he head of each Federal agency shall make and preserve records' documenting the business of the agency, 44 U.S.C. § 3101, and authorizes the federal Archivist to promulgate rules regarding record management and preservation that are binding on agency heads. *Id.* §§ 2904(a), (c)(1), 3105. *See* Doyle v. Dep't of Homeland Sec., 959 F.3d 72 (2d Cir. 2020).

188. 44 U.S.C. § 3301(a)(1)(A) (defining "records" as all recorded information . . . made or received by a Federal agency under Federal law or in connection with the transaction of public business".).

189. 44 U.SC. §§ 2201–07; *see also* H.R. REP. NO. 95-1487; *cf.* Exec. Order 12,667, 54 FR 3403 (1989); Exec. Order 13,233, 66 FR 56025 (2001); Exec. Order 13,489, 74 FR 4669 (2009). *See generally* James D. Lewis, *White House Electronic Mail and Federal Recordkeeping Law: Press "D" To Delete History*, 93 MICH. L. REV. 794 (1995) (arguing that PRA should be interpreted expansively to maximally preserve history); Memorandum from Devin A. Debacker, Deputy Assistant Att'y Gen. Off. of Legal Couns., on Responsibility for Electronic Presidential Records on hardware of the Executive Office of the President After a Presidential Transition, to Deputy Couns. to the President (Jan. 15, 2021) (opining that Archivist of the United States assumes responsibility for the custody of an outgoing President's electronic presidential records that temporarily remain on EOP hardware after the end of the outgoing President's term).

190. 44 U.S.C. § 2201(2).

191. *Cf.* United to Protect Democracy v. Pres. Advisory Comm'n. on Election Integrity, 288 F. Supp.3d 99, 113 (D.D.C. 2017) ("the definition of agency under the PRA is nearly identical to" FOIA, as amended).

an agency (as defined in [FOIA]), however.[192] Those records are instead subject to the FRA, which is "coextensive with the definition of 'agency' in the FOIA."[193] Following these definitions, and consistent with FOIA caselaw, the advise-and-assist components of EOP are subject to the PRA but not FRA: WHO, OVP, NSC,[194] OA, CEA, the Executive Residence (including the Usher's Office[195]).[196] In contrast, the following components of the EOP are subject to the FRA, but not PRA: OMB, OSTP, USTR, ONDCP, CEQ.

As noted in the context of FOIA, there was substantial litigation over whether NSC was subject to the FRA.[197] The *Armstrong* cases began with plaintiffs filing suit on the final day of President Reagan's term, seeking a declaratory judgment that NSC records could not be destroyed under the FRA or PRA.[198] The district court initially issued a temporary restraining order; the defendants ultimately agreed to maintain the records until the dispute was resolved.[199] On appeal, the D.C. Circuit held that a court could not review the Executive Branch's compliance with the PRA, but that compliance with the FRA was cognizable.[200] On remand, the district court determined that certain NSC records were subject to the FRA and that NSC's practices violated that act.[201] The district court later entered an order of contempt against the EOP, the NSC, and the Archivist for failing to promulgate new record-keeping regulations.[202]

On the next appeal, the D.C. Circuit agreed that NSC's new guidelines were inadequate, but the court reversed the contempt order.[203] The court noted that "[t]he FRA defines a class of materials that are

192. *Id.*
193. Armstrong v. Exec. Off. of the President, 90 F.3d 553, 556 (D.C. Cir. 1996).
194. *Id.*
195. Applicability of the Presidential Records Act to the White House Usher's Office, 31 Op. O.L.C. 194 (2007) [hereinafter Applicability of the Presidential Records Act].
196. *See, e.g.*, Guidance on Presidential Records from the National Archives and Records Administration, at 5, Wendy Ginsberg, Common Questions about Federal Records and Related Agency Requirements, Congressional Research Service, at 4 (Feb. 2, 2015).
197. *See* Armstrong v. Exec. Off. of the President, 90 F.3d 553, 556 (D.C. Cir. 1996) ("The legal controversy over procedures for the preservation of NSC records has a lengthy and complex history . . . .").
198. Armstrong v. Bush, 721 F. Supp. 343, 347 (D.D.C. 1989), *aff'd in part, rev'd in part*, 924 F.2d 282 (D.C. Cir. 1991).
199. *Armstrong*, 721 F. Supp. at 348 n.9.
200. Armstrong v. Bush, 924 F.2d 282, 289–90 (D.C. Cir. 1991).
201. Armstrong v. Exec. Off. of the President, 810 F. Supp. 335 (D.D.C. 1993), *aff'd and remanded sub nom.* Armstrong v. Exec. Off. of the Pres., Off. of Admin., 1 F.3d 1274 (D.C. Cir. 1993).
202. Armstrong v. Exec. Off. of President, 821 F. Supp. 761, 774 (D.D.C. 1993), *rev'd sub nom.* Armstrong v. Exec. Off. of the President, Off. of Admin., 1 F.3d 1274 (D.C. Cir. 1993).
203. Armstrong v. Exec. Off. of the President, Off. of Admin., 1 F.3d 1274, 1296–97 (D.C. Cir. 1993).

federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials that are subject to a different and less rigorous regime."[204] However, despite the fact that NSC had long complied with FOIA requests, and even though the Supreme Court had previously assumed without deciding that NSC was subject to FOIA,[205] the court determined that it could not definitively adjudicate on the record before it whether or to what extent NSC was subject to FOIA and, by extension, the FRA.[206]

Following the court's decision in *Armstrong*, OLC issued a September 1993 opinion concluding that NSC was not an agency subject to FOIA and therefore exempt from the FRA—and withdrawing its 1978 opinion to the contrary.[207] The 1993 Opinion noted that "recent cases addressing the question of whether an Executive Office entity is an agency for FOIA purposes have applied the sole-function test developed by the D.C. Circuit in *Soucie*, endorsed by the 1974 Conference Committee Report, and adopted by the Supreme Court in *Kissinger*."[208] Applying this test, OLC concluded that NSC was not subject to FOIA or the FRA.[209] Although a district court disagreed with this determination,[210] on appeal the D.C. Circuit definitively held that NSC was not subject to FOIA or FRA.[211]

In 2007, OLC also opined on the application of the PRA to the Usher's Office within the Executive Residence.[212] In that Opinion, OLC concluded that the Usher's Office "must be viewed either as part of the 'immediate staff' of the President or as a 'a unit . . . of the [EOP] whose function is to advise and assist the President.'"[213] Although there is no statutory definition for "immediate staff,"[214] the D.C. Circuit in *Meyer*

204. *Id.* at 1293.
205. *See* Kissinger v. Reps. Comm. For Freedom of the Press, 445 U.S. 135, 156 (1980) (FOIA requestors arguing that certain documents related to the National Security Council "may have been [NSC] records and therefore subject to the [FOIA].").
206. *Armstrong*, 1 F.3d at 1296.
207. Memorandum from Walter Dellinger, Acting Assistant Att'y Gen., Off. of Legal Couns., on Status of NSC as an "Agency" under FOIA, to Alan J. Kreczko, Special Assistant to the President and Legal Adviser, Nat'l Sec. Council 8 (Sept. 20, 1993); Freedom of Information Act (5 U.S.C. § 552)—Nat'l Sec. Council—Agency Status Under FOIA, 2 Op. O.L.C. 197 (1978).
208. Memorandum from Walter Dellinger, Acting Assistant Att'y Gen., Off. of Legal Couns., on Status of NSC as an "Agency" under FOIA, to Alan J. Kreczko, Special Assistant to the President and Legal Adviser, Nat'l Sec. Council 3 (Sept. 20, 1993).
209. *Id.* at 8.
210. Armstrong v. Exec. Off. of the President, 877 F. Supp. 690, 695 (D.D.C. 1995), *rev'd*, 90 F.3d 553 (D.C. Cir. 1996).
211. Armstrong v. Exec. Off. of the President, 90 F.3d 553, 555 (D.C. Cir. 1996); *see also* Main Street Legal Services, Inc. v. Nat'l Sec. Council, 811 F.3d 542, 553 (2d Cir. 2016) (NSC not an "agency" subject to FOIA).
212. Applicability of the Presidential Records Act, *supra* note 193, at 194.
213. *Id.* at 196 (quoting 44 U.S.C. § 2201(2)).
214. *Id.*

explained that this includes "at least those . . . individuals employed in the White House Office."[215] OLC analogized the Usher's Office to these employees and noted that other federal laws treated the WHO and Executive Residence employees similarly.[216] For example, under 3 U.S.C. § 105, the President is specifically authorized to "appoint and fix the pay of employees" in these two components "without regard to any other provision of law regulating the employment or compensation of persons in the Government service" and may prescribe "such official duties" for these employees to perform.[217] OLC thus concluded that the Usher's Office was subject to the PRA.[218]

Outside the context of NSC, courts have not had much occasion to address these issues because private parties lack a cause of action under the PRA and because whether a component is subject to the FRA or PRA tracks FOIA caselaw.[219] Nevertheless, courts have occasionally been asked and declined to apply the PRA to presidential commissions and similar entities.[220]

E. Employment Discrimination

The most shocking application of the presidential avoidance canon is in the context of employment discrimination. Title VII of the Civil Rights Act of 1964[221] generally prohibits employers from discriminating against an employee based on the "individual's race, color, religion, sex, or national origin."[222] Yet, in *Haddon v. Walters*, the D.C. Circuit held that Title VII's generally applicable workplace discrimination provisions did not apply to employees within the Executive Residence.[223] In *Haddon*, a former White House chef filed suit against the White House Chief Usher, alleging that he was passed over for a promotion in

215. Meyer v. Bush, 981 F.2d 1288, 1293 n.3 (D.C. Cir. 1993).
216. Applicability of the Presidential Records Act, *supra* note 193, at 196.
217. *Id.* at 197 (quoting 3 U.S.C. §§ 105(a)(1), (b)(1)).
218. *Id.* at 198–99.
219. *See, e.g.,* Citizens for Resp. & Ethics in Washington v. Cheney, 593 F. Supp. 2d 194, 218 (D.D.C. 2009) (finding text "cannot be read to evince a Congressional intent to create private cause of action under the PRA.").
220. *See, e.g.*, United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity, 288 F. Supp. 3d 99, 115 (D.D.C. 2017) ("[T]he Court cannot conclude that the Commission constitutes an 'agency' for purposes of the PRA.").
221. 42 U.S.C. §§ 2000e–2000e17.
222. *Id.* § 2000e-2(a)(1).
223. Haddon v. Walters, 43 F.3d 1488, 1490 (D.C. Cir. 1995). *Compare* E.E.O.C. v. St. Francis Xavier Parochial School, 117 F.3d 621, 626 (D.C. Cir. 1997) (Sentelle, J., concurring) (stating, with respect to Rule 12(b)(6) jurisdictional component of the ruling: "Although I served on the panel in *Haddon*, I have become increasingly convinced that *Haddon* was incorrectly decided."); *with* Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office, O.L.C., 2017 WL 10087533, at *1 (Jan. 20, 2017) ("[W]e believe that *Haddon* arrived at the correct outcome . . . .") [hereinafter Anti-Nepotism OLC Opinion].

part because of his engagement to a black woman.[224] The court noted that Title VII applied to "employees . . . in executive agencies as defined in section 105 of Title 5."[225] The court found that "[t]he Executive Residence is not included in Title 5's exclusive list of Executive departments . . . [226] [n]or does it fit within Title 5's definition of a Government corporation."[227] The court also rejected the plaintiff's argument that the Executive Residence qualified as an "independent establishment" within the meaning of 5 U.S.C. § 104 for two reasons.[228] First, "Congress has used the term 'independent establishment' in distinction to the Executive Residence."[229] "Second, while Title 5 relates to government organization and employees and prescribes pay and working conditions for agency employees . . . Title 3 addresses similar concerns with respect to the President's advisors and the staff of the Executive Residence," which "further suggests that it does not apply to the staff of the Executive Residence."[230] This particular argument is a form of the general-specific canon, also known as *generalia specialibus non derogant*, which holds that "the specific governs the general."[231] Based on this reasoning, the court held that the generally applicable protections of Title VII did not apply to employees of the Executive Residence.[232]

