POLITICAL MOOTNESS

*Z. Payvand Ahdout**

Congress and the executive have engaged in major clashes over the scope of their powers, particularly involving Congress's subpoena power and power of the purse. In the last two decades, none of these disputes with the government represented on both sides of the "v" has ended in a final judgment on the merits. This Article develops the concept of "political mootness." As elections take place and the parties in interest to litigation change, cases become politically moot. In the judiciary, political mootness manifests in three ways: legal mootness, separation-of-powers settlements conditional on vacatur of judicial opinions, or executive discretion in intra-branch prosecutions.

*But political mootness also affects the coordinate branches. Through a series of original interviews,** this Article shows that Congress self-constrains its authority preemptively to avoid litigation. Congress is aware that litigation threatens to drag out disputes beyond its electoral mandate and so pivots to use less than the full scope of its authority. These interviews also reveal a widespread practice of "friendly subpoenas," requested by putative witnesses for legal, political, or other cover. Although Congress appears to have significant authority, when executive witnesses are truly recalcitrant, that authority is at its lowest potency.*

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With this broader context for inter-branch conflicts, this Article returns to take on the role of adjudication in those conflicts. Adjudication performs neither law declaration nor dispute resolution when the United States is represented on both sides. Instead, this Article argues, adjudication is a forum for tripartite dialogue about the structural constitution's boundaries. In this frame, some aspects of political mootness are desirable, but other aspects have entrenched structural disadvantages that Congress faces. This Article offers some proposals to strengthen Congress's position in disputes with the executive, while taking advantage of some of political mootness's features.

INTRODUCTION

In times of divided government, high-stakes conflicts between the political branches erupt. Sometimes it's constitutional hardball.[1] Other times, it's a constitutional showdown.[2] And sometimes, it's constitutional no-ball.[3] Since the George W. Bush Administration, the House has subpoenaed sitting cabinet officials and former White House Counsels; it has investigated a former President's involvement with a riot on the Capitol; and it has sought to enforce its power of the purse through shutdowns. The executive branch has pushed back, using claims of executive privilege, enforcement discretion, or other tools.[4] In some, but importantly not all,[5] instances, the House has called on the federal judiciary to back its use of authority. What goes into the decision to initiate litigation? And what function does that litigation serve?

This Article examines the role of adjudication in apex separation-of-powers disputes: cases brought by Congress against the president and intra-branch prosecutions. I argue that these cases become "politically moot" when elections result in unified government and the interested parties to the case change. Political mootness, I will show, is a concept with legal and political dimensions. It has some positive features, but it can also entrench structural disadvantages that burden Congress when it takes on the executive.

[1] Mark Tushnet, Constitutional Hardball, 37 J. Marshall L. Rev. 523, 523 (2004) (naming the phenomenon where "political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings").

[2] See generally Eric A. Posner & Adrian Vermeule, Constitutional Showdowns, 156 U. Pa. L. Rev. 991, 991 (2008) ("Showdowns occur between the President and the courts, between Congress and the courts, as well as between the President and Congress. Indeed, some showdowns involve all three branches simultaneously, or threaten to do so.").

[3] See Matthew Callahan & Reuben Fischer-Baum, Where the Trump Administration Is Thwarting House Oversight, Wash. Post (Oct. 11, 2019), https://www.washingtonpost.com/graphics/2019/politics/trump-blocking-congress (cataloguing Trump Administration refusals to comply with congressional subpoenas).

[4] See infra Part I.

[5] See infra Part II.

The Article is focused on "apex powers" disputes.[6] This includes a subset of separation-of-powers cases that implicate core constitutional powers: litigation between the political branches as parties and intra-branch prosecutions. I include, for example, when a House committee sues to enforce a subpoena against White House officials.[7] Critically, this set of cases includes power issues such as congressional subpoena power, the scope of governmental privileges and immunities, and the line between Congress's appropriations power and the president's enforcement discretion.

It turns out that in the last two decades, these cases have *never* reached a final judgment on the merits. As these cases take a protracted path through the judiciary, they do so against the backdrop of election cycles. With time, the parties in interest change. The House moves from Democratic to Republican control or the presidency changes hands. Scholarship has accounted for the ways elections change, for example, the positions that the Justice Department takes in litigation[8] or the incentives that elected officials have in initiating or dropping litigation.[9] But what about the cases that are already in federal court? How do they end?

Part I documents a concept I call "political mootness." In the judiciary, political mootness takes three forms. First, and most straightforwardly, some of these cases are rendered legally moot when the parties in control change. The issue in the case is no longer "live," thus precluding judicial review. For example, in an appropriations challenge, a new president may not continue to spend funds in the way the House alleged was *ultra vires*.[10]

[6] See Aziz Z. Huq, Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design, 65 UCLA L. Rev. 1506, 1511–14 (2018) (embracing the looseness of the term "apex criminality" to describe offenses committed by high-level officials).

[7] I exclude suits where government actors are not parties on both sides of the litigation, which would include challenges over whether congressional legislation impermissibly infringes on executive power. I draw this line because federal courts operate differently when adjudicating disputes between branches as parties to litigation. See Z. Payvand Ahdout, Separation-of-Powers Avoidance, 132 Yale L.J. 2360, 2363, 2365–66 (2023).

[8] See, e.g., Cristina M. Rodríguez, The Supreme Court, 2020 Term—Foreword: Regime Change, 135 Harv. L. Rev. 1, 4 (2021); Michael R. Dreeben, Stare Decisis in the Office of the Solicitor General, 130 Yale L.J.F. 541, 552 (2021); Margaret H. Lemos & Deborah A. Widiss, The Solicitor General, Consistency, and Credibility, 100 Notre Dame L. Rev. 621, 623–24 (2025) (examining multiple explanations for the Solicitor General's changes in positions).

[9] Zachary D. Clopton & Katherine Shaw, Public Law Litigation and Electoral Time, 2023 Wis. L. Rev. 1513, 1514.

[10] See, e.g., Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021) (vacating as legally moot the dispute over border wall funding initiated by the House during the first Trump

Second, political mootness comes to fruition when the parties negotiate separation-of-powers settlements. When elections result in a rotation of power that puts the same political party in control of both the House and the White House, they often reach a settlement conditional on universal vacatur of every opinion in the case.[11] Although this separation-of-powers settlement has become the dominant resolution in modern apex litigation, this is the first Article to identify its existence and incorporate it into structural constitutional scholarship. It is somewhat surprising that cases that receive so much attention—from litigation over President Obama's allegedly *ultra vires* funding of the Affordable Care Act ("ACA")[12] to that over former White House Counsel Don McGahn's categorical refusal to testify before Congress[13]—still have discoveries to be unearthed. This may be because too often, attention is focused on the Supreme Court (or, more accurately, on anticipation of the Supreme Court's review). But these cases may never get there. Across cases, buried in dockets, is evidence of a separation-of-powers agreement between the branches of government that leaves much to be uncovered.

Third, political mootness manifests in intra-branch criminal cases. Almost from their inception, the prosecutions of then-former President Trump prompted commentary and anxiety about whether the cases could resolve before the November 2024 election.[14] Of course, they did not. And upon President Trump's election, the Special Counsel consulted

Administration); Petition for a Writ of Certiorari at 11, *Yellen*, 142 S. Ct. 332 (No. 20-1738) ("Following the change in Administration, and consistent with the President's discretion that 'no more American taxpayer dollars be diverted to construct a border wall,' [the Department of Defense] has canceled all border-wall projects and discontinued using any of the challenged funds for any further construction." (quoting Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 27, 2021))).

[11] This has one qualified exception. See infra Section I.B.

[12] See U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 63 (D.D.C. 2015).

[13] See Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 153 (D.D.C. 2019).

[14] See, e.g., James D. Zirin, Can Trump Conceivably Beat the Legal Clock—and the Rap?, The Hill (Oct. 9, 2023, 1:30 PM), https://thehill.com/opinion/judiciary/4244738-can-trump-conceivably-beat-the-legal-clock-and-the-rap/ [https://perma.cc/LC75-KFQT] ("The D.C. claim of presidential immunity is unlikely to win dismissal of the case, but it may succeed in delaying his D.C. trial, now scheduled for March 4, to a date known only in Neverland."); David A. Graham, The Cases Against Trump: A Guide, The Atlantic (Jan. 6, 2025), https://www.theatlantic.com/ideas/archive/2025/01/donald-trump-legal-cases-charges/675531.

binding Department of Justice ("DOJ") policy, which became binding on the courts: a sitting president cannot be prosecuted.[15]

Political mootness is borne of a design feature of American democracy: time. In the political branches, time plays a constraining role on authority. Through fixed and regular elections, the Constitution places a time limit on the power of any individual president or member of Congress. But time operates in a different direction (and more indirectly) in the judicial branch. It is not fixed and regular elections that constrain federal judges with life tenure. Instead, one constraining and fundamental feature of our democratic judicial system[16] is that every party is guaranteed process.[17] But process takes time. When protracted judicial process converges with elections, the result is political mootness. As the parties in interest to litigation change, their political interests no longer align with the legal interests they sought to vindicate.

To understand the role adjudication plays in apex litigation, we must understand what it means for Congress to choose to go to court. Through a series of original interviews with individuals who conducted the investigation for the House Select Committee to Investigate the Attack on the Capitol ("the Committee"), Part II examines their investigatory strategy and legal decision-making.[18] Through these interviews, Part II

[15] 1 Jack Smith, Final Report on the Special Counsel's Investigations and Prosecutions 1 (2025), https://www.justice.gov/storage/Report-of-Special-Counsel-Smith-Volume-1-January-2025.pdf [https://perma.cc/3UAE-553F].

[16] See Judith Resnik, Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure, 26 Cardozo L. Rev. 579, 590 (2005) ("[B]eing a judge within democratic governments ought to entail a set of practices distinct from that of judging in nondemocratic polities.").

[17] U.S. Const. amend. V.