After the case was decided, Congress passed legislation explicitly extending Title VII to White House employees,[233] which the President supported and signed.[234] This bill also extended basic protections recognized in the Fair Labor Standards Act of 1938,[235] Americans with Disabilities Act of 1990,[236] Age Discrimination in Employment Act of

224. *Haddon*, 43 F.3d at 1489.
225. *Id.* (quoting 42 U.S.C. § 2000e-16(a)).
226. *Id.* at 1490 (quoting 5 U.S.C. §§ 101, 103).
227. *Id.* (citing 5 U.S.C. § 103).
228. *Id.*
229. *Id. Cf.* Anti-Nepotism OLC Opinion, *supra* note 221, at 6 ("The D.C. Circuit's first reason may be the less convincing of the two.").
230. *Haddon*, 43 F.3d at 1490 (citing 3 U.S.C. § 105(b)(1); 5 U.S.C. § 7103(a)).
231. Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012). *See generally* SCALIA & GARNER, *supra* note 4, at 183–93.
232. *Haddon*, 43 F.3d at 1490.
233. Presidential and Executive Office Accountability Act, Pub. L. No. 104-331, § 2(a), 110 Stat. 4053, 4053 (1996) (codified as amended at 3 U.S.C. § 401). *See* Gomez-Perez v. Potter, 553 U.S. 474, 503 n.3 (2008) (Roberts, C.J., dissenting); Anti-Nepotism OLC Opinion, *supra* note 221, at *4 n.2.
234. President Signs Executive Office of Accountability Act, 1996 WL 619405 (Oct. 28, 1996).
235. 3 U.S.C. § 413; Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219).
236. 3 U.S.C. § 421; Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213).

1967,[237] Family and Medical Leave Act of 1993,[238] Occupational Safety and Health Act of 1970,[239] Chapter 71 of Title 5 (relating to Federal service labor-management relations), Employee Polygraph Protection Act of 1988,[240] Worker Adjustment Retraining Notification Act,[241] Rehabilitation Act of 1973,[242] and Chapter 43 of title 38 (Relating to veterans' employment and reemployment).[243] In doing so, the bill explicitly defines an "employing office" as "each office, agency, or other component of the [EOP]," "the Executive Residence at the White House; and . . . the official residence . . . of the Vice President."[244] There is now no question that these basic civil rights extend to White House employees. This is unquestionably the correct policy outcome, but it sets a dangerous precedent. It raises the specter that thousands of other laws will not be interpreted to apply to the President and their close advisers, unless and until Congress closes these loopholes by re-codifying these bills in Title 3. Going forward, the Executive Branch may argue that Congress must very explicitly extend general laws to White House officials and even separately legislate for that unique context. Indeed, the fact that Congress took remedial action after *Haddon* suggests that Congress agrees that it needs to separately legislate for White House employees.[245]

The *Haddon* decision and Congress's subsequent reaction formed a pivotal chapter in the history of the presidential avoidance canon, and together illustrate the remarkable power of the canon. After all, the Supreme Court has recognized that "few pieces of federal legislation rank in significance with the Civil Rights Act of 1964."[246] Yet, a D.C. Circuit panel refused to interpret this landmark legislation of general

237. 3 U.S.C. § 411; Pub. L. No. 90-202, 81 Stat. 602 (1968) (codified as amended at 29 U.S.C. §§ 621–634).
238. 3 U.S.C. § 412; Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601–2654).
239. 3 U.S.C. § 425; Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651–678.).
240. 3 U.S.C. § 414; Pub. L. No. 100-347, 102 Stat. 646 (1988) (codified at 29 U.S.C. §§ 2001–2009).
241. 3. U.S.C. § 415; Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified as amended at 29 U.S.C. §§ 2101–2109).
242. 3 U.S.C. § 411; Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in scattered section of 29 U.S.C.).
243. 3 U.S.C. § 416.
244. *Id.* § 401(a)(4). *Cf.* 5 U.S.C. § 105 ("'Executive agency' means an Executive department, a Government corporation, and an independent establishment."). *See also id.* § 552(a) (describing the information each agency shall make available to the public).
245. Alternatively, one could argue that Congress's remedial bill is evidence that the D.C. Circuit's interpretation in *Haddon* was wrong.
246. Bostock v. Clayton Cnty, Georgia, 140 S. Ct. 1731, 1737 (2020).

applicability to the White House, absent a clear statement.[247] Unthinkably, White House officials could have discriminated against employees on the basis of "race, color, religion, sex" or "national origin" up until 1996. Congress's remedial legislation has since entrenched this decision by setting new precedents for separately legislating employment laws for White House employees. This has strongly colored subsequent applications of the presidential avoidance canon, including the anti-nepotism statute.

F. Anti-Nepotism Statute

The presidential avoidance canon has also played a significant role in the interpretation of the 1967 federal anti-nepotism statute,[248] also known as the "Bobby Kennedy law."[249] This law, codified at 5 U.S.C. § 3110, provides that "[a] public official may not appoint . . . to a civilian position in the agency in which he is serving . . . any individual who is a relative of the public official."[250] For purposes of this section, the term "agency" is given a more expansive definition than found in 5 U.S.C. § 105.[251] Relying heavily on legislative history, OLC issued six opinions over several decades applying this provision of Title 5 to the White House.

In 1972, OLC first opined that the statute "would bar the President from appointing [a] . . . relative to permanent or temporary employment as a member of the White House staff."[252] The memorandum

247. *See* Nicole Picard, *A Treasured Institution, a Troubled Identity, and the Threat of Denotation: Whether the Smithsonian Institution is an Executive Agency Under 5 U.S.C. s. 105 and Why It Matters*, 59 CATH. U.L. REV. 1139, 1145 (2010) (citing Haddon v. Walters, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (commenting that the court "admitted" that the plain text of the statute did "not clearly foreclose" inclusion of Executive Residence).

248. Pub. L. 90-206, 81 Stat. 640 (1967) (codified as amended at 5 U.S.C. § 3110).

249. *See* Kris Olson, *Too Close for Comfort: An Insider's View of Presidents and Their Attorneys General*, 37 YALE L. & POL'Y REV. INTER ALIA 1, 5–6 (2019) ("To address congressional concerns about the JFK-RFK model, President Johnson passed and signed a federal anti-nepotism act in 1967. The provision . . . was dubbed the 'Bobby Kennedy law' and was designed to prevent federal officials from promoting relatives."); Adam H. Kurland, *The Travel Act at Fifty: Reflections on the Robert F. Kennedy Justice Department and Modern Federal Criminal Law Enforcement at Middle Age*, 63 CATH. U.L. REV. 1, 40 (2013) ("President Kennedy's appointment of his brother as attorney general prompted the passage of anti-nepotism legislation in 1967, which barred close relatives of the president from serving in the cabinet.").

250. 5 U.S.C. § 3110(b).

251. *See id.* § 3110(a)(1) (defining "agency" to include "(A) an Executive agency; (B) . . . establishments in the legislative branch; (C) . . . establishments in the judicial branch; and (D) the government of the District of Columbia").

252. Memorandum from Roger C. Cramton, Assistant Att'y Gen., on Applicability to President of Restriction on Employment of Relatives, to John W. Dean, III, Couns., to the President 1 (Nov. 14, 1972).

barely exceeded a page in length and began its analysis with legislative history.[253] However, the memorandum briefly acknowledged that it was "arguable that the section is an unconstitutional restriction on the President's appointive authority, especially if construed to limit his discretion in appointing members of his Cabinet or other high officials" considered "officers of the United States."[254] Yet, OLC concluded that "[w]hatever its constitutionality may be as applied to an appointment by the President of a relative to a Cabinet or other high-level position," the statute could lawfully be applied "to subordinate positions on the White House staff," since they were considered "inferior officers."[255] Although this opinion tracks the constitutional distinction between officers of the United States and inferior officers, it likely failed to appreciate the President's prerogative to organize his closest advisers.

In February 1977, OLC next advised that the appointment of President Carter's wife to be Chairman of the Commission on Mental Health[256] would violate 5 U.S.C. § 3110(b).[257] OLC interpreted that section to apply to "agencies" as defined by 5 U.S.C. § 105.[258] But OLC again relied primarily on legislative history, emphasizing testimony by Chairman Macy of the Civil Service Commission, who "stated that had it been in effect, the provision would have prevented President Franklin Roosevelt from appointing his son as a civilian White House aide, as the President apparently had done."[259] OLC therefore focused the bulk of its analysis on compensation, stating: "The only possible argument that the appointment of Mrs. Carter would be lawful might be that the statute does not apply if the appointee will serve without compensation."[260] Yet OLC ultimately rejected that reasoning, based in part on informal advice it received from the Civil Service Commission.[261] In a footnote, OLC also considered but rejected a 1968 memo-

253. *Id.* (The first words of the analysis are "The legislative history . . . .").
254. *Id.*
255. *Id.* at 1–2.
256. This was established pursuant to Exec. Order No. 11,973, 42 Fed. Reg. 10677 (Feb. 17, 1977).
257. Memorandum from John M. Harmon, Acting Assistant Att'y Gen., Off. of Legal Couns., on Possible appointment of Mrs. Carter as Chairman of the Commission on Mental Health, to Douglas B. Huron, Associate Couns. to the President (Feb. 18, 1977) [hereinafter Harmon Mental Health Memo]; Memorandum from Edwin S. Kneedler, Attorney-Adviser, Off. of Legal Couns., Legality of the President's appointing Mrs. Carter as Chairman of the Commission on Mental Health, to John M. Harmon, Acting Assistant Att'y Gen., Off. of Legal Couns. (Feb. 17, 1977) [hereinafter Kneedler Mental Health Memo].
258. Harmon Mental Health Memo, *supra* note 255, at 1 (citing 5 U.S.C. §§ 105, 3110(a)(1)(A)).
259. Kneedler Mental Health Memo, *supra* note 255, at 5 (citing Hearings on Federal Pay Legislation before the Senate Committee on Post Office and Civil Service, 90th Cong., 1st Sess. 360, 366 (1967)).
260. *Id.* at 2.
261. *Id.* at 4.

randum by Deputy Assistant Attorney General Richman who suggested that Section 3110 "may not apply to appointments to titled positions by the President."[262] But this suggestion was contradicted by both the 1972 and February 1977 memoranda; therefore, OLC concluded that this prior advice "appears to be wrong."[263]

One month later, in its third memorandum on the statute, OLC opined that 5 U.S.C. § 3110 prohibited the President from allowing his son to "be given office space and support services in the West Wing of the White House in connection with his part-time work for the Democratic National Committee."[264] OLC further opined that the President's son could not even volunteer "his time to work as an assistant to a regular member of the White House staff."[265] As in OLC's February 1977 memorandum, OLC's March memorandum conclusion rested on testimony before a Senate committee.[266] Again, OLC dismissed any "constitutional difficulties in applying the statute to positions on the President's staff" as "not substantial."[267] Remarkably, OLC even considered but rejected "points raised in a letter from the General Counsel of the Civil Service Commission to the Vice President's transition staff

262. *Id.*

263. *Id.* at 1 n.1.

264. Memorandum from John M. Harmon, Acting Assistant Att'y Gen., Off. of Legal Couns. & Edwin S. Kneedler, Off. of Legal Couns., on Appointment of President's Son to Position in the White House Office, to Honorable Robert J. Lipshutz, Couns. to the President 1 (Mar. 15, 1977) [hereinafter Kneedler Employment of Relatives Memo] (memorandum concluding that anti-nepotism statute prohibits the President from "appointing his son to an unpaid position on the White House staff"); Memorandum from John M. Harmon, Acting Assistant Att'y Gen., Off. of Legal Couns., on Employment of relatives who will serve without compensation, to the Att'y Gen. 1 (Mar. 23, 1977) [hereinafter Harmon Employment of Relatives Memo] (memorandum for Attorney General summarizing Kneedler Employment of Relatives Memo and related legal questions).

265. Harmon Employment of Relatives Memo, *supra* note 262, at 1

266. Such testimony included:

> [A] memorandum prepared by Ed Kneedler of the staff of the Office of Legal Counsel and sent to Mr. Lipschutz on March 15, 1977, noted that the Chairman of the Civil Service Commission informed the Senate Committee during hearings on the nepotism provision in 1967 that had it been in effect, the provision would have prevented President Roosevelt from appointing his son as a civilian aide in the White House. No member of the committee disputed the Chairman on this point.

Id. at 2. *See also* Kneedler Employment of Relatives Memo, *supra* note 262, at 2 (Mr. Kneedler did acknowledge, however, that "Chairman Macy . . . suggested that, as a matter of policy, the prohibition should be made altogether inapplicable to the President in order to preserve broad Presidential discretion in making appointments.").

267. Harmon Employment of Relatives Memo, *supra* note 262, at 2. *See also* Kneedler Employment of Relatives Memo, *supra* note 262, at 4 ("[T]he Civil Service Commission suggests that there might be serious constitutional questions involved in interpreting the statute to apply to appointments to the President or Vice President's staff. I believe this argument is of dubious validity.").

on December 29, 1976, which concluded that 5 U.S.C. § 3110 does not prohibit the President or Vice President from appointing relatives to their personal staffs."[268] Yet OLC's conclusion remained the same. OLC continued to interpret a generally applicable statute codified in Title 5 to limit the President's ability to appoint his preferred individuals to perform duties on the White House staff.

Then, in 1983, OLC issued a fourth memorandum advising that 5 U.S.C. § 3110 prohibited a member of the President's family from "serv[ing] actively on the Commission on Private Sector Initiatives . . . even if the relative serves without compensation."[269] This advice was given under "time constraints," such that OLC did not have "sufficient time to reexamine the legal analysis contained in [its] earlier memoranda."[270] Rather, OLC simply cited and attached copies of the February and March 1977 memoranda.[271] Thus, in the first four opportunities OLC had to construe this statute, the office declined to apply the presidential avoidance canon or any form of a clear statement principle. Instead, OLC concluded in each case that the statute prohibited the President from organizing his closest advisers as he saw fit.

It was not until 1993 that a court addressed this question. In *Assn. of Am. Physicians & Surgeons, Inc. v. Clinton*, the D.C. Circuit held that President Clinton's decision to appoint his wife to chair a Task Force on healthcare reform did not violate the anti-nepotism statute.[272] The court reasoned that because the statute lacked a clear statement, "we doubt that Congress intended to include the White House or the Executive Office of the President."[273] In other words, "a President would be barred from appointing his brother as Attorney General, but perhaps not as a White House special assistant."[274] The court then noted that even if the anti-nepotism statute did apply to the White House, this

268. Harmon Employment of Relatives Memo, *supra* note 262, at 1. I am not aware of any publicly available copy of the cited Dec. 29, 1976 letter.

269. Memorandum from Robert B. Shanks, Deputy Assistant Att'y Gen., Off. of Legal Couns., Appointment of Member of President's Family to Presidential Advisory Committee on Private Sector Initiatives, to David B. Waller, Senior Assoc. Couns. to the President 2 (Feb. 28, 1983).

270. *Id.*

271. *Id.* (citing Harmon Employment of Relatives Memo, *supra* note 262; Harmon Mental Health Memo, *supra* note 255).

272. 997 F.2d 898, 904–05 (D.C. Cir. 1993).

273. *Id.* at 905 (citing Franklin v. Massachusetts, 505 U.S. 788 (1992); Meyer v. Bush, 981 F.2d 1288, 1298 (D.C. Cir. 1993); Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991)).

274. *Id. Cf. id.* at 921 (Buckley, J., concurring in the judgment) ("Viewed purely as a matter of congressional intent, the argument that the Anti-Nepotism Act applies only to the Departments and not to the White House is a weak one.") (citation omitted).

case was distinguishable because the First Lady was not receiving compensation from the government.[275]

Nevertheless, following *Clinton*, OLC continued to adhere to its prior position. In 2009, OLC issued its fifth memorandum, this time opining that 5 U.S.C. § 3110 prohibited President Obama from appointing (a) "his brother-in-law to the President's Council on Physical Fitness and Sports" and (b) "his half-sister to the President's Commission on White House Fellowships."[276] OLC specifically addressed the D.C. Circuit's observation that "[t]he anti-nepotism statute . . . may well bar appointment only to paid positions in government," but rejected this view as foreclosed by its prior analysis in the 1977 memorandum.[277] It also explicitly rejected the D.C. Circuit's argument that the separation of powers imposes a clear statement requirement on statutes that restrict the President's ability to appoint and control his close advisers.[278] According to OLC, that "rule does not affect our construction of section 104, section 105, or section 3110 as applied to the Fellowships Commission," for two reasons.[279] First, "Congress defined 'public official' in section 3110 expressly to include the President."[280] Second, "we do not think that the application of the prohibition to bar presidential appointments to such entities raises significant constitutional concerns."[281] Thus, President Obama was prohibited from appointing his relatives to these commissions.

Finally, in 2017, OLC issued its sixth memorandum interpreting the statute.[282] OLC concluded that President Trump could lawfully appoint "his son-in-law to a position in the White House Office, where the President's immediate personal staff of advisors serve."[283] Rather than relying upon legislative history, this memorandum looked to the statutory text and judicial authorities. It began by noting that 3 U.S.C. § 105(a) "authorizes the President to appoint employees in the White House Office 'without regard to any other provision of law regulating the employment or compensation of persons in the Government

275. *Id.* at 905 ("The anti-nepotism statute, moreover, may well bar appointment only to paid positions in government. Thus, even if it would prevent the President from putting his spouse on the federal payroll, it does not preclude his spouse from aiding the President in the performance of his duties.") (citation omitted).
276. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., on Application of 5 U.S.C. § 3110 to Two Proposed Appointments by the President to Advisory Committees, to Gregory B. Craig, Couns. to the President 1 (Sept. 17, 2009).
277. *Id.* at 5 (citing *Clinton*, 977 F.2d at 905).
278. *Id.* at 20.
279. *Id.*
280. *Id.* (citing 5 U.S.C. § 3110(a)(2)).
281. *Id.*
282. *See* Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office, 2017 WL 10087533 Op. O.L.C. at *1 (2017).
283. *Id.*

service.'"[284] It therefore followed that this specific statute "exempts positions in the White House Office from" the generally applicable 5 U.S.C. § 3110.[285] The opinion also noted that the D.C. Circuit's decision in *Haddon* provided "a different, but overlapping, route to the same result."[286] Finally, OLC also acknowledged the separation of powers concerns resulting from a contrary interpretation. For example, OLC noted that "Congress . . . most likely could not block the President from seeking advice from family members in their personal capacities."[287] OLC therefore concluded that the anti-nepotism statute did not apply to the White House Office.

In sum, resolving the application of the anti-nepotism statute to the President and his close advisers took some time. OLC originally interpreted this generic statute to apply to the President and his close advisers, despite an institutional incentive to interpret the President's powers expansively. When the D.C. Circuit finally confronted the question, the court applied the presidential avoidance canon. In response, OLC's most recent opinion construed a particular statute in Title 3 to displace the anti-nepotism statute codified in Title 5.

G. Federal Advisory Committee Act

The Supreme Court and the D.C. Circuit have also applied the presidential avoidance canon in cases interpreting a landmark government transparency law. The Federal Advisory Committee Act of 1972 (FACA)[288] was enacted to promote uniformity and transparency among various advisory groups established within the executive branch.[289] FACA broadly applies to any "Advisory committee," defined to include any "committee, board, commission, council, . . . task force, or other similar group" which "is established or utilized [by the President] to obtain advice or recommendations for the President or one or more agencies or officers of the Federal government."[290] Once established,[291] such an advisory committee must make its meetings "open to the public," permit interested persons "to attend . . . or file statements," keep "[d]etailed minutes of each meeting," and make available to the public

284. *Id.* (quoting 3 U.S.C. § 105(a)).
285. *Id.*
286. *Id.* (citing Haddon v. Walters, 43 F.3d 1488 (D.C. Cir. 1995).
287. *Id.* at 13 (citing In re Cheney, 406 F.3d 723, 728 (D.C. Cir. 2005); Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 466 (1989)).
288. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 §§ 1–16) (current version at 5 U.S.C. §§ 1001–1014).
289. *See* 5 U.S.C. § 1002.
290. *Id.* § 1001(2)(A).
291. *Id.* § 1008(a) (providing requirements for the establishment under the act).

"the records, reports, transcripts . . . working papers, drafts, studies, agenda, or other documents" of the committee.[292]

In 1989, the Supreme Court addressed DOJ's longstanding practice of soliciting advice from the American Bar Association's Standing Committee on the Federal Judiciary (ABA Committee) about potential nominees for federal judgeships.[293] The Court began its analysis by stating: "Whether the ABA Committee constitutes an 'advisory committee' for purposes of FACA . . . depends upon whether it is 'utilized' by the President or the [DOJ] as Congress intended that term to be understood."[294] The Court noted that "[t]here is no doubt that the Executive makes use of the ABA Committee, and thus 'utilizes' it in one common sense of the term."[295] Yet the Court declined to adopt this "literal reading of the statute" that applied the ordinary meaning of the word "utilize."[296] Instead, it analyzed FACA's purpose and reviewed its legislative history at length before invoking the canon of constitutional avoidance.[297] Because "construing FACA to apply to [DOJ's] consultations with the ABA Committee would present formidable constitutional difficulties," the Court narrowly construed the statute as not covering the ABA Committee.[298] The Court then expressed no view on whether FACA, if applied to the committee, would have "infringed unduly on the President's Article II power to nominate federal judges and violated the doctrine of separation of powers."[299]

Writing for three Justices, Justice Kennedy concurred in the judgment.[300] He found it "clear" that FACA applied to the ABA Committee; however, rather than "go along with the unhealthy process of amending the statute by judicial interpretation," he would have interpreted FACA to apply to the ABA and then held the act unconstitutional as violating the separation of powers.[301] When read together, the majority opinion and concurrence illustrate how the Supreme Court narrowly construed FACA to exempt a major consulting practice that unquestionably fell within the literal terms of the statute.

The same dynamic played out in the D.C. Circuit's *Clinton* decision. In addition to considering the anti-nepotism statute, the panel addressed whether FACA applied to President Clinton's Task Force on

292. *Id.* § 1009(a), (b), (c). *See also* Disclosure of Advisory Comm. Deliberative Materials, 12 Op. O.L.C. 73 (1988) (addressing FACA's disclosure requirements); Applicability of the Fed. Advisory Comm. Act to the Natl. Endowment for the Humanities, 4B Op. O.L.C. 743 (1980) (same).
293. Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440 (1989).
294. *Id.* at 452.
295. *Id.*
296. *Id.* at 454–55.
297. *Id.* at 452–66.
298. *Id.* at 466.
299. *Id.*
300. *Id.* at 467 (Kennedy, J., concurring).
301. *Id.* at 468–69, 470.