[18] I set out to understand the Select Committee's investigative and legal decision-making and how, in particular, that decision-making was informed by the timeline of the investigation. I spoke with senior staffers who had worked for the Committee. Some individuals' roles were exclusively for the Committee, others served broader roles in the House and had the Committee within their portfolios. Most individuals served in a legal capacity. I also spoke with senior staffers with experience in the Senate to understand the similarities and differences between House and Senate investigations and litigation. I recognize that the pool of individuals—generally related to the Committee's work, serving in a legal role, and willing to speak with me—may suffer from selection bias. Although I used semi-structured interviews, I make no claims about interview design or comprehensiveness. I include them to add some context from congressional decision-makers, a contingent that is not often heard from directly in legal scholarship concerning the separation of powers. Cf. David E. Pozen, The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information, 127 Harv. L. Rev. 512, 520 n.21 (2013) (using interviews with sources inside the executive branch to add "texture" to an analysis of governmental leaks). I also assured the individuals anonymity.

shows that, first, familiar words like "subpoena" and "contempt" do not have the same meaning within Congress as they do in federal court. Second, there is a widespread use of so-called "friendly subpoenas" in congressional investigations. These are subpoenas that are requested by putative witnesses for legal, political, or social cover. On the outside, these subpoenas look no different from subpoenas of truly recalcitrant witnesses. But this means that the House is not as aggressive with its power as it appears to outside observers. Indeed, Part II further shows that the House self-constrains its authority in part because of the specter of political mootness. These interviews show some evidence of the structural disadvantage the House suffers from in disputes with the executive. They demonstrate the House's need for an ally to back its use of power. But these interviews also show how recalcitrant witnesses can use courts and legal process (or the mere threat of them) to run out the clock on a congressional investigation.

With this richer understanding of what happens outside, before, and during apex litigation, Part III turns back to political mootness and what it means for the role of adjudication in apex disputes. Focusing on the special problem of separation-of-powers settlements, Part III argues that courts engage in neither law declaration nor dispute resolution when they are called on to adjudicate apex disputes. Rather than dismissing these cases as outside of the judicial role, Part III calls for recasting the role that courts play as a participant in tripartite constitutional dialogue and reframes the legal outputs of these cases in terms of constitutional dialogue. Part IV turns to the normative, arguing that within the frame of dialogue, some aspects of political mootness are desirable. But political mootness is also subject to abuse. Part IV suggests some ways to address its shortcomings, while capitalizing on its advantages.

Structural constitutional scholarship is in need of a conceptual frame and vocabulary to discuss structural constitutional litigation between the three branches of government. That conceptual frame cannot be sheared of its politics. Political mootness is one conceptual structure that helps us better understand the modern fractures, allocations, and distribution of power between our three branches of government.

I. SURFACING POLITICAL MOOTNESS

Disputes between the branches of government are a core feature of the Madisonian separation of powers.[19] Early in the nation's history, Alexander Hamilton and James Madison penned letters in newspapers debating whether President George Washington's neutrality proclamations intruded on Congress's war powers.[20] Although powers disputes began in the nation's infancy, public debates aired in newspapers have given way to a combination process of accommodation and litigation between Congress and the president.

Inter- and intra-branch litigation has been a feature of American governance since the 1970s. Litigation between Congress and the president began, in the main, with challenges brought by individual congresspeople over foreign affairs powers during the Nixon Administration.[21] Litigation over domestic powers began shortly thereafter, but changed form as there were shifts to justiciability doctrine in the courts.[22] Although there is a broader story to tell about the whole body of apex cases, I focus here on modern cases because my aim is to say something about how power is exercised and negotiated today. The evidence does not support the idea that boundary lines between the branches have always been fixed; indeed, even the forms of apex litigation have changed since they began.[23]

Focusing on the last two decades, this Part documents political mootness in apex litigation. During this period, litigation between Congress and the president primarily focused on domestic disputes over the boundary points between Congress's subpoena power and executive privilege and Congress's power of the purse and executive enforcement discretion. In each of these cases, Congress called on the federal judiciary

[19] See, e.g., The Federalist No. 51, at 263–64 (James Madison) (Ian Shapiro ed., 2009).

[20] See Morton J. Frisch, Introduction *to* Alexander Hamilton & James Madison, The Pacificus-Helvidius Debates of 1793–1794: Toward the Completion of the American Founding, at ix–x (Morton J. Frisch ed., 2007).

[21] See, e.g., Gravel v. Laird, 347 F. Supp. 7, 7–8 (D.D.C. 1972); Drinan v. Nixon, 364 F. Supp. 854, 855 (D. Mass. 1973); Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973); Holtzman v. Schlesinger, 484 F.2d 1307, 1308 (2d Cir. 1973).

[22] See, e.g., Nader v. Bork, 366 F. Supp. 104, 105–06 (D.D.C. 1973); Williams v. Phillips, 360 F. Supp. 1363, 1364 (D.D.C. 1973).

[23] For example, cases used to be brought by individual congresspeople. See supra notes 21–22 (collecting cases). After *Raines v. Byrd*, which significantly narrowed legislator standing to those cases where "their votes have been completely nullified," 521 U.S. 811, 823 (1997), congressional litigation was brought by combinations of congresspeople, committees, and whole chambers.

to support its claim of power. Although there have been some conflicts over other powers, the great majority of litigation is over Congress's investigative powers.

Although Congress achieved significant victories in the lower courts, the cases did not end through a judgment on the merits. Because of the combination of procedural guarantees[24] and a practice of courts not to coerce coordinate branches as parties to litigation (a phenomenon I have previously called separation-of-powers avoidance[25]), apex litigation is often protracted. In this time, elections take place and the parties in interest—practically, and sometimes, even nominally—change. The cases end, then, not with a judgment, but instead when they become politically moot, or when the political parties in interest no longer drive them forward.

This Part documents the three ways that political mootness presents itself in the judiciary. Section I.A focuses briefly on the well-known concept of legal mootness. Section I.B gathers evidence of a modern agreement between the three branches: separation-of-powers settlements. In these settlements, Congress and the president reach some resolution conditional—with limited exceptions—on the vacatur of decisions in the case. Finally, Section I.C describes the special case of intra-branch prosecutions, where the specter of political mootness looms over the case from inception to resolution.

A. Legal Mootness

Political mootness often manifests in federal court through a well-known doctrine, legal mootness. Mootness, which ostensibly comes from Article III's case-or-controversy requirement, has both jurisdictional and prudential attributes: when the dispute in a case is no longer "live," it is no longer fit for judicial review. But the doctrine recognizes a balance among a series of tradeoffs involving the investments made by the parties and the legal system, real-life constraints, and fairness.[26] When a case

[24] See U.S. Const. amend. V; Resnik, supra note 16, at 590 ("[B]eing a judge within democratic governments ought to entail a set of practices distinct from that of judging in nondemocratic polities.").

[25] Ahdout, supra note 7, at 2365.

[26] See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 190–92 (2000) (recognizing that certain functional considerations—like significant resource investments by courts or parties, or harms that are capable of repetition but evading review—negate mootness's application).

becomes moot while an appeal is pending, the appellate court may dismiss the appeal and vacate the underlying opinions through the *Munsingwear* doctrine.[27] This well-known process is one vehicle for political mootness.

Consider the dispute over the funding of President Trump's border wall during his first term.[28] For many months, the Trump Administration negotiated with Congress to obtain funding to build a wall along the southern border. President Trump even shut down his own government to garner political support for the project.[29] Thirty-five days passed, representing the longest shutdown in history.[30] Congress then passed, and President Trump signed, spending legislation that did not provide funding for a wall. Thirteen hours later, President Trump "declared" a national emergency at the border to invoke a historical emergency delegation.[31] Congress then attempted to override the President's declaration, but was stymied by President Trump's veto.[32]

On April 23, 2019, the House sued to enjoin President Trump's expenditure, arguing that it countermanded the bargain that was

[27] See United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."). For a more in-depth discussion, see infra Section III.A.

[28] U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 4 (D.C. Cir. 2020), *vacated as moot sub nom*. Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021).

[29] Natalie Andrews & Kristina Peterson, U.S. Government Shuts Down Over Border Wall Funding, Wall St. J. (Dec. 22, 2018, 12:01 AM), https://www.wsj.com/articles/trump-pledges-long-government-shutdown-without-border-wall-funding-11545398044; Z. Payvand Ahdout, Enforcement Lawmaking and Judicial Review, 135 Harv. L. Rev. 937, 954 (2022); Curtis Bradley & Jack Goldsmith, Foreign Affairs, Nondelegation, and the Major Questions Doctrine, 172 U. Pa. L. Rev. 1743, 1745 (2024) (noting that President Trump's border wall construction "purport[ed] to be authorized by statutes").

[30] Andrew Restuccia, Burgess Everett & Heather Caygle, Longest Shutdown in History Ends After Trump Relents on Wall, Politico (Jan. 25, 2019, 7:06 PM), https://www.politico.com/story/2019/01/25/trump-shutdown-announcement-1125529 [https://perma.cc/9Q5P-G9FW]; Ahdout, supra note 29, at 954.

[31] See Peter Baker, Trump Declares a National Emergency, and Provokes a Constitutional Clash, N.Y. Times (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html; Ahdout, supra note 29, at 954.

[32] See U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 11 (D.D.C. 2019), *aff'd in part, vacated in part*, 976 F.3d 1 (D.C. Cir. 2020). For an argument that this legislative bargaining history should inform judicial resolution, see Kristen E. Eichensehr, The *Youngstown* Canon: Vetoed Bills and the Separation of Powers, 70 Duke L.J. 1245, 1255 (2021).

reached.[33] The case involved questions of congressional standing, whether the House had a cause of action, and the scope of Congress's appropriations power.[34] The suit took a winding path through the federal courts. At one point, the U.S. Court of Appeals for the District of Columbia Circuit issued an en banc opinion holding that the House had standing to bring the appropriations challenge.[35]

After President Biden took office, the Justice Department petitioned for certiorari, seeking an order with directions to vacate the underlying opinions as moot under *Munsingwear*.[36] President Biden had ceased the allegedly illegal spending. Over the House's opposition,[37] the Supreme Court—in a summary order—granted the petition, vacated the judgment, and remanded with instructions to dismiss the case as moot under the *Munsingwear* doctrine.[38] In doing so, the Court erased over two years of legal development and congressional victories in the lower federal courts.

B. Separation-of-Powers Settlements

The *United States House of Representatives v. Mnuchin* case is not an aberration. *Munsingwear* vacatur has become a tool that apex parties deploy in their disputes. This Section documents the practice of separation-of-powers settlements. Cases work their way through the judiciary in protracted fashion as multiple elections take place, eliding a final judgment on the merits. Ultimately, when the relevant house in Congress and the presidency are held by the same political party, Congress and the executive reach a settlement that appears to be conditional on the judiciary vacating nearly all decisions in the case. With one exception, these settlements render nearly every aspect of the case—including intervening doctrine—a legal nullity.

These separation-of-powers settlements obscure the fact that Congress has been largely doctrinally successful in the lower federal courts in establishing its ability to sue, preserving its subpoena power, and

[33] United States House of Representatives' Application for a Preliminary Injunction at 1, *Mnuchin*, 379 F. Supp. 3d 8 (No. 19-cv-00969).

[34] Id at 20–39.

[35] U.S. House of Representatives v. Mnuchin, 969 F.3d 353, 354 (D.C. Cir. 2020) (en banc) (per curiam).

[36] Petition for a Writ of Certiorari at 33, Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021) (No. 20-1738). For more on the *Munsingwear* doctrine, see infra Section III.A.

[37] Brief in Opposition at 1, *Yellen*, 142 S. Ct. 332 (No. 20-1738).

[38] *Yellen*, 142 S. Ct. at 332.

safeguarding its power of the purse. These settlements are a rich source of the functional content of governmental powers because they implicate all three branches of government's powers. Most directly, Congress and the president agree to some balance that falls outside of what the judiciary has said the law requires. But they also implicate the judiciary's power: by bringing courts into these settlements, the political branches have in effect forced judges to render their decisions in apex cases advisory.[39] This Section documents this settlement practice in apex litigation over two power clashes: first, disputes over the boundary lines between Congress's subpoena power and executive privilege and, second, disputes over the lines between Congress's appropriations power and executive enforcement discretion.

1. Congressional Subpoenas and Executive Privilege

One of the most persistent separation-of-powers conflicts is whether—when there is a clash between Congress and the executive—Congress's subpoena power prevails over executive privilege.[40] To date, there is no definitive doctrinal answer about who the legal winner is or where the dividing line might fall. In the modern history of apex powers cases, these disputes have been particularly fertile ground. Close advisors to the president, especially former White House counsel, have claimed testimonial immunity before Congress in disputes that have generated years-long litigation.

Recalcitrant witnesses know that they can use the judicial system to great effect to delay—and eventually deny—congressional oversight.

[39] See infra Part III.

[40] See, e.g., Shalev Gad Roisman, Balancing Interests in the Separation of Powers, 91 U. Chi. L. Rev. 1331, 1350–51, 1381–82 (2024) (exploring the tension between Congress's oversight power and executive privilege and advocating for a balancing approach); Rex E. Lee, Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships, 1978 BYU L. Rev. 231, 239–42 (exploring the tension between these doctrines); Posner & Vermeule, supra note 2, at 1015–17 (exploring executive privilege versus congressional oversight as a paradigm constitutional showdown). A version of this problem persists even when the executive does not formally assert privilege but nonetheless withholds information from Congress. See Emily Berman, Executive Privilege Disputes Between Congress and the President: A Legislative Proposal, 3 Alb. Gov't L. Rev. 741, 749 (2010) ("Though the number of explicit 'executive privilege' disputes that develop may be small, the number of information disputes between Congress and the Executive that never reach the stage where the President explicitly asserts executive privilege is much larger.").

Although this tactic is not unique to the separation-of-powers context,[41] the stakes of using judicial review as a delay tactic are different in kind when the subject of Congress's investigation is alleged public corruption, misuse of the coercive power of the state, or even insurrection, and the goal is to use an election to evade legal accountability. One could argue that the election serves as a political measure of accountability. I agree to a point, but I am generally skeptical that an election can serve as a referendum on any single issue or event, even if it is a significant one.

Consider three examples—from three successive presidential administrations—that share common procedural traits and ultimately end in separation-of-powers settlements. In each instance, a House committee investigated alleged misconduct in the executive branch: forced resignations during the Bush II Administration, Operation Fast and Furious during the Obama Administration, and foreign election interference during the Trump Administration.[42] After a recalcitrant witness stifles a congressional investigation, the House turns to the judiciary. The cases then follow common procedures: motions practice, appeals, en banc review, and the like. The part that is uncommon is that while judicial process unfolds, there is substantial electoral turnover shifting political control of the parties to litigation. When the House and the presidency are controlled by the same political party, the dispute becomes politically moot. The House and the executive enter a settlement,

[41] See, e.g., Hans Zeisel, Delay by the Parties and Delay by the Courts, 15 J. Legal Educ. 27, 28–29 (1962) (exploring means of and motivations for litigation delay by private parties). Judges also recognize parties' strategic delay. See John K. Narsutis, An Answer to Litigation Abuse: Active Docket Control Helps Against Deliberate Delay, 34 Judges' J. 4, 6 (1995) (explaining that "[p]laintiffs (petitioners) sometimes seek to maintain the status quo in one arena to allow the completion of their agenda in another. For example, a temporary restraining order may be obtained and an injunction sought for the purposes of tying up one company while the plaintiff, knowing the defendant's (respondent's) resources are tied up, obtains its competitor's business in another arena . . . . [This approach does not] fall[] within the purpose for which the court system exists. These are manipulations to subvert the application of public justice to disputes").

[42] These examples all take place during modern administrations because litigation over this power dispute—subpoena power versus executive privilege—is a relatively recent phenomenon. In the opening paragraph of his 1965 article on the topic, Raoul Berger noted that in spite of the fact that Congress and the president have "stubbornly engaged in a boundary dispute bottomed on irreconcilable claims to constitutional power . . . it is yet remarkable that the issue has never been submitted to the courts." Raoul Berger, Executive Privilege v. Congressional Inquiry, 12 UCLA L. Rev. 1043, 1044 (1965).

a condition of which—with limited exception[43]—appears to be vacatur of all judicial opinions in the case.

The first time the House sued an executive officer to enforce a subpoena concerned the House Judiciary Committee's investigation into the forced resignation of nine United States Attorneys during the Bush II Administration and alleged falsehoods by the executive branch to the Committee.[44] The Judiciary Committee called several White House officials to testify before it and, in the process of accommodation and negotiation, the White House, citing executive privilege, refused to allow former White House Counsel Harriet Miers or Chief of Staff Joshua Bolten to appear to testify.[45] After the accommodation process broke down, the Judiciary Committee subpoenaed Miers and Bolten, held them in contempt for failing to appear, referred them for prosecution to the Justice Department, and then sought to enforce the subpoena in court.[46] The case squarely presented the conflict between Congress's subpoena power on the one hand and executive privilege on the other.

It is worth taking a step back to focus on time and process.[47] The Judiciary Committee began its investigation in February 2007.[48] It then engaged in negotiations and accommodation with the White House for over a year. On March 10, 2008, it filed suit to enforce its subpoenas against Miers and Bolten, thus beginning its engagement with the judicial branch.[49] About seven months later—over a year and a half into the investigation—the U.S. District Court for the District of Columbia held that Miers and Bolten did not have testimonial immunity, and so they had to appear before the Judiciary Committee and claim executive privilege on a question-by-question basis.[50] Miers and Bolten appealed, filing a

[43] See infra Subsection I.B.1.

[44] Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 57–64 (D.D.C. 2008) (per curiam); Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chi. L. Rev. 1083, 1083–84 (2009) (recognizing *Miers* as the first suit against a subordinate officer since the first suit against any official was against President Nixon himself).

[45] *Miers*, 558 F. Supp. 2d at 59–62.

[46] Id. at 61–64.

[47] Others have written about the constitutional episodes in this Section, including this one, from a different vantage point. See, e.g., Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 185–90 (2017) (discussing the *Miers* incident); Todd David Peterson, Arbitrating Executive Privilege, 73 Am. U. L. Rev. 217, 219–22 (2023) (discussing the first Trump Administration's assertion of executive privilege).

[48] Complaint for Declaratory and Injunctive Relief at 2, *Miers*, 558 F. Supp. 2d 53 (No. 08-cv-00409).

[49] See id. at 1–2.

[50] See *Miers*, 558 F. Supp. 2d at 105–06.

motion for a stay of the district court's order pending appeal and a motion for reconsideration of that order.[51]

In the 2008 federal election, the Democrats remained in control of the House and won control of the White House. Although the case was still pending at the start of the Obama Administration, the Democratic-controlled House and President negotiated a settlement: the Obama Administration turned over additional documents to the House.[52] As part of the negotiated settlement, the federal courts agreed to vacate the underlying decisions in the case.[53] Although few in number, each of these settlements is deeply consequential for powers allocation. One congressional staffer recalled President Obama himself being present for the negotiations resulting in this settlement.[54]

With this settlement in place, the House did ultimately end up getting some of the relevant information. But by the time the materials were in hand, their political value was considerably diminished. And what the House ultimately gave up to get that information was the ability to obtain similar information in a timely manner in the future.

Viewed on its own, this settlement looks strange. Although federal courts may vacate underlying decisions when a case pending appeal becomes legally moot,[55] they do not do so when the parties settle, because federal courts want to forestall strategic use of vacatur by litigants.[56] However, vacatur pursuant to a separation-of-powers settlement is not a singular aberration. As the following discussion demonstrates, it is part of the apex conflict playbook.

Consider next the House's investigation into Operation Fast and Furious—a gunrunning probe that resulted in the alleged outflow of thousands of weapons into Mexico—during the Obama Administration.[57] With process and elections at the top of mind, the outcome takes on renewed meaning.

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[51] See Defendants' Notice of Appeal, *Miers*, 558 F. Supp. 2d 53 (No. 08-cv-00409); Motion to Stay Court's Order, *Miers*, 558 F. Supp. 2d 53 (No. 08-cv-00409).

[52] See Joe Palazzolo, Before Fast and Furious, a Bitter Subpoena Fight, Wall St. J. (June 29, 2012, 5:30 PM), https://www.wsj.com/articles/BL-LB-42960.

[53] Exhibit B, *Miers*, 558 F. Supp. 2d 53 (No. 08-cv-00409), ECF No. 68-1; Order, *Miers*, 558 F. Supp. 2d 53 (No. 08-cv-00409), ECF No. 69.

[54] Interview with Senior Staffer (June 26, 2024).

[55] See United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).

[56] See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 28–29 (1994).

[57] CNN Editorial Research, Operation Fast and Furious Fast Facts, CNN, https://www.cnn.com/2013/08/27/world/americas/operation-fast-and-furious-fast-facts/index.html [https://perma.cc/HS3D-VE5E] (last updated Sept. 16, 2022, 9:50 AM).

The House Oversight Committee began its investigation in February 2011.[58] The separation-of-powers clash began as a run-of-the-mill conflict, but soon turned historic: for eight months, Attorney General Eric Holder did not turn any materials over and made no assertion of privilege.[59] About a year and a half into the investigation, President Obama claimed executive privilege over the materials—his first claim of executive privilege in a dispute with Congress.[60] After assessing the claim, Congress held Attorney General Holder in contempt—the first time a sitting cabinet member had been held in contempt in American history.[61]

By the time Congress filed its complaint on August 13, 2012, about one and a half years had passed since the start of the Committee's investigation.[62] Notably, the House was still controlled by Republicans and the presidency was still controlled by Democrats. It took another three and a half years to get a district court opinion in the case. On January 19, 2016, the district court sided with Congress, holding that, in the

[58] Complaint at 3, Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016) (No. 12-cv-01332), *appeal voluntarily dismissed sub nom.* Comm. On Oversight & Gov't Reform, U.S. House of Representatives v. Barr, No. 16-5078, 2019 WL 2158212 (D.C. Cir. May 14, 2019).