National Health Care Reform.[302] The court began by observing that FACA's "definition of an 'advisory' committee is apparently rather sweeping."[303] As noted, it applies to "any . . . task force . . . established or utilized by the President . . . in the interest of obtaining advice or recommendations for the President."[304] All parties agreed that the task force was established or utilized by the President.[305] But FACA's definition exempts "any committee which is composed wholly of full-time officers or employees of the Federal government."[306] In this case, the Task Force was chaired by First Lady Hillary Clinton.[307] Everyone else was unquestionably a full-time officer or employee.[308] The crux of the case, then, was whether the First Lady was a "full-time officer" or "employee" of the federal government for purposes of FACA.[309]

The court ultimately held that the Task Force was not an advisory group subject to FACA.[310] The court read FACA *in pari materia* with 3 U.S.C. § 105(e), which provides that "[a]ssistance and services authorized pursuant to this section to the President are authorized to be provided to the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities."[311] The court found this to be probative of congressional intent that the President might "use his or her spouse to carry out a task that the President might delegate to one of his White House aides" and so construed the provision "as treating the presidential spouse as a *de facto* officer or employee."[312] The court cited the Supreme Court's recent decision in *Public Citizen v. DOJ*, which it described as adopting "an extremely strained construction of the word 'utilized' in order to avoid the constitutional question."[313] In the same way, the D.C. Circuit found that "[a]pplication of FACA to the Task Force clearly would interfere with the President's capacity to solicit direct advice on any subject related to his duties from a group of private citizens, separate from or together with his closest governmental associates."[314] In doing so, the court repeatedly stressed the "Task Force's operational proximity to the President himself."[315] The court then invoked the doctrine of constitutional avoidance and held that

302. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993).
303. *Id.* at 903.
304. *Id.* (citing 5 U.S.C. app. 2 § 3(2), *amended by* 5 U.S.C. § 1001(2)(A)).
305. *Id.*
306. *Id.* at 903 (citing 5 U.S.C. app. 2 § 3(2)(iii), *amended by* 5 U.S.C. § 1001(2)(B)(i)).
307. *Id.* at 900.
308. *Id.* at 905.
309. *Id.* at 910–11.
310. *Id.* at 916.
311. *Id.* at 904 (quoting 3 U.S.C. § 105(e)).
312. *Id.* at 904–05.
313. *Id.* at 906.
314. *Id.* at 908.
315. *Id.* at 909.

"[t]he question whether the President's spouse is 'a full-time officer or employee' of the government is close enough for us properly to construe FACA not to apply to the Task Force merely because Mrs. Clinton is a member."[316]

Judge Buckley wrote separately, concurring in the judgment.[317] He stated that the majority had "stretch[ed] the phrase 'officer or employee of the Federal Government'" to extend to the First Lady.[318] He criticized the government for refusing to accord words their ordinary meaning, stating: "the Government's only consistent position has been that FACA is not subject to those statutory definitions of 'officer' and 'employee' that most logically apply to it."[319] He noted that FACA appeared in Title 5 of the U.S. Code, which elsewhere defined "officer" and "employee" as individuals "appointed in the civil service."[320] He therefore found the "plain meaning of the statutory language" to require finding that "Mrs. Clinton does not wear any of these labels."[321] He "conclude[d] that under any fair interpretation of that term, Mrs. Clinton is not an officer of the United States."[322] Moreover, unlike *Public Citizen*, which considered an "ambiguous term[]" for "which no statutory definition . . . was available," here the terms "officer" and "employee" were statutorily defined "words in common legal usage."[323] There was no need to "resort to legal maxims."[324] Instead, he "would conclude that FACA is unconstitutional as applied to the Task Force."[325]

In both *Public Citizen* and *Clinton*, the courts avoided interpreting this generally applicable statute to apply to advisory groups in close operational proximity to the President. The courts stretched terms beyond their ordinary meaning to avoid interpreting FACA to reach the President, his wife, and outside advisory groups. Later courts have followed this lead. For example, in *Ctr. for Arms Control & Non-Proliferation v. Pray*, the D.C. Circuit broadly interpreted FACA's exemption for CIA deliberations to exempt NSC records.[326] OLC has also had numerous occasions to address the application of FACA to various

316. *Id.* at 910–11. The court also rejected the argument that the anti-nepotism statute applied to Mrs. Clinton. *Id.* at 905. *See also* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (finding the President not "agency" under the Administrative Procedure Act); Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991) (same); Meyer v. Bush, 981 F.2d 1288, 1298 (D.C. Cir. 1993) (finding the President's Task Force advisors not "agency" under the FOIA).
317. *Clinton*, 997 F.2d at 916 (Buckley, J., concurring).
318. *Id.*
319. *Id.* at 917.
320. *Id.* (citing 5 U.S.C. §§ 2104, 2105).
321. *Id.* at 918.
322. *Id.* at 920.
323. *Id.* at 923–24.
324. *Id.* at 924.
325. *Id.* at 925.
326. 531 F.3d 836 (D.C. Cir. 2008).

entities.[327] Often this has taken the form of advice on how to craft a committee so that it falls outside the scope of FACA.[328] Collectively, this body of law evinces a consistent effort to avoid interpreting FACA according to the plain meaning of its text, instead relying upon ambiguous terms and constitutional avoidance to limit FACA's potentially overbroad scope.[329] It is further evidence of the lengths to which courts and the Executive Branch will go to exclude the President and his close advisers from generally applicable statutes.[330]

H. Intelligence Community Inspector General Act

A final example of the presidential avoidance canon is the DOJ's treatment of a whistleblower complaint filed against the President himself. In 2019, the U.S. House of Representatives impeached

327. *See, e.g.*, Application of Fed. Advisory Comm. Act to Non-Governmental Consultations, 25 Op. O.L.C. 291 (2001) (FACA does not apply to non-governmental consultations by Department of Defense); Applicability of 18 U.S.C. § 219 to Members of Fed. Advisory Comms., 15 Op. O.L.C. 65 (1991) (interpreting 18 U.S.C. § 219(a) to apply to FACA committees); Applicability of the Fed. Advisory Comm. Act to Presidential Task Force on Mkt. Mechanisms, 12 Op. O.L.C. 11 (1988) (task force not subject to FACA); Establishment of the President's Council for Int'l Youth Exch., 6 Op. O.L.C. 541, 542 (1982) (describing requirements of council established under FACA); Applicability of the Fed. Advisory Comm. Act to the Native Hawaiians Study Comm'n., 6 Op. O.L.C. 39 (1982) (commission not subject to FACA); Fed. Advisory Comm. Act (5 U.S.C. App. I)—U. S.—Japan Consultative Grp. on Econ. Rels., 3 O.L.C. 321 (1979) (FACA does not apply to U.S.-Japan Consultative Group on Economic Relations). *Cf.* Three Mile Island Comm'n—Closed Meetings—Fed. Advisory Comm. Act (5 U.S.C. App.)—Gov't in the Sunshine Act (5 U.S.C. § 552b), 3 Op. O.L.C. 208 (1979) (describing authorities of commission subject to FACA); Applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Comm'n., 6 Op. O.L.C. 292 (1982) (addressing applicability of Hatch Act to a FACA commission); Standards for Closing a Meeting of the Select Comm'n. on Immigr. & Refugee Pol'y, 4A Op. O.L.C. 67 (1980) (narrowly construing FACA to exempt from disclosure classified materials).

328. *See, e.g.*, Application of Fed. Advisory Comm. Act to Bd. of Dep't. of Just., 14 Op. O.L.C. 53 (1990) (concluding that "[a]n outside advisory . . . board for a new [DOJ] publication would be subject to the [FACA] if it deliberated as a body in order to formulate recommendations, but would not be subject to FACA if each individual member reviewed submissions to the journal and gave [their] own opinion about publication."); Applicability of the Fed. Advisory Comm. Act to L. Enf't Coordinating Comms., 5 Op. O.L.C. 283 (1981) (possible to construct committee that is not advisory but is rather intended to exchange information and data).

329. In another case, the D.C. Circuit narrowly construed FACA to exempt a committee "composed wholly of federal officials if the President has given no one other than a federal official a vote in or, if the committee acts by consensus, a veto over the committee's decisions." In re Cheney, 406 F.3d 723, 728 (D.C. Cir. 2005).

330. *See generally* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 54 (1994) (arguing "that courts, in attempting to avoid difficult constitutional questions, have misread FACA" and that, "[p]roperly construed, FACA violates separation of powers by limiting the terms on which the President can acquire information from nongovernmental advisory committees.").

President Trump for conduct that occurred during a teleconference he held with the President of Ukraine.[331] These proceedings were precipitated by a whistleblower complaint made to the Inspector General of the Intelligence Community (IC).[332] The Inspector General is authorized, among other things, to audit and investigate "programs and activities within the responsibility and authority of the Director of National Intelligence."[333] By statute, the Director of National Intelligence must transmit to Congress within seven days any complaint received from the Inspector General addressing an "urgent concern,"[334] which was defined, at the time, as including "[a] serious or flagrant problem, abuse, violation of law . . . relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence."[335]

The whistleblower filed a complaint with the IC Inspector General, raising concerns about alleged misconduct during the President's telephone call. The IC Inspector General determined that the complaint was an "urgent concern" within the meaning of the statute and suggested that the President's diplomatic communications "could be viewed as soliciting a foreign campaign contribution in violation of campaign-finance laws."[336] The Director of National Intelligence referred the complaint to OLC, which opined that the allegations did not relate to "the funding, administration, or operation of an intelligence activity" and so was outside the jurisdiction of the Director of National Intelligence.[337] Therefore, the complaint was not an "urgent concern" requiring congressional notification.[338]

In reaching this conclusion, OLC began with the text of the statute. Even if the text was broad enough to "cover every alleged violation of federal law or other abuse that comes to the attention of a member of the intelligence community,"[339] OLC narrowly construed this general statute as inapplicable to the President and his diplomatic communications because the whistleblower's complaint "alleged misconduct by someone from outside the intelligence community, separate form any 'intelligence activity' within the [Director of National Intelligence's]

331. H.R. Res. 755, 116th Cong. (2019).
332. This office was established by 50 U.S.C. § 3033. A copy of the whistleblower complaint is available here: https://www.nytimes.com/interactive/2019/09/26/us/politics/whistle-blower-complaint.html [https://perma.cc/K73S-6TQD].
333. 50 U.S.C. § 3033(e)(1).
334. *Id.* § 3033(k)(5)(C).
335. *Id.* § 3033(k)(5)(G)(i)(1).
336. "Urgent Concern" Determination by the Inspector Gen. of the Intel. Cmty., 43 Op. O.L.C., slip op. at 1 (2019).
337. *Id.* at 11 (citing 50 U.S.C. § 3033(k)(5)(G)(i)).
338. *Id.* at 12.
339. *Id.* at 5.

purview."[340] In other words, OLC interpreted the generally applicable statute to exclude the President's conduct.

To summarize, the presidential avoidance canon requires a clear statement before applying a generally applicable statute to the President, his close advisers, or the advise-and-assist components of the EOP. Courts and OLC have applied this canon to narrowly construe some of the most significant legislation in American history, including the APA, FOIA, and the Civil Rights Act of 1964. In some cases, courts have exempted EOP components even where the text of the statute explicitly covers the EOP. Courts have even exempted EOP components where those components themselves have long complied with those statutes.[341]

IV. FUTURE APPLICATIONS

This robust history suggests that the presidential avoidance canon may have application to future statutes. The majority of federal statutes are silent as to their application to the President and his close advisers. Several statues, however, explicitly apply to the EOP. For example, The Paperwork Reduction Act of 1995,[342] as amended, applies to "any executive department . . . or other establishment in the executive branch of the Government (including the [EOP])."[343] The Presidential and Executive Office Accountability Act of 1996,[344] which extends the protections of Title VII and other legislation to White House officials, applies to a "covered employee" defined as "any employee of a unit of the executive branch, including the [EOP]" who meets additional criteria.[345] The Federal Vacancies Reform Act of 1998,[346] as amended, addresses vacancies in "an Executive agency (including the Executive Office of the President)."[347] A provision of federal law permitting federal agencies to expend funds "for the maintenance, operation, or repair of any passenger carrier . . . used to provide transportation for official purposes" explicitly applies to "any establishment in the executive branch of the Government (including the [EOP])."[348] However, even in the context of the FOIA, a statute explicitly stating that it applies to the EOP is sometimes insufficient to construe the statute to apply to

340. *Id.* at 6.
341. *See* discussion *supra* Section III.A.
342. Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified as amended at 44 U.S.C. §§ 3501–3521).
343. 44 U.S.C. § 3502(1).
344. Pub. L. No. 104-331, 110 Stat. 4053 (1996) (codified as amended in scattered sections of 3 U.S.C. & 28 U.S.C.).
345. 3 U.S.C. § 411(c)(1).
346. Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as amended at 5 U.S.C. §§ 3345–3349d).
347. 5 U.S.C. § 3345(a).
348. 31 U.S.C. § 1344(a)(1), (h)(2)(G).

the President, his immediate staff, and the advise-and-assist components of the EOP. Sometimes even more explicit language is needed.