[59] Id. at 9–10.

[60] Devin Dwyer, White House Invokes Executive Privilege on 'Fast and Furious' Documents, ABC News (June 20, 2012), https://abcnews.go.com/blogs/politics/2012/06/white-house-invokes-executive-privilege-on-fast-and-furious-documents [https://perma.cc/TA36-YBYK].

[61] H.R. Res. 711, 112th Cong. (2012). Although this was the first time that Congress held a sitting attorney general in contempt, John Bresnahan & Seung Min Kim, Holder Held in Contempt, Politico (June 28, 2012, 5:47 PM), https://www.politico.com/story/2012/06/holder-held-in-contempt-of-congress-077988 [https://perma.cc/88UY-M2KY], it appears to have crossed a line that opened a door to doing so more regularly. The House held Attorney General William Barr in contempt in 2019. See H.R. Res. 497, 116th Cong. (2019) (finding "William P. Barr, Attorney General of the United States, . . . in contempt of Congress for failing to comply with subpoenas authorized by the Committee on Oversight and Reform . . . relating to the 2020 Census"). The Justice Department announced it would not bring contempt of Congress charges against him. See Andrew Desiderio, DOJ Won't Charge William Barr, Wilbur Ross After Contempt Vote, Politico (July 24, 2019, 5:50 PM), https://www.politico.com/story/2019/07/24/justice-william-barr-wilbur-ross-1432595 [https://perma.cc/M4Y8-WFPN]. And the House held Attorney General Merrick Garland in contempt in 2024. See H.R. Res. 1292, 118th Cong. (2024) (finding "Merrick B. Garland, Attorney General, . . . in contempt of Congress for failure to comply with a congressional subpoena"). The Justice Department announced it would not bring contempt of Congress charges against him. See Melissa Quinn, Justice Department Says It Won't Prosecute Merrick Garland After House Contempt Vote, CBS News, https://www.cbsnews.com/news/merrick-garland-contempt-justice-department [https://perma.cc/WX7P-GB3P] (last updated June 14, 2024, 7:12 PM).

[62] Complaint at 1, *Lynch*, 156 F. Supp. 3d 101 (No. 12-cv-01332).

circumstances of the case, the privilege must yield.[63] It should be underscored that (1) the President made an actual assertion of executive privilege before Congress; (2) the House held a *sitting cabinet member* in contempt of Congress for the first time in history; and (3) it took three and a half years to get a district court opinion holding that Congress was in the right. Meanwhile, the executive and legislative branches were sitting in a state of unprecedented conflict.

Ultimately, the case was voluntarily dismissed in May of 2019, eight years after the investigation began.[64] By that time, the Republicans had control of the presidency and the House. The Trump Justice Department and the Republican-controlled House conditioned settlement on vacatur of the district court's opinion.[65] When that was ultimately denied,[66] the parties agreed not to use the case affirmatively in future cases.[67] This halts legal development: the opinion does not join into the content of separation-of-powers law. When Congress and the executive negotiate the bounds of their powers in the future, this law neither formally constrains nor must be incorporated into those controversies.

Parties and party control matter. As we see a shift to unified government, Congress and the president reach settlements that they could not have reached in times of divided government.[68] As one senior staffer put it, "It's awkward to litigate a case against your own Justice Department. So you find a way to settle it."[69] But institutions also matter. For both Forced Resignations and Operation Fast and Furious, the House

[63] *Lynch*, 156 F. Supp. 3d at 106.

[64] Order at 1, *Barr*, No. 16-5078, 2019 WL 2158212 (D.C. Cir. dismissed May 14, 2019).

[65] See Tim Ryan, Justice Dep't Settles with House Panel on 'Fast & Furious' Records, Courthouse News Serv. (Mar. 7, 2018), https://www.courthousenews.com/justice-dept-settles-with-house-panel-on-fast-furious-records/ [https://perma.cc/9XHE-3YHC].

[66] Comm. on Oversight & Gov. Reform, U.S. House of Representatives v. Sessions, 344 F. Supp. 3d 1, 15 (D.D.C. 2018).

[67] See Katelyn Polantz, Settlement in Fast and Furious Executive Privilege Lawsuit Between DOJ and the House, CNN (May 8, 2019, 7:56 PM), https://www.cnn.com/2019/05/08/politics/fast-and-furious-settlement-doj-house [https://perma.cc/B2FX-EPGW] ("The Parties agree that . . . the District Court's holdings should not in any way control the resolution of the same or similar issues should they arise in other litigation between the Committee and the Executive Branch, and hereby waive any right to argue that the judgment of the District Court or any of the District Court's orders or opinions in this case have any preclusive effect in any other litigation.").

[68] See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2322–23 (2006); Richard H. Pildes, Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 Calif. L. Rev. 273, 330–32 (2011).

[69] Interview with Senior Staffer (June 26, 2024).

secured doctrinal victories confirming both its ability to litigate and its subpoena power. But in times of unified government, the House reached settlements that gave up those doctrinal victories, making it more cumbersome to litigate those questions anew in the next case. The president, by contrast, made sure to secure through a settlement what he could not in federal court: wiping the slate clean so that the executive would not have to fight the next case on the back foot.[70]

Viewed in this light, why would the House agree to these separation-of-powers settlements that wipe away victories and require it to fight each dispute anew? The next case explores what happens when the House acts more institutionally and not purely in partisan terms.

Finally, consider the House Judiciary Committee's investigation into foreign interference in the 2016 presidential election. Like other apex disputes, this case settled when the parties in interest became unified. Unlike the others, the House acted in an institutionally strategic manner. At the end of the case, the House retained some of the judiciary's pro-Congress doctrine.

In March 2019, after the publication of Special Counsel Robert Mueller's report on Russian interference in the 2016 presidential election, the House Judiciary Committee started an investigation into alleged misconduct by President Trump.[71] Mueller had interviewed the White

[70] Scholars have argued that the executive, in particular, is incentivized to accrete power. See, e.g., Bijal Shah, Executive (Agency) Administration, 72 Stan. L. Rev. 641, 650 (2020) ("[L]itigation might become a more commonly deployed instrument for presidential administration. . . . Litigation could impact both the formal and functional boundaries between executive and legislative power."); id. at 653 ("[T]hrough litigation, the DOJ has amassed authority in executive agencies (including itself) . . . . [T]he DOJ has consistently maintained the autonomy of and expanded the statutory jurisdiction of executive agencies . . . ."); Jonathan David Shaub, The Executive's Privilege, 70 Duke L.J. 1, 9 (2020) (charting this incentive through the Office of Legal Counsel's opinions on executive privilege); Gillian E. Metzger, The Interdependent Relationship Between Internal and External Separation of Powers, 59 Emory L.J. 423, 441 (2009) ("Although . . . Presidents have reasons to adhere to [internal separation of powers] mechanisms, they also have strong incentives to trump and evade internal checks in order to advance their political agendas and desired policy goals. Particularly in the face of a determined President, the constraining power of internal checks can be quite limited."); William P. Marshall, Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters, 88 B.U. L. Rev. 505, 510 (2008) ("Presidential power also inevitably expands because of the way executive branch precedent is used to support later exercises of power."); id. at 511 ("The expansion of presidential power is also a product of executive branch lawyering.").

[71] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 761 (D.C. Cir. 2020) (en banc).

House Counsel, Donald McGahn, during his investigation.[72] In parallel, the Committee sought McGahn's testimony. McGahn, now the former White House Counsel, refused.[73] The Committee subpoenaed McGahn and filed suit on August 17, 2019, to enforce the subpoena.[74] Just three months later, on November 25, 2019, the district court sided with Congress and held that McGahn could not assert absolute testimonial immunity, but would instead have to appear before Congress.[75]

As McGahn pursued appeals, the case took a protracted path. First, a panel of the D.C. Circuit held that the Committee did not have standing to enforce its subpoena.[76] About two weeks later, the full court agreed to hear the case en banc.[77] Five months after that, the en banc court held that the Committee had Article III standing to enforce its subpoena and remanded the case back to the panel.[78] On remand, the panel held that the Committee did not have a cause of action to enforce its subpoena.[79] But that was not the end of the matter.

After the 2020 election resulted in unified control of the House and the presidency, the House Judiciary Committee and the Biden Administration settled the case.[80] With President Biden in office, the dispute between the House and McGahn was rendered politically moot. Of course, McGahn did not want to testify, but the House Democrats had moved on and did not want to be opposed to their own executive branch. In the meantime, McGahn agreed to testify only that he had been truthful in speaking with

[72] Id.

[73] Id. at 761–62.

[74] Id.

[75] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 214–15 (D.D.C. 2019).

[76] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510, 531 (D.C. Cir. 2020).

[77] U.S. House of Representatives v. Mnuchin, No. 19-5331, 2020 WL 1228477, at *1 (D.C. Cir. 2020) (per curiam).

[78] *McGahn*, 968 F.3d at 778.

[79] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020), *vacated*, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020).

[80] See Ann E. Marimow, Biden Administration, House Democrats Reach Agreement in Donald McGahn Subpoena Lawsuit, Wash. Post (May 11, 2021), https://washingtonpost.com/local/legal-issues/donald-mcgahn-subpoena-lawsuit-settled/2021/05/11/8c445dfe-b2ab-11eb-ab43-bebddc5a0f65_story.html.

Mueller.[81] And the parties returned to the D.C. Circuit, jointly moving to dismiss the appeal and vacate the panel opinion about the cause of action.[82] The en banc D.C. Circuit obliged,[83] and, once more, the law—about the causes of action available to Congress—was erased from doctrine. This time, though, the parties did not ask the court to vacate *all* decisions, so the en banc decision confirming Congress's standing to enforce subpoenas remains. According to a congressional staffer who participated in constructing this settlement, it was a deliberate and hard-fought choice to retain the favorable circuit precedent on congressional standing to enforce its subpoenas.[84] This demonstrates the interrelationship between litigation and accommodation. As the House Counsel behaved more institutionally strategically, the terrain for apex clashes shifted. The House used the separation-of-powers settlements to establish favorable law for itself. Even acting more institutionally strategically, however, the House secured only a partial win.[85] *Committee on the Judiciary of the United States House of Representatives v. McGahn* shows that both political branches are capable of using vacatur of judicial opinions in a strategic manner.

2. Congressional Appropriations and Presidential Enforcement

Separation-of-powers settlements are in the playbook for the other major source of apex dispute: the divide between congressional appropriations and presidential enforcement authority. Appropriations are considered one of Congress's most potent tools in maintaining a system

[81] See Byron Tau, Don McGahn Agrees to Testify About Events Described in Mueller Report, Wall St. J. (May 13, 2021, 2:23 AM), https://www.wsj.com/articles/don-mcgahn-agrees-to-testify-about-events-described-in-mueller-report-11620886992.