Congress has demonstrated that it can communicate its intent to apply statutes to the President, his immediate staff, as well as advise-and-assist components of the EOP through clear statements.[349] For example, The Ethics in Government Act of 1978[350] requires a number of officials to file financial disclosures, including "the President," "Vice President," and "each officer or employee in the executive branch," with certain limitations.[351] The Lobbying Disclosure Act of 1995[352] applies certain ethics provisions to "covered executive branch official[s]" defined as including "the President," "the Vice President," and "any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the [EOP]."[353] Title 18 criminalizes the assassination, kidnapping, and assault of "the President of the United States," "the Vice President," as well as "any person appointed under [3 U.S.C. § 105(a)(2)(A)] employed in the [EOP] or appointed under [3 U.S.C. § 106(a)(1)(A)] employed in [OVP]."[354] Title 3 explicitly extends federal service labor-management laws to the specific advise-and-assist components of the EOP by name.[355] In other contexts, Congress has used very broad statutory language that leaves no question that it applies to the President and his close advisers.[356] Conversely, Congress may communicate its intent that a statute does not apply to the EOP by enumerating the list of agencies to which it applies and omitting the EOP.[357]

The remainder of this Article analyzes the potential application of the presidential canon of construction to several new contexts: the (A) Federal Tort Claims Act, (B) Whistleblower Protection Act, (C) Inspector General Act, (D) Computer Fraud and Abuse Act, and (E) Hatch Act. But these general principles could apply to any number of current and future statutes.

349. *See e.g.,* N.L.R.B. v. SW Gen., Inc., 580 U.S. 288 (2017) (looking to related statutory provisions as evidence that Congress knows how to communicate its intent).
350. Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended in scattered sections of 2 U.S.C. & 28 U.S.C.).
351. 5 U.S.C. § 13103(f)(1)–(3).
352. Pub. L. No. 104-65, 109 Stat. 691 (1995) (codified as amended at 2 U.S.C. §§ 1601–1614).
353. 2 U.S.C. § 1602(3)(A)–(C).
354. 18 U.S.C. § 1751(a).
355. 3 U.S.C. § 431(d)(2).
356. *See* 42 U.S.C. § 2000bb–2(1) (defining "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States").
357. *See, e.g.*, 5 U.S.C. § 402 (creating offices of inspector general at enumerated list of establishments).

A. Federal Tort Claims Act

Under the doctrine of sovereign immunity, the federal government is generally immune from suit.[358] The Federal Tort Claims Act of 1946 (FTCA)[359] provides a limited waiver that allows private persons to sue the United States for tort claims "in the same manner and to the same extent as a private individual under like circumstances."[360] Nothing in the text of this general applicable section excludes the President, his close advisers, or the EOP. This raises the question: does the FTCA apply to the President and other White House officials?

There is a textual argument that they are exempt. The FTCA contains an exhaustion requirement: "An action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency."[361] For purposes of this section, a "Federal Agency" is defined as including "the executive departments."[362] Recall that in the context of 5 U.S.C. §§ 105 & 551(1), the terms "agency" and "executive departments" have been interpreted to exclude the President, his immediate staff, as well as advise-and-assist components of the EOP.[363] Reading the FTCA's definition *in pari materia* with the definitions in Title 5, one might argue that the FTCA does not apply to torts committed by the President and his close advisers, because the FTCA's exhaustion requirement contemplates that the liable entity is an "agency"—which the White House is not (at least under 5 U.S.C. § 551(1)).[364]

This remains an open question. For example, in 2007, a federal district court dismissed a suit alleging torts against the Vice President and White House officials because the plaintiffs failed to exhaust their administrative remedies under the FTCA. But the court declined to identify which federal agency the plaintiff should have consulted.[365]

More recently, a volunteer who tripped and sustained injuries at the White House Easter Egg Roll event sued "the United States" under the

358. Price v. United States, 174 U.S. 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.").
359. Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified as amended in scattered sections of 28 U.S.C.). *See also* U.S.C. § 1346 (waiving sovereign immunity over certain contracts).
360. 28 U.S.C. § 2674. *See* Richards v. United States, 369 U.S. 1, 6 (1962) (characterizing act).
361. 28 U.S.C. § 2675(a). *See* McNeil v. United States, 508 U.S. 106, 113 (1993) (describing exhaustion requirement).
362. 28 U.S.C. § 2671.
363. 5 U.S.C. §§ 105, 551(1).
364. *See* discussion *supra* Section III.
365. Wilson v. Libby, 498 F. Supp. 2d 74, 100 (D.D.C. 2007), *aff'd*, 535 F.3d 697 (D.C. Cir. 2008).

FTCA, alleging negligence.[366] The district court initially dismissed the suit without prejudice for failing to exhaust administrative remedies, but at least clarified that the National Park Service was the appropriate agency with jurisdiction over President's Park—the *locus delicti*.[367] But while this clarifies that claimants should pursue trip-and-fall claims with the National Park Service, it remains an open question whether personal torts committed by the President or his close advisers are subject to the FTCA.

However, consider an alternative approach. Applying the presidential avoidance canon, a court could decline to interpret the FTCA to apply to the President, his close advisers, or the advise-and-assist components of the EOP—absent a clear statement provided in future legislation. This is the same reasoning that the Supreme Court used in *Feres v. United States*, where it held "that the Government [was] not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[368] The court explained: "We cannot impute to Congress such a radical departure from established law in the absence of express congressional command."[369] In addition, a court could read the FTCA's exhaustion requirement, which refers to the "agency," *in pari materia* with other statutory provisions that have been interpreted to exclude the President and his close advisers.[370]

Yet in practice, courts will likely have a number of alternative grounds to dispose of suits. For example, in *Haddon v. United States*,[371] a White House chef (the same plaintiff in *Haddon v. Walters*[372]) sued a White House electrician for an intentional tort in the Superior Court of the District of Columbia.[373] The Executive Branch filed a certification under the Westfall Act[374] that the electrician was acting within the scope of his employment and so removed to federal court.[375] The court

366. Norton v. United States, 530 F.Supp.3d 1, 3 (D.D.C. 2021).
367. Pub. L. No. 87-286, 75 Stat. 586 (repealed 2014) (providing that area "within the President's park . . . to be known as the White House . . . shall be administered pursuant to the [National Park Service Organic Act]"); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 289–90 (1984) (describing NPS jurisdiction over President's Park). *Cf.* 3 U.S.C. § 110 (addressing NPS authorization to accept donation of furniture for Executive Residence).
368. 340 U.S. 135, 146 (1950).
369. *Id.*
370. *But see* Dong v. Smithsonian Inst., 125 F.3d 877, 882–83 (D.C. Cir. 1997) (Smithsonian Institute not an "agency" for purposes of Privacy Act but is an "agency" for purposes of FTCA).
371. 68 F.3d 1420 (D.C. Cir. 1995), *abrogated by* Osborn v. Haley, 549 U.S. 225 (2007).
372. 43 F.3d 1488 (D.C. Cir. 1995).
373. *Haddon*, 68 F.3d at 1422 (summarizing procedural history).
374. Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100–694, 102 Stat. 4563 (codified as amended in scattered sections of 28 U.S.C. & 16 U.S.C.)
375. *Haddon*, 68 F.3d at 1421–22.

agreed and "substituted the United States as the defendant."[376] On appeal, the D.C. Circuit reversed.[377] Rather than reaching the broader question of whether the FTCA applied to the White House, the court held that, as a matter of District of Columbia law, the alleged tort was outside the scope of the electrician's employment.[378] The court was therefore able to avoid the question before remanding the case back to the Superior Court of the District of Columbia.[379] Thus, whether the FTCA applies to the President or White House employees remains an open question.

B. Whistleblower Protections

The Whistleblower Protection Act of 1989,[380] as amended, protects certain executive branch employees from prohibited personnel practices.[381] This includes a prohibition, codified at 5 U.S.C. § 2302, against taking any personnel action.

> [B]ecause of . . . any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . . any violation of any law, rule, or regulation, or . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. . . . [382]

This remains true whether that disclosure is made to the Office of Special Counsel, Inspector General, or Congress.[383] This section specifically applies to agencies defined as "an Executive agency" but excludes intelligence agencies.[384] As noted above, the term "agency" in Title 5 has generally been interpreted to exclude advise-and-assist components of the EOP.[385] Therefore, it's important to consider whether this provision applies to the White House staff.

Title 3 contains a separate, narrower protection specific to White House staff. Under 3 U.S.C. § 417, it is "unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter."[386] As noted above, 3 U.S.C. § 401 explicitly defines "employing office" and "employee" to include "each office, agency, or other component of the [EOP]," the "Executive

376. *Id.* at 1422
377. *Id.*
378. *Id.* at 1425.
379. *Id.* at 1427.
380. Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.).
381. *See* 5 U.S.C. § 2302.
382. *Id.* § 2302(b)(8).
383. *Id*.
384. *Id.* § 2302(a)(2)(C).
385. *See supra* Section III.A.
386. 3 U.S.C. § 417(a)

Residence," and the residence of the Vice President.[387] Meanwhile, the term "this chapter" refers to Title 3 Chapter 5, "Extension of Certain Rights and Protections to Presidential Offices"—which extends Title VII and other protections to EOP employees.

Against this backdrop, one might argue that White House staffers are protected against reprisals under 3 U.S.C. § 417 but not under 5 U.S.C. § 2302—or other provisions outside Title 3. On this view, certain White House staffers enjoy protection against reprisals for opposing employment practices that violate protections specifically contained in Title 3 Chapter 5.[388] But that chapter does not contain the broad whistleblower protections codified at 5 U.S.C. § 2302. As a result, a White House staffer could theoretically fall outside the scope of the Whistleblower Protection Act. If so, a White House staffer would be without recourse for any adverse employment action taken because of their opposition to unlawful practices codified outside of Title 3 Chapter 5. In particular, it would not protect against disclosures to the Office of Special Counsel, Inspector General, or Congress concerning violations of law, gross mismanagement, or substantial and specific dangers to public health and safety. This would lead to the strange result that the President and his close advisers could lawfully retaliate against any staffer who truthfully told members of Congress about ongoing violations of law—even though these would be considered protected disclosures if made by a Title 5 employee.

This argument follows the usual logic. Courts have consistently interpreted Title 5's definitions of agency and employee to exempt the EOP entirely—or at least advise-and-assist components of the EOP.[389] Moreover, under the rule that a specific provision controls over the general (*generalia specialibus non derogant*),[390] 3 U.S.C. § 417 displaces Title 5's more general protections. As noted, 3 U.S.C. § 417 clearly applies to advise-and-assist components of the EOP and explicitly excludes violations of law outside of Title 3 Chapter 5. Under the canon of *inclusio unius est exclusio alterius*,[391] the explicit inclusion of Chapter 5's protections implicitly exclude other laws, rules, and regulations. In addition, interpreting 5 U.S.C. § 2302 to prohibit the President or his close advisers from removing certain inferior executive branch officials would arguably impinge on the President's constitutional authority under Article II.[392] Combining the presidential avoidance canon with the canon of constitutional avoidance, a court might interpret 5 U.S.C

387. *Id.* § 401(a)(4).
388. *See id.* § 417 (prohibiting intimidation or reprisals against covered employees who oppose practices "made unlawful by this chapter").
389. *See supra* note 142.
390. *See, e.g.*, Bloate v. United States, 559 U.S. 196, 207 (2010).
391. *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 11 (2013).
392. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020); Myers v. United States, 272 U.S. 52 (1926).

§ 2302 to be inapplicable to the President, his immediate staff, and the advise-and-assist components of the EOP. This is consistent with how OLC narrowly construed the Director of National Intelligence's obligation to report matters of "urgent concern" to Congress under 50 U.S.C. § 3033 as inapplicable to a whistleblower's allegation that the President violated federal law during a diplomatic call with the President of Ukraine.[393] This would be a remarkable conclusion inconsistent with general intuitions about whistleblower protections specifically and the rule of law generally. Yet the logic of the presidential avoidance canon, as applied by courts and OLC over recent decades, suggests this result.

C. Inspector General Act

OLC's Opinion[394] narrowly construing the Intelligence Community's Inspector General Act also suggests that the presidential avoidance canon could be applied to the Inspector General Act of 1978.[395] Under the Act, each Inspector General is authorized:

> [W]ith respect to the establishment within which the Inspector General is established . . . to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of the establishment . . . [and] to keep the head of the establishment and Congress fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by the establishment.[396]

The text of this provision includes explicit references to "the establishment," appearing to limit the scope of the Inspector General's audit and investigative authorities to agency programs.

Subsection (d) of the same provision more broadly directs each Inspector General,"[i]n carrying out the duties and responsibilities established under this [Act]," to "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds

393. *See* "Urgent Concern" Determination by the Inspector Gen. of the Intel. Cmty., 43 Op. O.L.C., slip op. at 1 (2019). It is arguably also consistent with the general framework for civil service whistleblower protection laws. On one view, such laws operate as delegated oversight powers that Congress has installed in executive branch agencies to monitor the activities and programs of agency heads. Whistleblower protections may be appropriate to mitigate concerns that agency personnel will retaliate against whistleblowers for disclosing waste, fraud, and abuse of agency programs. Yet the President does not directly manage any programs or activities; rather, he makes high level policy decisions (concerning the military, nominations, pardons, proposed legislation, and regulatory directives) with the power to remove inferior officers—including all of his direct reports—for any reason. The typical concerns associated with civil service whistleblowers are therefore inapplicable to the President.

394. *Id.*

395. Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. §§ 401–424).

396. 5 U.S.C. § 404(a)(1), (5).

to believe there has been a violation of Federal criminal law."[397] The Attorney General, in turn, has statutory authority to investigate "any violation of Federal criminal law involving Government officers and employees . . . notwithstanding any other provision of law."[398]

Against the backdrop of the presidential avoidance canon, one might construe the jurisdiction of the Inspector General to audit and investigate agency activities—and not to opine on the policy judgments, political statements, or activities of the President, his immediate staff, or the advise-and-assist components of the EOP.[399] In contrast, the Inspector General's obligation to report to the Attorney General violations of law might extend to violations by the President and his immediate advisers, given that subsection's unlimited language and reference to the Attorney General's broad investigative powers—which presumably permit the Attorney General to investigate even the President.[400] After all, this was the distinction that OLC made in its Opinion interpreting the jurisdiction of the Intelligence Community's Inspector General; the complaint alleging wrongdoing by the President was not an "urgent concern" to be transmitted to Congress but could be referred to the Attorney General for criminal investigation.[401]

D. Computer Fraud

The Computer Fraud and Abuse Act of 1986 (CFAA)[402] makes it illegal "to access a computer with[out] authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[403] This section also criminalizes

397. *Id.* § 404(d).
398. 28 U.S.C. § 535(a).
399. Note that one commentator has recently advocated for the establishment of an Inspector General for the White House, on the premise that no current IG has jurisdiction over these activities. *See* Yevgeny Vindman, *A White House Inspector General for Accountability*, LAWFARE (Dec. 2, 2021, 9:01 AM), https://www.lawfareblog.com/white-house-inspector-general-accountability [https://perma.cc/R6C8-DC23].
400. *See* Morrison v. Olson, 487 U.S. 654, 660 (1988) (upholding statute authorizing investigation into president and other executive branch officials); *see also* ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019) (reporting on investigation into conduct by sitting President).
401. "Urgent Concern" Determination by the Inspector Gen. of the Intel. Cmty., 43 Op. O.L.C., slip op. at 2, 12 (2019) (opining that "the statute does not require that the DNI transmit the complaint to the intelligence committees" but stating that "the attached complaint have been referred to the Criminal Division of the Department of Justice for appropriate review").
402. Pub. L. 99-474, 100 Stat. 1213 (1986) (codified as amended at 18 U.S.C. § 1030).
403. 18 U.S.C. § 1030(e)(6). *See also* Van Buren v. United States, 141 S. Ct. 1648, 1652 (2021) (describing statutory history); *see generally* Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596 (2003).

"intentionally access[ing] a computer . . . and thereby obtain[ing] . . . information from any department or agency of the United States,"[404] as well as "intentionally, without authorization … access[ing] any nonpublic computer of a department or agency of the United States."[405] Yet the statute specifically defines "department of the United States" as "the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of Title 5,"[406] which as noted above, excludes the President, his immediate staff, as well as advise-and-assist components of the EOP. This raises the question: Does the CFAA not criminalize the unauthorized access of the President's computer—or a computer of the President's immediate staff or advise-and-assist components of the EOP?

On the one hand, a defendant might argue that the statute does not. The CFAA appears to specifically define "department" to exclude the President, his immediate staff, and the advise-and-assist components of the EOP. This textual reading, combined with the presidential avoidance canon and rule of lenity,[407] suggests that an individual could access WHO, NSC, or other computer systems with impunity.

On the other hand, the presidential avoidance canon normally operates in the opposite direction. Normally, Congress enacts a generally applicable statute (typically civil in nature and administrative in function) that by its express terms imposes some burden or obligation on the President or his close advisers. The application of the statute often raises constitutional concerns. Applying a version of constitutional avoidance, courts narrowly construe the statute to exempt the President and his close advisers from arguably unconstitutional restrictions or regulations.

In the case of the CFAA, the statute criminalizes illegal conduct by private persons, rather than imposing any obligation on the President or his advisers. Consequently, the statute does not raise separation of powers concerns. It would therefore be inappropriate to apply the presidential avoidance canon in this context. If anything, context suggests broadly construing the statute to criminalize the unauthorized access of White House computer systems. If Congress was concerned with protecting the computer systems of generic agencies, it would presumably be even more concerned with protecting access to the computer systems of the President and his close advisers. Nevertheless, a defendant charged under the act with accessing presidential computer records could argue that the presidential avoidance canon, paired with the rule of lenity, counseled against criminalizing his conduct.

404. 18 U.S.C. § 1030(a)(2).
405. *Id.* § 1030(a)(3).
406. *Id.* §1030(e)(7).
407. *See* Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021); Ocasio v. United States, 578 U.S. 282, 295 & n.8 (2016).

E. Hatch Act

The Hatch Act of 1939[408] generally prohibits government employees from engaging in partisan activities on the job. 5 U.S.C. § 7323 generally prohibits "an employee" from taking an active part in political management or political campaigns, including "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election."[409] For purposes of this subchapter, an "employee" is defined as including "any individual, other than the President and the Vice President, employed or holding office in . . . an Executive agency other than the Government Accountability Office."[410]

Section 7324 separately prohibits an "employee" from "engag[ing] in political activity" while on duty, on government property, while wearing a uniform, or while using a government vehicle.[411] This subsection specifically exempts employees whose "duties and responsibilities . . . continue outside normal duty hours" and who are (i) "paid from an appropriation for the [EOP]" or (ii) "appointed by the President, by and with the advice and consent of the Senate," so long as political activities "are not paid for by money derived from the Treasury of the United States."[412]

Applying the presidential avoidance canon, one might argue that these provisions do not apply to the President, his close advisers, or the advise-and-assist components of the EOP. By its terms, the statute only applies to "employees" of an "Executive agency," which is defined elsewhere in Title 5 as "an Executive department,"[413] which in turn is defined by an exhaustive list of agencies that does not include the EOP.[414]

Yet there are three counterarguments based on the text. First, Section 7322's definition specifically exempts the President and Vice President; the exclusion of these two individuals could imply the inclusion of all other Executive Branch employees.

Second, Section 7324(d) explicitly exempts certain activities of employees "paid from an appropriation for the [EOP]." This language implies that the drafters believed at least some EOP employees were covered by that section, if not by the Hatch Act as a whole.[415] One could interpret this to imply that all EOP employees are subject to the Hatch Act or that at least some EOP employees are subject to the act. Both

408. Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939) (codified as amended in scattered sections of 5 U.S.C. & 18 U.S.C.).
409. 5 U.S.C. § 7323(a).
410. *Id.* § 7322(1).
411. *Id.* § 7324(a).
412. *Id.* § 7324(b)(1)–(2).
413. *Id.* § 105.
414. *Id.* § 101.
415. Historically, it appears that this language was intentionally added to exclude employees in the Executive Office of the President—the predecessor to WHO.

are in tension with Section 7322's definition (which appears to exempt EOP entirely).

Third, a separate provision codified at 18 U.S.C. § 603 broadly criminalizes any "employee" from making any political campaign contribution "to any other such officer, employee or person . . . if the person receiving such contribution is the employer or employing authority of the person making the contribution."[416] The ostensible purpose of this provision was to prevent a supervisor from coercing his employees into funding his campaign. However, the broad language initially raised concerns that no Executive branch employee could ever contribute to a sitting President's reelection campaign.[417] DOJ OLC ultimately provided a limiting construction.[418] But § 603 also contains a separate carveout that this section "shall not apply to any activity of an employee (as defined in [5 U.S.C. § 7322(1)] . . . unless that activity is prohibited by [5 U.S.C. §§ 7323–24]."[419] One could read this provision *in pari materia* with the Title 5 provisions to conclude that the Hatch Act applies to all EOP employees, who are therefore exempt from 18 U.S.C. § 603 unless their conduct violates the Hatch Act.

OLC has opined on this thorny question several times. For example, in 1995, OLC opined that 18 U.S.C. § 603 would not bar civilian Executive Branch employees from making campaign contributions to a President's authorized re-election campaign committee.[420] In arriving at this conclusion, OLC relied upon section 603(c)'s exemption as a basis for exempting Executive Branch employees. But OLC did not specifically address this sections application to EOP employees.

In 2003, OLC was asked whether its 1995 opinion remained valid in light of the D.C. Circuit's decision in *Haddon v. Walters*,[421] discussed above,[422] which held that Title VII did not apply to WHO employees.[423] OLC noted that *Haddon* was decided four months before its 1995 opinion; the office was therefore presumed to be aware of that decision.[424] OLC acknowledged that there was "arguable tension between

416. 18 U.S.C. § 603(a).
417. Whether 18 U.S.C. § 603 Bars Civilian Exec. Branch Emps. & Officers from Making Contributions to a President's Authorized Re-Election Campaign Comm., 19 Op. O.L.C. 103, 104 (1995).
418. *Id.* at 108.
419. 18 U.S.C. § 603(c).
420. *See* Whether 18 U.S.C. § 603 Bars Civilian Exec. Branch Emps. & Officers from Making Contributions to a President's Authorized Re-Election Campaign Comm., 19 Op. O.L.C. 103 (1995).
421. 43 F.3d 1488 (D.C. Cir. 1995).
422. *See* discussion *supra* Section III.
423. 43 F.3d at 1490; Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Comm., 27 Op. O.L.C. 118, 118 (2003). For context of this request, *see* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1489 (2010).
424. Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee, 27 Op. O.L.C. 118, 119 (2003).