[82] Joint Motion to Dismiss Appeal, & Consent Motion to Vacate Panel Opinion, Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331, 2021 U.S. App. LEXIS 20759 (D.C. Cir. June 10, 2021).

[83] Order at 1, *McGahn*, No. 19-5331, 2021 U.S. App. LEXIS 20759 (D.C. Cir. July 13, 2021).

[84] Interview with Senior Staffer (June 13, 2024).

[85] Indeed, some even called this a lost opportunity. See, e.g., Jonathan Shaub, Why the McGahn Agreement Is a Devastating Loss for Congress, Lawfare (May 19, 2021, 11:47 AM), https://www.lawfaremedia.org/article/why-mcgahn-agreement-devastating-loss-congress [https://perma.cc/Z762-MJVE] ("By settling the McGahn case, the House has forfeited what was, as a matter of history, its most advanced and most favorable opportunity since Watergate to cut back on broad assertions of presidential prerogatives over information."). I am less sanguine about the House's ability to have maintained and secured victories if the case had proceeded to the Supreme Court.

of checks and balances.[86] We have come to expect some measure of shutdown politics in times of divided government. But the president's enforcement discretion rubs up against this authority.[87] In part because of historical congressional delegations of power that give the executive broad discretion when certain preconditions are met,[88] and in part because of the sheer breadth of the substantive areas over which the executive exercises control, the president may be able to use appropriated funds to undermine the bargains reached between Congress and the president. When does this executive discretion cross the line? Even after highly visible and consequential clashes between the political branches, there are no doctrinal answers.

Consider the suit concerning President Obama's implementation of the ACA.[89] In 2014, the House sued the Obama Administration for its implementation of the ACA.[90] During a time of high political tension, Speaker of the House John Boehner publicly framed the House's decision to sue the Obama enforcement agencies as an existential battle: "For the integrity of our laws and the sake of our country's future, the House must act now," he wrote in a memorandum to House members.[91] He reinforced this separation-of-powers theme when advocating for legislation to authorize the House General Counsel "to file suit in the coming weeks in an effort to compel the president to follow his oath of office and faithfully execute the laws of our country."[92] And so, on November 21, 2014, the House initiated *House v. Burwell*,[93] the first lawsuit against the president

[86] See U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

[87] For an at-the-time robust analysis of the gap between how Congress appropriates and how the executive actually spends, see Louis Fisher, Presidential Spending Discretion and Congressional Controls, 37 Law & Contemp. Probs. 135, 171 (1972) (concluding "[w]hile there no doubt exists a need for executive flexibility, that is an abstract term capable of hiding much mischief").

[88] See A Guide to Emergency Powers and Their Use, Brennan Ctr. for Just. (June 11, 2024), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [https://perma.cc/79Y3-8X5W].

[89] U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015).

[90] Complaint at 1, *Burwell*, 130 F. Supp. 3d 53 (No. 14-cv-01967).

[91] Memorandum from John Boehner, Speaker of the U.S. House of Reps., to Members of the U.S. House of Reps. (June 25, 2014), https://www.nytimes.com/interactive/2014/06/25/us/25boehner-memo.html.

[92] Id.

[93] Complaint at 1, *Burwell*, 130 F. Supp. 3d 53 (No. 14-cv-01967).

based on a dispute over the manner of enforcement,[94] challenging the manner in which Obama Administration officials implemented two aspects of the ACA.[95] One cluster of claims—the "non-appropriations theory"—charged the Secretaries of Health and Human Services and the Treasury with spending billions of dollars that Congress had not appropriated to support the implementation of the ACA.[96]

Ten months after the suit was filed, on September 9, 2015, the district court held that the House had standing to support the appropriations claims.[97] At the top of its opinion, the court noted how narrow its opinion was—it concerned only "whether the House can sue the Secretaries; the merits of this lawsuit await another day."[98] Less than two months later, the district court denied the Administration's motion for interlocutory appeal.[99] It took over a year to get to the merits. On May 12, 2016, the district court ruled in favor of the House and enjoined further *ultra vires*

[94] Indeed, the district court judge noted the novelty of this type of case, recognizing that "no precedent" dictated the result of the standing analysis. *Burwell*, 130 F. Supp. 3d at 80 n.29.

[95] Complaint at 1, 3–4, *Burwell*, 130 F. Supp. 3d 53 (No. 14-cv-01967).

[96] *Burwell*, 130 F. Supp. 3d at 57–58 ("The House sues, as an institutional plaintiff, to preserve its power of the purse and to maintain constitutional equilibrium between the Executive and the Legislature."). The issue requires some background of the technical aspects of the statute. At the time, the ACA provided subsidies in two ways. In Section 1401, Congress enacted a premium tax credit for income-qualifying individuals to purchase insurance on healthcare exchanges. See 26 U.S.C. § 36B; 42 U.S.C. §§ 18081–18082. Section 1402, in addition, requires insurers to reduce out-of-pocket costs for another defined group of qualifying individuals. See 42 U.S.C. § 18071(a)(2). The government then provides offsets for the added costs to the insurers. See id. § 18071(c)(3)(A) ("An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions."). In its complaint, the House alleged that these two programs have different funding mechanisms. See Complaint at 9, *Burwell*, 130 F. Supp. 3d 53 (No. 14-cv-01967). Section 1401's program, it claimed, is funded by a permanent appropriation in the Internal Revenue Code, whereas Section 1402's program must be refunded annually through the appropriations process. Id. at 9–10. It alleged that when the Secretaries of Health and Human Services and the Treasury drew public monies on the Section 1402 program—when Congress had refused to fund it annually—they impermissibly contravened the power of the purse. Id. at 11–14. Even though both provisions subsidize healthcare costs for income-qualifying individuals, money is not fungible under the Appropriations Clause. Id. at 6–7, 11, 13–14. The House also made a series of claims based on the method the Administration used to enforce the ACA—unrelated to appropriations—that the court dismissed for lack of standing. See *Burwell*, 130 F. Supp. 3d at 75–76. Those claims are not relevant here.

[97] *Burwell*, 130 F. Supp. 3d at 81.

[98] Id. at 57.

[99] Order at 1, U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016) (No. 14-cv-01967), ECF No. 51, *vacated in part sub nom.* U.S. House of Representatives v. Azar, No. 14-cv-01967, 2018 WL 8576647 (D.D.C. May 18, 2018).

insurance reimbursements.[100] Much like the subpoena litigation, Congress was actually successful in the lower courts. The court anticipated there would be more litigation; it stayed its injunction pending appeal by the parties.[101]

But the *Burwell* case—styled *House v. Azar* after the Administration transitioned—ended with a separation-of-powers settlement and a corresponding doctrinal vacuum. The Obama Administration had appealed the decision to the D.C. Circuit.[102] After a rotation of power (and multiple congressional elections), in October 2017, the Trump Administration announced that it would no longer make the challenged payments to insurers.[103] Then, attorneys general from seventeen states and the District of Columbia intervened in the case.[104] In December 2017, the parties—the Republican-controlled House, Trump Administration officials, and the states—reached a conditional settlement, asking the district judge to issue an "indicative ruling" committing to vacatur of her original order after the case was remanded.[105] The court vacated its opinion, which was the first word on Congress's ability to use the courts to defend its appropriations power.[106]

Through the settlement, the complaining representatives were able to achieve politically what they could not legally—the cessation of particular forms of spending. But through the settlement, they again signed themselves up to relitigate the legal questions anew the next time around. Although these settlements can address political problems—such as a partisan clash over the ACA's implementation—they have not

[100] *Burwell*, 185 F. Supp. 3d at 168.

[101] Id.

[102] Notice of Appeal, *Azar*, No. 14-cv-01967, 2018 WL 8576647, ECF No. 75.

[103] Memorandum from Eric Hargan, Acting Sec'y, Health and Hum. Servs., to Seema Verma, Adm'r, Ctrs. for Medicare and Medicaid Servs (Oct. 12, 2017), https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf [https://perma.cc/J57V-PWYW].

[104] See U.S. House of Representatives v. Price, No. 16-5202, 2017 WL 3271445, at *1 (D.C. Cir. Aug. 1, 2017) (per curiam); Motion to Intervene of the States of California, New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, New Mexico, Pennsylvania, Vermont, and Washington, and the District of Columbia at 1, *Price*, No. 16-5202, 2017 WL 3271445. For a discussion of how intervention shapes remedies, see generally Monica Haymond, Intervention and Universal Remedies, 91 U. Chi. L. Rev. 1859 (2024) (arguing that courts can shape the ultimate remedies available in a case by granting or denying intervention motions that would keep the case live).

[105] Joint Motion for Indicative Ruling, *Azar*, No. 14-cv-01967, 2018 WL 8576647.

[106] *Azar*, No. 14-cv-01967, 2018 WL 8576647, at *1 (D.D.C. May 18, 2018).

resolved the structural problems—the president reallocating funds in ways that countermand Congress.[107]

C. Political Mootness and Intra-Branch Prosecutions

Political mootness—or, more accurately, the specter of political mootness—presents itself in intra-branch prosecutions. Consider the federal prosecutions of former President Trump: one for alleged mishandling of classified documents and the other for alleged participation in a plot to overturn the results of the 2020 election.[108] Both of these cases ended in the same way: after Trump was elected to a nonconsecutive second term—but before his inauguration—the Special Counsel filed motions to dismiss the cases without prejudice, citing DOJ policy against prosecuting a sitting president. Federal judges then dismissed the cases. The cases were ultimately politically mooted—but along the way, there were important lessons about the nature of adjudication.

From the day that Trump was charged in each of the cases, pundits asked whether the cases could be tried before the next presidential election.[109] The presidential election was the elephant in the room and on the page of every conference, brief, and motion. The anticipation of the possible rotation of power infused every procedural decision in these cases with the specter of political mootness. Every procedural decision was viewed politically.[110] The approaches taken in these two prosecutions

[107] There is more evidence of the strategic use of separation-of-powers settlements to erase judicial pronouncements on law. In *Maloney v. Murphy*, the D.C. Circuit held that a minority of representatives had standing to challenge the Administrator of the General Services Administration's failure to turn over requested materials. 984 F.3d 50 (D.C. Cir. 2020). After the Justice Department successfully petitioned for certiorari, the parties reached an undisclosed settlement voluntarily dismissing the D.C. Circuit case. The parties then filed a "suggestion of mootness" with the Supreme Court, prompting the Court to dismiss the petition on grounds of mootness with instructions to vacate the decisions below. See Carnahan v. Maloney, 143 S. Ct. 2653, 2653 (2023) (mem.).