[its] 1995 opinion . . . and *Haddon*," but it opined that "there are . . . powerful reasons to conclude that the term 'Executive agency' in section 7322(1) does not have the same meaning that section 105 of Title 5 generally assigns it (and that cases like *Haddon* recognize) for the purpose of Title 5."[425] OLC interpreted § 7322(1)'s explicit exclusion of the President and Vice President to imply the inclusion of all other Executive Branch employees—even though the statutory definition does not reach EOP employees.[426] Finally, OLC relied upon the 7324(d) exemption for employees paid out of appropriations for the EOP: "This provision appears to presuppose that employees paid by the Executive Office of the President . . . are employees of an 'Executive agency' under section 7322(1)."[427] But even if this provision implies that some EOP employees are subject to the Hatch Act, it does not follow that all EOP employees are. Rather, application of the presidential avoidance canon would suggest that OLC and courts should narrowly construe the Hatch Act to apply only to EOP employees outside the advise-and-assist components of the EOP.

This is a particularly thorny legal question given the unusual text, structure, and history of these provisions. It is further complicated by the near dozen OLC opinions reviewing aspects of these laws. But this brief discussion illustrates the potentially broad implications of the presidential avoidance canon, if decisions like *Haddon* are even-handedly applied to other contexts.

V. DISCUSSION

This Article identifies the presidential avoidance canon and proposes that courts apply this rule when interpreting generally applicable statutes in the context of the President. However, there remain several outstanding questions: (A) What is the precise formulation of the presidential avoidance canon? (B) In what contexts is it appropriate to apply the canon? (C) On what basis is the canon justified? Finally, (D) what is the utility of recognizing the presidential avoidance canon as a separate doctrine? The remainder of this Section addresses these questions.

A. Scope

What exactly is the presidential avoidance canon? Courts have suggested several formulations. In *Nixon v. Fitzgerald*, the Supreme Court

425. *Id.* at 118–19.
426. *Id.* at 119.
427. *Id.* Note that in 2017, OLC issued an Opinion that accepted the logic of *Haddon* yet distinguished the Hatch Act in a lengthy footnote. *See* Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Off., 2017 WL 5653623, n.4 (2017).

declined to apply causes of action to the President where "[i]n neither case has Congress taken express legislative action to subject the President to civil liability for his official acts."[428] In *Franklin*, the Supreme Court explained that "textual silence is not enough to subject the President to the provisions of the APA[,]" but instead "requir[ed] an express statement by Congress" before doing so.[429] These statements come from the most authoritative source. But they fail to state a clear rule of general applicability.

Perhaps the best formulation from an appellate court is the D.C. Circuit's rule articulated in *Armstrong v. Bush*: "When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear."[430] In other words, courts apply a clear statement before interpreting a statute that would restrict or regulate presidential action to apply to the President or his close advisers. This formula has the benefit of stating a clear rule and at the same time clarifying that the principle chiefly applies when the statute in question restricts or regulates presidential action.

However, what counts as a clear statement? Congress has demonstrated that it can communicate its intent to cover the President by expressly applying statutes to "the President" by name, as it did in the Ethics in Government Act of 1978[431] and Lobbying Disclose Act of 1995.[432] Congress can also apply laws to specific components and sub-components of the EOP by name.[433] But even where Congress has expressly applied laws to the EOP, courts have interpreted these laws with the gloss of *Soucie*. Against this backdrop, it may be insufficient to satisfy the presidential avoidance canon's clear statement requirement merely by extending laws to the EOP, without further specificity. This is particularly true for laws that interrelate with provisions codified in Title 5, such as the APA, FOIA, and Privacy Act. Furthermore, statutes that merely apply to federal agencies generally may be insufficient to reach the EOP at all.

Finally, if Congress fails to include a clear statement, how far will courts go to avoid applying a generally applicable law to the President? The answer is quite far. Recall these startling results: Even where "agency" is defined to include the EOP, courts have interpreted this to exclude the advise-and-assist components of the EOP (APA, FOIA, Privacy Act, FRA). The President does not "utilize" the ABA Committee's evaluations of judicial nominees for purposes of FACA. The First

428. 457 U.S. 731, 748 (1982).
429. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).
430. 924 F.2d 282, 289 (D.C. Cir. 1991).
431. Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended in scattered sections of 2 U.S.C. & 28 U.S.C.).
432. Pub. L. No. 104-65, 109 Stat. 691 (1995) (codified as amended at 2 U.S.C. §§ 1601–1614).
433. *See, e.g.*, 3 U.S.C. § 431(d)(2).

Lady is an "employee" or "officer" within the meaning of FACA but not for purposes of other statutes. Until 1996, White House officials could have discriminated against employees on the basis of race. The NSC and OA were not subject to FOIA, despite the fact that they voluntarily complied with that statute for decades. It is difficult to think of another canon of construction that has prompted such interpretive gymnastics.

B. Context

There are three broad contexts when the presidential canon applies. First, the canon has special application when interpreting statutes that implicate the President's constitutional powers. The Supreme Court has recognized the President's unique authority to solicit information from individuals within and outside the government[434] to protect this information as confidential,[435] to control classified information,[436] to remove inferior officers,[437] and to act as the sole organ of the federal government in international relations.[438] Thus, if a statute does not apply to the President by its plain terms and its application would interfere with his constitutional prerogatives, a court may narrowly construe the statute to exempt the President or his close advisers in order to avoid an unconstitutional interpretation. This is a straightforward application of the constitutional avoidance doctrine. Specific examples include: *Franklin*, which held that the President was exempt from the APA, citing the separation of powers;[439] *Kissinger*, which held that the President's National Security Adviser was exempt from FOIA, because that would interfere with the President's ability to solicit confidential advice;[440] and *Public Citizen*, which held that FACA did not apply to the ABA Committee's evaluation of judicial candidates, because this would interfere with the President's ability to solicit advice about federal nominees.[441] In these contexts, the presidential avoidance canon serves as a narrow version of the constitutional avoidance canon.

Second, the canon is also applicable when interpreting laws organizing the executive branch. Congress has enacted laws specific to the President and his close advisers codified in Title 3. It has also established a robust framework of federal agencies to assist the President. These are governed by landmark administrative laws such as the APA, FOIA, Privacy Act, FRA, WPA, and the Inspector General Act of 1978,

434. *See e.g.,* United States v. Nixon, 418 U.S. 683, 705–06 (1974).
435. *See id.*
436. *See e.g.,* Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988).
437. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Myers v. United States, 272 U.S. 52 (1926). *But see* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
438. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).
439. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (2019).
440. Kissinger v. Reps. Comm. For Freedom of the Press, 445 U.S. 136, 157 (1980).
441. Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 466–67 (1989).

which are all codified in Title 5. Several of these have been interpreted to be linked in scope, such as FOIA and the Privacy Act.[442] Against this backdrop, if a court is asked to interpret a generally applicable provision of law in Title 5, it would be appropriate to interpret this provision in harmony with the rest of the corpus juris. For example, the court should interpret terms *in pari materia* with other provisions of Title 5, such as Sections 105 ("defining executive department") and 551 (defining "agency"), which have been interpreted to exclude the President and his close advisers. Examples of this include the D.C. Circuit's opinion in *Clinton*, which held that FACA did not apply to a Commission chaired by the First Lady[443] and the 2017 OLC Opinion, which interpreted the anti-nepotism law to permit the President to appoint his son-in-law to a position in the White House Office.[444]

Courts should also interpret statutes in light of what Congress has separately codified in Title 3. Under the general principle of *generalia specialibus non derogant*, courts will interpret specific provisions to control over more general provisions. In the context of the presidency and White House staff, provisions in Title 3 should control over more general provisions codified in Title 5. The best example of this is the D.C. Circuit's decision in *Haddon v. Walters*, which held that Title VII of the Civil Rights Act of 1964 did not apply to staff in the White House residence.[445] Subsequently, Congress enacted a new provision of law specifying that these protections applied to White House employees under Title 3.[446] In these contexts, the presidential avoidance canon serves the same function as traditional tools of statutory interpretation, such as *in pari materia* and *generalia specialibus non derogant*.

Finally, the presidential avoidance canon is also appropriate in cases where Congress enacted general applicable laws without contemplating their application to the President. As the Supreme Court has recognized, the President "occupies a unique position in the constitutional scheme."[447] Yet laws are written in general terms, sometimes without consideration of corner cases or officials holding unique positions. It may therefore be inappropriate, and in some cases absurd, to apply a law of general applicability to the President. Perhaps the most colorful example is the 1973 OLC Opinion advising that the APA did not apply to the President, in part because it would be absurd to require the President to comply with notice-and-comment rulemaking when

442. *See* Applicability of the Priv. Act to the White House, 24 Op. O.L.C. 178 (2000).
443. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 910–911 (D.C. Cir. 1993).
444. *See* Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Off., 2017 WL 5653623, at *10 (2017).
445. 43 F.3d 1488, 1491 (D.C. Cir. 1995).
446. See supra Section III.E.
447. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

making speeches on foreign policy.[448] In these cases, the presidential avoidance canon operates as a tool to clarify congressional intent.

In contrast, the presidential avoidance canon has limited applicability to laws that regulate private conduct, such as criminal law. For example, a law may criminalize conduct targeting the President or his close advisers. In the case of the CFAA, it is unclear whether the law prohibits accessing the President's computer systems without authorization.[449] But as discussed above, interpreting the law to cover such conduct does not regulate or restrict presidential action. It therefore does not raise constitutional concerns. This fact pattern also describes the core conduct that Congress likely had in mind when it passed the law.

In light of these considerations, the following formulation of the presidential avoidance canon may be appropriate. Courts require a clear statement before interpreting a general applicable statute to apply to the President, his immediate staff, or the EOP. Even where a statute by its terms covers the EOP, courts may narrowly construe the statute as excluding EOP components whose sole function is to advise and assist the President, absent a clear statement to the contrary. The canon is applicable to statutes that raise constitutional concerns, for example, by restricting or regulating presidential action. It is also applicable where specific statutes separately regulate the President and his close advisers. But the canon has limited applicability when interpreting statutes regulating private conduct.

C. Justification

What justifies this canon as a normative matter? It is not enough simply to acknowledge a common pattern in case law and OLC opinions. These decisions must also be justified if they merit application in future cases. The presidential avoidance canon can be justified on at least three independent bases, tracking the three contexts in which it is used.

First, some applications of the canon may be species of the constitutional avoidance canon. Under this broader rule, courts will narrowly construe statutes to avoid interpretations that are unconstitutional. As noted above, the Constitution entrusts the President with a number of specific duties and powers. Thus, whenever the application of a statute to the President or his close advisers could conflict with his constitutional prerogatives, there is a sufficient basis, grounded in the Constitution, to apply the presidential avoidance canon. Examples

448. *See* Memorandum from Roger C. Cramton, Assistant Att'y Gen., Off. of Legal Couns., Application of the Freedom of Information Act to Certain Entities Within the Executive Office of the President, to the Honorable. John W. Dean, III, Couns. to the President (Jan. 30, 1973).

449. *See supra* Section IV.D.

include *Nixon*,[450] *Franklin*,[451] and *Public Citizen*.[452] But although constitutional avoidance may justify the presidential avoidance canon in some circumstances, there are other applications that do not obviously present constitutional concerns and so must be justified on some other basis.