[108] Contemporary readers are likely to be familiar with the facts and circumstances involved in these two cases. This Section is thus intentionally brief and describes these cases to demonstrate how they too factor into this broader, longstanding opposition between electoral time and process.

[109] See, e.g., Amy Schoenfeld Walker & Zach Levitt, How Trial Delays Could Pay Off for Trump, N.Y. Times (Jan. 22, 2024), https://www.nytimes.com/interactive/2024/01/23/us/politics/23trump-trials-schedule-delays.html.

[110] The media coverage of the election subversion prosecution focused on the effects of delay ostensibly through process. See, e.g., Alan Feuer, In Taking Up Trump's Immunity Claim, Supreme Court Bolstered His Delay Strategy, N.Y. Times (Feb. 28, 2024), https://www

show how judicial discretion over procedure can play a role in bringing political mootness to fruition.

Although the criminal cases discussed in this Section raise important questions for the structural constitution, including the scope of presidential immunity and the meaning of and procedures governing classification, these cases are different in one crucial respect from the executive-congressional clashes discussed in the previous sections. These are *intra*-branch or *intra*-executive disputes, not *inter*-branch disputes.

.nytimes.com/2024/02/28/us/politics/trumps-immunity-supreme-court-delay-strategy.html ("By scheduling a hearing for late April on the former president's assertion that he cannot be prosecuted for his actions in office, the justices increased the chances that he will not face trial by Election Day."); John Kruzel & Andrew Chung, US Supreme Court Justices in Trump Case Lean Toward Some Level of Immunity, Reuters (Apr. 25, 2024, 6:29 PM), https://www.reuters.com/legal/us-supreme-court-weighs-trumps-bid-immunity-prosecution-2024-04-25/ [https://perma.cc/7GWK-P9BV] ("The Supreme Court's decision to put off hearing arguments over immunity until this month, months after lower courts acted, already postponed Trump's trial, which had been scheduled for March. Legal experts have said a ruling would be needed by about June 1 for Trump's trial to be held before the election. If Trump regains the presidency, he could try to force an end to the prosecution or potentially pardon himself for any federal crimes."); Ruth Marcus, Supreme Court Aids and Abets Trump's Bid for Delay, Wash. Post. (Feb. 29, 2024), https://www.washingtonpost.com/opinions/2024/02/29/supreme-court-trump-immunity/ ("The justices are not entirely responsible for this mess, but they have just made a bad situation far worse than it needed to be. My beef isn't with the court's decision to hear the case—it's with the outrageously lethargic timing."); Jess Bravin, Supreme Court to Decide on Trump Immunity Claim in 2020 Election Case, Wall St. J. (Feb. 28, 2024, 8:36 PM), https://www.wsj.com/us-news/law/supreme-court-to-say-if-donald-trump-must-stand-trial-in-2020-election-conspiracy-case-1b7f4e3f ("Even if Trump ultimately loses before the Supreme Court, the delays in his trial could afford him a de facto victory should he return to the White House next year."). Likewise, the media coverage of the classified documents case focused on the judge's use of process to slow the case. See, e.g., Alan Feuer, Judge Dismisses Classified Documents Case Against Trump, N.Y. Times (July 15, 2024), https://www.nytimes.com/2024/07/15/us/politics/trump-document-case-dismissed.html (observing the judge's "penchant for scheduling hearings to consider questions that many federal judges would have dealt with on the merits of written filings alone [and how it] has played into Mr. Trump's strategy of seeking to delay the case for as long as possible"); April Rubin, Judge in Trump Classified Docs Case Faces Mounting Scrutiny, Axios, https://www.axios.com/2024/04/05/aileen-cannon-trump-classified-documents-case [https://perma.cc/8RXG-DXPF] (last updated Apr. 8, 2024) ("The pace and decision-making has fueled critics' concerns that the Trump-appointed judge is intentionally slow-walking the case."); Alison Durkee, DOJ Warns Judge Cannon That Trump Is Trying to 'Manipulate' Her in Documents Case to Delay Trials, Forbes (Nov. 2, 2023, 11:45 AM), https://www.forbes.com/sites/alisondurkee/2023/11/02/doj-warns-judge-cannon-trump-is-trying-to-manipulate-her-in-documents-case-as-ex-president-asks-to-delay-trials/ ("Delaying the federal trials until after the 2024 election, as Trump has tried to do, could work to his benefit should he win back the presidency, as he could then try to have the charges against him dropped before the cases went to trial.").

Political mootness therefore depends only on a rotation of power in the presidency.[111]

1. Election Subversion

The election subversion case against Donald Trump involved his alleged role in disrupting the peaceful transfer of power during Congress's election certification.[112] The heart of the alleged crime was that Trump and his associates worked to delegitimize the 2020 election results through a number of illegal measures, including by orchestrating a plan to have fraudulent slates of electors prepared in multiple states, pressuring Vice President Pence not to perform his ceremonial role of certifying the election, and obstructing the certification proceeding by inciting a mob to storm the Capitol.[113]

In the life of the case, the Supreme Court held that presidents enjoy absolute immunity from prosecution for acts taken within their core constitutional powers, at least presumptive immunity as to other official acts, and no immunity for unofficial acts.[114] With an indictment that involves primarily mixed acts, the Court's opinion gave little practical guidance about how to move forward. The Supreme Court wrote an opinion employing a mode of reasoning I have previously called "process avoidance," where a federal court of appeals (here, the Supreme Court) avoids a ruling that would direct a coordinate branch to take a particular act and instead mandates more process in the lower courts.[115] Although the opinion announces a broad rule of immunity, the practical effect was to delay the case even further by requiring the district court to engage in this fact-specific enterprise with little guidance. Beyond that, employing process avoidance in a criminal case relating to presidential immunity tells us something about presidential immunity in practice. Although the legal presidential immunity the Court announced was quite broad, when combined with the effects of time in the elected branches, the *functional*

[111] Before dismissing these cases as *sui generis* because the defendant was also a presidential candidate, recall that his primary opponents each committed to dropping the prosecution should they have won the nomination and presidency. See Where the Republican Candidates Stand on the Trump Investigations, N.Y. Times (Jan. 23, 2025), https://www.nytimes.com/interactive/2023/08/18/us/politics/republican-candidates-2024-trump-investigations.html.

[112] Indictment ¶ 10(c)–(e), United States v. Trump, 704 F. Supp 3d 196 (D.D.C. 2023) (No. 23-cr-00257).

[113] See id. ¶ 10.

[114] Trump v. United States, 144 S. Ct. 2312, 2331–32 (2024).

[115] See Ahdout, supra note 7 at 2387–94 (describing the process model of avoidance).

content of presidential immunity is broader still because, as we observed, it is very unlikely, and likely impossible, for a crime relating to a presidential election to be resolved before the next election.

Two aspects of this case stand out. First, the prosecution attempted to highlight the import of time throughout its briefing. For instance, it aimed to get the Court to resolve the question quickly, bypassing intermediate review. After the Court of Appeals's decision, when Trump's team sought to oppose a stay of the mandate, it again underscored the ticking clock.[116] Although the Special Counsel's brief was expressly concerned with time,[117] it lacked judicially cognizable language to move the subtext to the text: Donald Trump is using process because delay inures to his advantage.

Second, the Court was deeply concerned with the separation of powers. It addressed those concerns in a way that might seem intuitive—to ensure process protections—without acknowledging what that meant for the functional content of power. In an opinion authored by Chief Justice Roberts, the Court chided the lower courts:

> Despite the unprecedented nature of this case, and the very significant constitutional questions that it raises, the lower courts rendered their decisions on a highly expedited basis. Because those courts categorically rejected *any* form of Presidential immunity, they

[116] See, e.g., Response in Opposition to Application for a Stay of the Mandate of the United States Court of Appeals for the District of Columbia Circuit at 3, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-A745) ("If, however, this Court believes that applicant's claim merits review at this time, the government respectfully requests that it treat the application as a petition for a writ of certiorari, grant the petition, and set the case for expedited briefing and argument. An expedited schedule would permit the Court to issue its opinion and judgment resolving the threshold immunity issue as promptly as possible this Term, so that, if the Court rejects applicant's immunity claim, a timely and fair trial can begin with minimal additional delay."); id. at 34 ("In all criminal cases, delay can be 'fatal' to achieving just outcomes . . . . [D]elay 'may work to the accused's advantage' and to the harm of the public." (citations omitted)).

[117] See id. at 5 ("After considering the government's proposal to begin the trial on January 2, 2024, and applicant's proposal to schedule trial for April 2026, the district court set trial to begin on March 4, 2024, seven months after indictment."); id. at 6 ("On December 7, 2023, applicant filed a notice of appeal. At that time, 88 days remained of the seven-month period from indictment to the trial date. . . . [T]he effect of an appeal is to 'automatically stay any further proceedings . . . .' " (citation omitted)) ; id. at 6–7 (recounting that the Court of Appeals directed the mandate to be issued on an expedited basis).

> did not analyze the conduct alleged in the indictment to decide which of it should be categorized as official and which unofficial.[118]

It seems then that the Court was hewing close to its process-centric values without regard for process's tradeoffs to the functional separation of powers.

Of course, the Chief Justice does not mention the Speedy Trial Act or statements from the Court claiming that expedited review does not forego accuracy. But there is subtext: the decision to rule expeditiously appears political. In expediting briefing, appellate review, and even the appellate court's mandate, the courts below created the impression that they were deploying discretion to avoid political mootness, which is itself a political decision. The classified documents prosecution provides the opportunity to see that deploying discretion *to* politically moot a case creates a similar impression of politicized judicial process.[119]

2. Classified Documents

The classified documents prosecution against Donald Trump involved his alleged retention of, treatment of, and refusal to return classified documents after his presidency. Before the 2024 election, the district court had dismissed the prosecution on the grounds that the special prosecutor's appointment was *ultra vires*. The Special Counsel appealed that decision.[120]

Just as in the election subversion case, the Special Counsel team attempted to bring time into its briefing, but again it lacked a judicially cognizable vocabulary for doing so. On November 2, 2023, the Special Counsel responded to a motion, saying the quiet part out loud: "Defendant Trump's actions in the hours following the hearing in this case illustrate the point and confirm his overriding interest in delaying both trials at any

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[118] *Trump*, 144 S. Ct. at 2332.

[119] These questions implicate all of the criminal cases involving Donald Trump. See, e.g., Ben Protess, Jesse McKinley & William K. Rashbaum, In Deciding When to Sentence Trump, Judge Faces 'Impossible' Task, N.Y. Times (Sept. 4, 2024), https://www.nytimes.com/2024/09/04/nyregion/trump-hush-money-sentencing.html ("While Mr. Trump has already been deemed a felon, if Justice Merchan postpones his sentencing until after the Nov. 5 election, the American people will vote without knowing whether Mr. Trump will spend time behind bars. A delay would also reward the stalling tactics Mr. Trump has deployed throughout the case, and feed the very impression the judge has labored to dispel—that the former president is above the law.").

[120] Notice of Appeal, United States v. Trump, 740 F. Supp. 3d 1245 (S.D. Fla. 2024) (No. 23-cr-80101).

cost. This Court should [not] allow itself to be manipulated in this fashion."[121] Ultimately, though, that warning was purely rhetorical. There was no motion the Special Counsel could bring or doctrine that he could point to in order to keep the case on track. Unlike the lower courts in the election subversion case, which worked too expeditiously, the district court here did not work with haste. Faced with a judge unmotivated to move quickly—whether out of a desire to get the case right or otherwise—any defense strategy of delay worked. Throughout the case, the defense filed countless motions—ranging from plausible to outlandish—that the district court docketed, scheduled argument for, and *never* ruled on.[122]

* * *

These intra-branch prosecutions show that—even outside the settlement context—federal courts can *participate* in political mootness. Through procedural decision-making, federal courts have a hand in bringing political mootness to fruition. Whether that role is taken on consciously or merely incidentally because procedure in apex cases is not regularized, these two prosecutions highlight a role that courts play in all apex cases. Through decisions that are procedural and substantive, high-profile or mundane, federal courts are *participating* in the separation of powers when they adjudicate the separation of powers.

[121] Notice of Defendant's Motion to Stay Proceedings in the District of Columbia, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101).

[122] See, e.g., Reply in Further Support of Motion for Revised Schedule for Motions to Compel and CIPA § 4 Litigation and Motion for Adjournment of the Trial Date, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101); Government's Response in Opposition to Defendants' Motion for Adjournment of Trial Date, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101); Order Granting in Part Defendants' Motions to Continue Pre-Trial Deadlines and Denying Without Prejudice Motion to Adjourn Trial, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101); President Donald J. Trump's Motion for Access to CIPA § 4 Filings, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101); Government's Consolidated Opposition to Trump's Motion for Access to CIPA Section 4 Filings and Nauta and De Oliveira's Motion Related to the Ex Parte Nature of CIPA Section 4, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101); Paperless Order Setting Argument on January 31, 2024, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101); President Trump's Motion to Dismiss Counts 1–32 Based on Unconstitutional Vagueness, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101); Government's Opposition to Donald J. Trump's Motion to Dismiss Counts 1–32 Based on Unconstitutional Vagueness, *Trump*, 740 F. Supp 3d 1245 (No. 23-cr-80101); Notice of Non-Evidentiary Hearing on Defendant Trump's Motion to Dismiss Counts 1–32 on Unconstitutional Vagueness and Defendant Trump and Nauta's Motion to Dismiss Superseding Indictment Based on the President Records Act, *Trump*, 740 F. Supp. 3d 1245 (No. 23-cr-80101) (setting argument on March 14, 2024).

Each manifestation of political mootness in the courts highlights this role. Because the political branches are subject to the constraint of elections, which are inextricably linked to time, federal courts have a hand in determining winners and losers without declaring them expressly. By employing procedure, justiciability doctrine, or avoidance, federal courts play a role in separation of powers that does not line up perfectly with the roles we have theorized for them. Before returning to ask what political mootness means for adjudication in apex cases, the next Part contextualizes apex litigation by looking to the broader universe of apex conflict. What informs the decision for Congress to bring—or not bring—litigation? How does Congress view litigation in the context of an investigation?

II. POLITICAL MOOTNESS AND CONGRESS

Judge Robert Katzmann often emphasized that for judges to interpret statutes, they needed to understand how Congress worked.[123] Likewise, to interpret a congressional subpoena or contempt order, for instance, judges should understand how a congressional investigation works. This Part looks outside of the federal courts and pieces together a richer landscape of apex powers disputes. Most clashes involving congressional and executive power do not wind up in court. This Part shows how Congress's investigative power was deployed in one investigation and, critically, how the *specter* of litigation influenced the Committee's investigative strategy.

Despite Congress's victories in the lower federal courts, legal decision-makers within Congress exercise less than the full scope of authority that has been recognized in federal court. Instead, they self-constrain their authority to create a buffer zone between themselves and litigation. To illustrate, this Part looks to those who exercise and implement congressional investigative power.[124]

[123] See, e.g., Robert A. Katzmann, Judging Statutes 8–10 (2014).

[124] This Part thus joins the growing body of structural constitutional law scholarship that looks beyond the federal courts and includes accounts from the co-equal branches in the analysis. See generally, e.g., Anya Bernstein & Cristina Rodríguez, The Accountable Bureaucrat, 132 Yale L.J. 1600 (2023); Jonathan S. Gould, Law Within Congress, 129 Yale L.J. 1946 (2020); Christopher J. Walker, Legislating in the Shadows, 165 U. Pa. L. Rev. 1377 (2017); Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901 (2013); Trevor W. Morrison, Constitutional Avoidance in the Executive Branch,

I use the Committee to understand the functional content of the House's authority. I use a combination of publicly available sources—including the Committee's report, hearings, court filings, and reporting—and a series of original interviews with individuals directly involved in the Committee's investigation to form a picture of decision-making (and, in particular, the role that time played in that decision-making). In the main, I spoke with senior staffers who had worked for the Committee and had some authority over legal decision-making. Of course, in the House, the members are the ultimate decision-makers. Nonetheless, staffers can exercise authority in the spaces that members stake out for them.

In defining how time politically moots apex cases, Part I illustrated, but left implicit, the idea that judicial review in apex cases affects not only the content of doctrine concerning powers, but also the *functional content* of powers outside of the judiciary. By functional content, I mean to move beyond the idea that the doctrine, law, or the Constitution would permit or constrain action in a particular branch. Instead, I aim to capture the *functional* effects—the de facto winners and losers—in apex disputes. This Part takes on that task by putting a lens on Congress's functional structural powers. Congress's functional power is the power that Congress actually uses and exercises, not the power that is theoretically permissible under the Constitution, doctrine, or laws.

In the face of doctrinal uncertainty, the risks of separation-of-powers litigation are difficult to quantify. Just as the uncertainty and risks of litigation are built into private parties' behavior, so too are they built into congressional behavior. Members of Congress—and, in particular, members of the House—are extremely sensitive to the ticking clock of their terms. Every two years, members of the House face two elections—a primary and a general election—and with them comes the possibility that the member loses her seat or that the member's party loses control of the chamber.[125] With only two years certain to take an investigation from start to finish, litigation is not something that members can afford to take on lightly. And it appears that they self-impose constraints on their constitutional authority to avoid the existential delay that federal litigation brings with it.

106 Colum. L. Rev. 1189 (2006); Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575 (2002).

[125] See Richard H. Pildes, The Neglected Value of Effective Government, 2023 U. Chi. Legal F. 185, 194 ("[T]wo-year House terms provide a source of constant disruption in government.").

At the outset, I acknowledge that each of the inter-branch disputes described in Part I have a political and partisan element to them. Perhaps more than a partisan *element*, some of the decisions to launch investigations could be motivated primarily or even entirely by partisanship.[126] I do not make any claims about the motivations of members of the House: they may be entirely or only partially partisan. Instead, I argue that the potential for protracted litigation can influence members' political and partisan calculations, and that, in turn, can motivate them to exercise less of their structural power than they otherwise would be politically inclined to exercise.

Section II.A discusses the Committee's structure. Section II.B turns to the Committee's functional authority. The Committee self-constrained its authority because delay could be wielded by recalcitrant witnesses to thwart the Committee's objectives. One staffer put it succinctly: "Time is the enemy of any congressional investigation."[127]

My interviews also revealed some common misunderstandings about Congress. Outside the Committee, there is a misimpression about its use of subpoenas. The Committee issued scores of subpoenas, but the volume is misleading. The Committee widely issued "friendly subpoenas"—subpoenas requested by willing witnesses for legal, political, or other cover. What is more, the interviews revealed that although words like "subpoena" and "contempt" have legal meanings, their meanings in the House chamber are different.

A. The House Select Committee

The Committee was tasked with learning what happened at the Capitol on January 6, 2021, to inform legislation that would ensure that it does not happen again. There are ways in which the Committee's work is representative of other House investigations, and ways in which it is *sui generis*. I set out to understand the legal and investigative decisions the Committee made as an exemplar of whether and how the constraint of time and the specter of litigation factor into investigative decision-making. Free from some of the other major constraints in a House investigation—a minority staff, resource limits, and an uncooperative sitting president—the Committee is a particularly salient vehicle for

[126] See generally Josh Chafetz, Congressional Overspeech, 89 Fordham L. Rev. 529 (2020) (describing congressional investigations as "political theater").

[127] Interview with Senior Staffer (July 15, 2024).

studying the constraint of time. There are three distinctions between the Committee and a typical House investigation that contextualize the findings in Section II.B.

1. Committee Structure

The Committee had nine members.[128] Although Speaker Pelosi did not serve on the Committee, multiple individuals credited Pelosi as the Committee's primary architect and confirmed that she held a continuing interest in the Committee's work.[129] The Committee retained an investigative team that consisted primarily of lawyers. From its inception, time factored into the shape the investigation would take. Because of the Committee's roughly eighteen-month mandate,[130] the investigation was broken up into five teams, each of which had its own subject-matter focus and team leader: (1) red (organization of the rioters); (2) blue (law enforcement and military response); (3) gold (elements connected to the election); (4) purple (domestic extremism); and (5) green (funding streams).[131] Each operated with its own goals in mind, and there was coordination at the top.[132]

The Committee, like any other House committee, had access to the Office of the General Counsel. According to the House Rules, the "Office of General Counsel" provides "legal assistance and representation to the House."[133] The House Rules establish that the General Counsel functions "pursuant to the direction of the Speaker, who shall consult with the Bipartisan Legal Advisory Group," which consists of the Speaker and the majority and minority leadership.[134] Nonetheless, multiple individuals described the House Counsel as serving at the pleasure of the Speaker.[135]

[128] H.R. Rep. No. 117-663, at ii (2022).

[129] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (June 26, 2024); Interview with Senior Staffer (July 15, 2024); Interview with Senior Staffer (July 19, 2024).

[130] Interview with Senior Staffer (July 15, 2024) ("Part of the structure we created was motivated by the finite amount of time we had to complete our work. We knew going in that we had maybe eighteen months to investigate the attack and that would require prioritization and no duplication of effort.").

[131] Interview with Senior Staffer (July 15, 2024); Interview with Senior Staffer (July 19, 2024).

[132] Id.

[133] Rules of the House of Representatives, 119th Cong., r. II, cl. 8(a) (2025).

[134] Id. r. II, cl. 8(a)–(b).

[135] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (July 19, 2024).