Second, several authorities have applied the presidential avoidance canon on the grounds of traditional tools of statutory construction. In these cases, the canon has been supported by the broader principles of *in pari materia* or *generalia specialibus non derogant*. Over time, Congress has enacted a number of laws specific to the President and his close advisers codified in Title 3, while separately legislating for federal agencies through regulations codified in Title 5. Against this legislative backdrop, courts have appropriately interpreted new laws *in pari materia* with these existing laws. In particular cases, they have also applied the *generalia specialibus non derogant* rule by holding that the specific laws in Title 3 control over the general rules in Title 5. The most aggressive form of this argument would be to interpret Title 5 laws as wholly inapplicable to the President and his close advisers. In practice, OLC appears to take the position that at least the Hatch Act provisions of Title 5 do apply to White House officials. A more conservative position would note that the inclusion of specific provisions in Title 3 may exempt the President and his close advisers from conflicting provisions in Title 5. This is the approach adopted in *Haddon v. Walters*[453] and the 2017 OLC Opinion interpreting the anti-nepotism statute.[454] Even without raising constitutional concerns, these outcomes may be justified under well-established tools of statutory construction.

Finally, some authorities have applied the presidential avoidance canon on the grounds of ascertaining congressional intent. Any statute that applies generally—to all individuals, all U.S. citizens, all federal employees, or all agencies—will have most of its applications outside of the White House. Indeed, the President and his close advisers will necessarily be a corner-case. On the one hand, our law has a long tradition of insisting that the President and his close advisers are not above the law. On the other hand, laws organizing the civil service and federal agencies are not always drafted with the President in mind. Indeed, as seen in the case of the APA, it would be ridiculous to image the President having to comply with modern notice-and-comment requirements before delivering any speech.[455] In these cases, the presidential

450. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).
451. Franklin v. Massachusetts, 505 U.S. 788 (2019).
452. Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 455 (1989).
453. 43 F.3d 1488 (D.C. Cir. 1995)
454. *See* Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Off., 2017 WL 5653623 (2017).
455. *See* Memorandum from Roger C. Cramton, Assistant Att'y Gen., Off. of Legal Couns., on Application of the Freedom of Information Act to Certain Entities

avoidance canon can be separately justified as ensuring that courts interpret statutes in accord with congressional intent. This is what the D.C. Circuit meant in *Clinton* when it wrote, "we doubt that Congress intended to include the White House or the Executive Office of the President."[456] In many cases, Congress may not have intended to regulate or restrict presidential action, in large part because Congress may not have considered the law's application to the President, his close advisers, or the EOP. In these cases, the canon avoids blindly extending generally applicable laws to unintended and potentially dramatic corner cases. This is same spirit animating the absurdity doctrine, under which courts will not interpret statutes literally if doing so would produce absurd results.[457]

In sum, the presidential avoidance canon is a canon just like any other. It is valuable to the extent that it produces interpretations consistent with legislative intent. Some applications are grounded in the Constitution. Other applications may be justified based on the statute's context within the broader U.S. Code. Still other instances will simply aim to ensure that the law is applied as Congress intended. Across these disparate cases, the canon will sometimes perform a prophylactic role by requiring a clear statement before interpretating a statute to apply to the President his close advisers. But since most laws are enacted without considering their potential application to the President, the canon provides a restraint on officials and judges who might blindly extend those laws to the Presidency, with potentially dramatic consequences.

D. Utility

Finally, what is gained from recognizing the presidential avoidance canon? After all, many of the applications of the presidential avoidance canon can be explained as applications of the broader constitutional avoidance canon. Others can be explained are examples of *in pari materia*, *generalia specialibus non derogant*, or even the absurdity canon. Indeed, courts so far have adjudicated these cases without recourse to yet another canon of construction. But consider three benefits of recognizing this canon.

First, existing canons are overinclusive. As a result, they fail to state the controlling principle with the same level of granularity. Of course, it is a cardinal rule of statutory construction to give effect to the legislature's intent. But such generic advice often fails to provide

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Within the Executive Office of the President, to the Honorable. John W. Dean, III, Couns. to the President (Jan. 30, 1973).

456. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 905 (D.C. Cir. 1993).

457. *See* United States v. Kirby, 74 U.S. 482, 486 (1868); *see generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

meaningful guidance in particular cases. In the same way, the constitutional avoidance canon provides high level guidance when interpreting provisions that impinge on the President's constitutional prerogatives. But it fails to direct attention to the small cluster of cases interpreting generally applicable statutes to the context of the presidency. The constitutional avoidance canon is therefore less likely to direct attention to the most relevant precedents. This objection also holds for other tools of statutory construction: *in pari materia*, *generalia specialibus non derogant*, and the absurdity doctrine.

Second, each of these alternative canons is also underinclusive. The constitutional avoidance canon may justify some cases, such as *Franklin*. But it fails to explain much of the reasoning in other opinions, discussed above, which focus heavily on statutory context or unintended applications of general statutes. This is also true of the other alternative canons of construction.

Third, and most importantly, the presidential avoidance canon unifies otherwise disparate lines of cases. The current approach has been to treat these authorities on an ad hoc basis. But this approach has several limitations. It fails to alert judges to relevant cases that may appear under the guise of different doctrines. It fails to situate questions of statutory interpretation within the dense network of uniquely interrelated statutes, such as the APA, FOIA, Privacy Act, and FRA. Finally, it fails to elicit the longstanding judicial glosses that have informed subsequent legislation, such as the distinction between advise-and-assist and other components of the EOP. That distinction does not appear in statute. Yet the D.C. Circuit's opinions in *Soucie*[458] and *Meyer*[459] have profoundly influenced how Congress, the Executive Branch, and the Judiciary have differentially treated components of the EOP. Similarly, who would have guessed that the D.C. Circuit once held that Title VII protections did not apply to White House employees? Yet the D.C. Circuit's decision in *Haddon v. Walters*,[460] combined with the Congress's decision to specifically codify workplace protections for White House staffers in Title 3, has strongly colored subsequent cases and OLC deliberations. In the absence of the presidential avoidance canon, courts may proceed unaware of these non-obvious but foundational distinctions. The value of the presidential avoidance canon is that it immediately evokes this rich history and locates new questions of statutory interpretation within the context of this dense network of statutes, OLC opinions, and judicial cases.

A last objection to the presidential avoidance canon is that it is new. But to quote Chief Justice Roberts, "novelty is not necessarily fatal;

458. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).
459. Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993).
460. 43 F.3d 1488.

there is a first time for everything."[461] Moreover, as this analysis has shown, some form of the presidential avoidance canon can be traced back to Chief Justice Marshall. There are also clear applications of the principle by the time of *Nixon* and *Franklin*. Since then, the presidential avoidance canon has been consistently applied to virtually every major executive branch statute, ranging from the APA to FOIA to anti-nepotism laws. By comparison, the major questions doctrine is of a much more recent vintage. That doctrine was only recently confirmed in the landmark case *West Virginia v. EPA*.[462] Arguably, the doctrine can be traced back to *MCI Telecommunications Corp. v. AT&T Co*.[463] and *FDA v. Brown & Williamson Tobacco Corp*.[464] Yet even those opinions postdate *Nixon* and *Franklin*. Nevertheless, the majority in *West Virginia v. EPA* justified its reliance on the major questions doctrine based on its utility. Writing for the Court, the Chief Justice explained that the doctrine "took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem."[465] The same may be said of the presidential avoidance canon. If the Supreme Court can identify a new canon such as the major questions doctrine, it can also identify the older presidential avoidance canon.

VI. CONCLUSION

The presidential avoidance canon requires a clear statement before courts will interpret a generally applicable statute to apply to the President, his immediate staff, or the EOP. Even where a statute by its terms covers the EOP, courts may narrowly construe the statute to exclude EOP components whose sole function is to advise and assist the President. All three branches of government have converged on this understanding. Courts have applied this canon to narrowly construe landmark legislation. The Executive Branch has applied this principle when issuing OLC opinions. In response, Congress has begun specifying with particularity whether laws should apply to the President or specific subcomponents of the EOP. Collectively, these actions have reinforced the presidential avoidance canon, which is now more relevant than ever.

The presidential avoidance canon reflects the unique position of the President and his close advisers in our constitutional structure. It accords appropriate deference to Congress's longstanding practice of differentiating between the President and his advisers, who are

461. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012).
462. 142 S. Ct. 2587, 2609 (2022).
463. 512 U.S. 218 (1994).
464. 529 U.S. 120 (2000). *See also* King v. Burwell, 576 U.S. 473, 486 (2015) (applying major questions doctrine in context of Affordable Care Act).
465. 142 S. Ct. at 2609.

regulated by Title 3, and executive branch agencies generally, which are regulated by Title 5.[466] It also respects statutory definitions, which frequently omit the EOP from enumerated lists of agencies.[467] In some cases, the presidential avoidance canon may override statutes where Congress expresses its legislative intent to cover the President and his immediate staff; in this subset of cases, the canon may be considered as a species of the canon of constitutional avoidance.[468]

This Article chronicled how courts and OLC have applied this interpretive tool across diverse contexts: judicial subpoena authority, the APA, FOIA, Privacy Act, FRA, PRA, Title VII of the Civil Rights Act of 1964, the anti-nepotism statute, FACA, and inspector general law. In doing so, we documented the great lengths that courts will go to construe generally applicable statutes to exclude the President and his close advisers.

We applied the logic of these decisions to new contexts to better understand the implications and precise contours of the presidential avoidance canon. Under the above reasoning, Congress may not have waived sovereign immunity over torts committed by the President and his close advisers under the FTCA. Employees within the advise-and-assist components of the EOP may lack standard whistleblower protections. The Inspector General may lack the authority to investigate EOP misconduct. Congress may have forgotten to criminalize the unauthorized access of EOP computers. White House officials could contest whether the Hatch Act applies to their conduct.

Finally, we discussed the significance of recognizing the presidential avoidance canon. Courts in fact impose a strong clear statement requirement before interpreting statutes to apply to the President and his close advisers. The presidential avoidance canon acknowledges this reality and at the same time unifies otherwise disparate lines of cases fashion. In particular, the canon draws attention to the dense network of interrelated statutes, OLC opinions, and judicial cases wrestling with the application of Title 5 laws to the context of the President and his closer advisers. In the absence of this canon, courts may continue to treat future cases in isolation, perhaps with the blunt tools of the constitutional avoidance canon or other tools of statutory interpretation. But these tools are both overinclusive and underinclusive. Instead, courts

466. *But see* Aneil Kovvali, *Constitutional Avoidance and Presidential Power*, 35 YALE J. ON REGUL. BULL. 10, 10, 16 (2017) (arguing that applying the constitutional avoidance canon to defend presidential prerogatives is "problematic" and "distortive").

467. *See, e.g.*, 5 U.S.C. § 105.

468. Notably, many of the developments described in this Article postdate the creation of the administrative state and the proliferation of oversight statutes passed in the wake of the Watergate controversy. Most of the examples analyzed are "good governance" statutes codified in Title 5. This suggests that a central role of the presidential avoidance canon is to align recent administrative and oversight laws with the proper understanding of the separation of powers.

should expressly acknowledge by name what is implicit in the history of the administrative state: that courts have applied the presidential avoidance canon to avoid interpreting generally applicable statutes to the President and his closer advisers.

This analysis has important implications for each branch of government. First, Congress should be explicit when it intends for legislation to cover the President, his close advisers, or the EOP. To this end, Congress may wish to embark on a codification project to ensure that, when intended, Title 3 includes all legislation to apply to the President and his close advisers. Second, executive branch officials wield a formidable tool in the presidential avoidance canon when interpreting generally applicable statutes. When advising whether certain statutes apply to the President and his close advisers, executive branch officials should demand that Congress provide a clear statement comparable to the precedents recounted above. Third, courts should also apply the presidential avoidance canon to require a clear statement before interpreting generally applicable statutes to apply to the President, his close advisers, or the EOP. This respects the separation of powers and prior legislative judgments. Finally, all lawyers and scholars should include the presidential avoidance canon among the canons of construction.