This means the House Counsel's role is both institutional—she is charged with representing any member who is involved in litigation in his or her official capacity—and political—she serves at the pleasure of the Speaker.

2. Distinctive Features

First, the Committee's composition was unique. Although the Committee was technically bipartisan, Minority Leader Kevin McCarthy did not appoint the Republican members. Instead, Democratic Speaker of the House Nancy Pelosi asked Republicans Liz Cheney and Adam Kinzinger to serve on the Committee.[136] Although Representative Cheney served as Vice Chair of the Committee, the Committee technically did not have a "ranking member." This means that the Committee did not technically operate the way that other House committees do. Multiple staffers described that not having minority members—and critically, a minority staff—meant there was less of a logjam to getting things done.[137] The Committee was more focused on the end task and less on partisan fighting. On the one hand, the Committee's unique structure does not reflect the ordinary House investigation. On the other hand, if any House committee was going to be able to exercise the full scope of its functional power without partisan stalling, it was the Committee. This makes it a particularly good candidate for assessing the role that time plays in limiting the House's institutional functional authority as opposed to, say, partisanship.

Second, the Committee was exceptionally well resourced. This feature demonstrates the power that the House can wield in apex conflict when it can back it with resources. The Committee could follow leads and make choices that, in other circumstances, would not be possible. For example, the Committee chose to hold a series of televised hearings during prime time and retained media experts—including the former president of ABC

[136] Jeremy Herb, Manu Raju & Annie Grayer, Pelosi Says Liz Cheney Will Serve on Committee That Will Investigate January 6 Insurrection, CNN, https://www.cnn.com/2021/07/01/politics/nancy-pelosi-announces-members-of-january-6-committee/index.html [https://perma.cc/M9FJ-TKRP] (last updated Jul. 1, 2021, 2:13 AM); Luke Broadwater, Pelosi Appoints Kinzinger to Panel Scrutinizing Jan. 6, NY Times (Oct. 29, 2021), https://www.nytimes.com/2021/07/25/us/politics/pelosi-adam-kinzinger-capitol-riot.html.

[137] Interview with Senior Staffer (July 15, 2024); Interview with Senior Staffer (July 18, 2024); Interview with Senior Staffer (July 19, 2024).

News—to help portray the Committee's findings.[138] For this project distilling the *functional* content of congressional power, the Committee's work shows just how powerful the House can be when it uses today's media landscape. To the extent that legal decision-makers on the Committee felt that they did not have power to enforce a certain type of subpoena or compel a particular type of testimony, they did so without regard to pecuniary limits.

Third, during the pendency of the Committee's jurisdiction, the House and the presidency were held by the same political party, which limits the generalizability during times of divided government.[139] Although the Committee's work involves apex conflict, those claiming executive privilege were not officeholders. This gave the Committee a broader set of options than is otherwise realistic during apex conflict. For example, the Committee could realistically consider referring contempt prosecutions to the Justice Department without fear that it would be dismissed for purely partisan reasons. But institutional forces would still be at work. That is, the executive branch would still need to consider its interest in preserving executive privilege claims when assessing whether and how to bring a prosecution for contempt of Congress. The Committee thus gives us a window into institutional separation of powers uncomplicated by separation of parties, but that makes the claims less generalizable when divided government is layered in.

B. Investigative Power in Action

The Committee was constituted on June 30, 2021, and had eighteen months before the end of the session.[140] In that roughly year-and-a-half period, the Committee formed its plan, brought in witnesses, held open- and closed-door hearings, and presented its findings.[141] Given the Committee's emphasis on witnesses with personal recollections from the White House and Donald Trump's reelection team (as far as government

[138] Mike Allen, Scoop: Jan. 6 Committee's Secret Adviser, Axios (June 6, 2022), https://www.axios.com/2022/06/06/jan-6-committee-adviser-james-goldston [https://perma.cc/5MSC-BRRK]; Interview with Senior Staffer (July 19, 2024).

[139] See Levinson & Pildes, supra note 68, at 2315 ("The practical distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics.").

[140] H.R. Res. 503, 117th Cong. (2021) (enacted).

[141] H.R. Rep. No. 117-663, at 3–4, 7 (2022).

and government-adjacent interviews go), it would have been clear from the get-go that at least some witnesses would not be forthcoming and others would be recalcitrant. Nonetheless, the investigative team pursued a path of voluntary—and, sometimes, begrudging—participation where possible. Most of the subpoenas the Committee issued were "friendly subpoenas," a term used when the witness is willing to testify but requests a subpoena for legal, political, or other cover. When witnesses were truly recalcitrant, there was little the Committee could do. In all, staffers described a process where the most coercive tools at their disposal—contempt and litigation—were least effective.

1. Negotiation and Cooperation

In my conversations with investigators, they laid out several tools that they considered to be a part of their toolbox in these negotiations. First, for those motivated by patriotism, a call asking them to participate voluntarily could be enough.[142] Often, those witnesses would ask for a friendly subpoena for cover.[143] Many witnesses, even some that one might imagine would be recalcitrant—because, for example, they worked in senior positions during the Trump Administration—fell into this category.[144] For scholarship, this means that when we evaluate the effectiveness of a congressional subpoena, we have to discount for friendly subpoenas that come at the witness's request. The subpoena is not itself doing work to compel compliance.

Second, the investigative team might approach prospective witnesses with an informal off-the-record conversation as a scoping exercise.[145] This method was particularly fruitful for bringing in individuals with colorable claims of privilege but who could be motivated to cooperate.[146] Through these conversations, investigators would learn what the witness could speak to; the investigators were better situated to negotiate over

[142] Interview with Senior Staffer (July 15, 2024).

[143] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (July 15, 2024).

[144] With the exception of the witnesses held in contempt and referred for prosecution, see infra Subsection II.B.3, I have made the deliberate choice not to use identifying information for any of the witnesses that I discussed with staffers in order to maintain focus on the strategies that the Committee used in its investigation instead of the identities of witnesses.

[145] Interview with Senior Staffer (July 15, 2024).

[146] Id.

what was worth pressing for in a formal deposition and could make concessions over material that another witness could provide.[147]

Third, the Committee had the power to immunize witnesses for the information they turned over, though it never used this authority.[148] Fourth, the Committee could make assurances as to confidentiality, but this was often difficult in practice.[149] Many prospective witnesses were worried about the public perception of their cooperation. Although the Committee could take steps to promote confidentiality, in practice the Committee was plagued with leaks, and there was a pool of reporters staked outside of their workspace, making promises of confidentiality difficult to keep.[150]

In all, some teams had more trouble with recalcitrant witnesses than others. In particular, the gold team—focused on how the violent riot was tied to the 2020 election—faced the highest hurdles to voluntary participation.[151] There could be months of back-and-forth with individual witnesses and negotiations over a range of subjects: from the highly salient (for example, what subject matter would be covered) to the pedantic (for example, the number of agency lawyers allowed in the room).[152]

All the staffers recognized that recalcitrant witnesses had tools at their disposal other than full-scale hardball: delay and obfuscation. Instead of appearing obstinate from the start, witnesses would come in voluntarily, claim not to recall, or claim privilege retail. One staffer described that process as "frustrating and cumbersome and time consuming."[153] As a practical matter, there was little the investigators could do when a witness claimed privilege retail—from executive privilege, to attorney-client, to the Fifth Amendment—because the time burden of litigation was too high when the Committee's mandate was so brief.[154] In a criminal investigation before a grand jury, by contrast, judges can make rulings promptly about privilege. In one discussion of a witness interview, an investigator

[147] Id.
[148] Id.
[149] Id.
[150] Interview with Senior Staffer (July 15, 2024); Interview with Senior Staffer (July 19, 2024).
[151] Interview with Senior Staffer (July 19, 2024).
[152] Interview with Senior Staffer (July 15, 2024); Interview with Senior Staffer (July 19, 2024).
[153] Interview with Senior Staffer (July 15, 2024).
[154] Id.

described that a witness would "take us right to the line" and then claim privilege.[155] The investigator relayed:

> I think we could have litigated and overcome that objection, but we didn't. We made retail decisions about this given the limited time available for our investigation. In a criminal prosecution, these decisions would have been different—it's fact specific—but they can go faster . . . . Since they have the ability to go faster, my guess is that [prosecutors would not need to] settl[e] for these compromises.[156]

When comparing the Committee's investigation to Special Counsel Jack Smith's investigation of the same subject matter, the staffer remarked that—at least with what was reported publicly—the Special Counsel was able to bring in witnesses and particular pieces of evidence that witnesses and prospective witnesses had claimed privilege over before the congressional investigator.[157]

Another investigator described a different interview with a recalcitrant witness:

> There were back-and-forth negotiations, and he came in. He just did a lot of dancing. He didn't directly answer one question. His transcript reads as almost funny . . . . The [government] attorneys who reviewed the transcript called me and said "that was unbelievable."[158]

Negotiations with the Justice Department—one of the same political party as the House—often took the same approach, but on a broader scale. DOJ negotiations had the institutional weight of the executive behind them, and these, too, show how delay worked to thwart the investigation. These negotiations were not with individual witnesses, but instead with the DOJ for either production of certain documents or witnesses:

> They did a classic slow roll for congressional committees. They ultimately did not get the people that I wanted in terms of answering the very important questions [that my committee was tasked with obtaining. DOJ] knows that there is an expiration date and I had . . . I would probably say, if I started on the Committee in August of 2021, it

[155] Id.
[156] Id.
[157] Id.
[158] Interview with Senior Staffer (July 19, 2024).

> was ten months of negotiations to get the answers that I wanted and I still didn't get the answers.[159]

The staffer ultimately concluded, "[The DOJ] negotiations are ways to prolong the inevitable . . . . [W]ell, maybe not inevitable."[160]

2. Subpoenas

Although the House has a formal set of codified rules, the reality on the ground often departs from it.[161] During Speaker Pelosi's tenure, she set in place a practice that every subpoena the House would issue (whether it was through a Committee or otherwise) would go through the House Counsel for substantive review and through Speaker Pelosi herself.[162] Those familiar with the process made clear that this was not pro forma review, but that both the House Counsel and Speaker Pelosi would take a hard look and think seriously about whether issuing a subpoena was the right thing to do. One staffer attributed Speaker Pelosi's process over subpoenas to a hard truth about Congress's subpoena power in action:

> To be blunt, [congressional subpoenas aren']t real. It's not like a grand jury subpoena. You have to comply or a judge will put you in contempt. A prosecutor can't put you in contempt, but a judge will enforce a criminal subpoena. We call [congressional subpoenas] 'subpoenas,' but they're so different from a subpoena that has a judge's contempt power easily behind it.[163]

Speaker Pelosi wanted subpoenas to be rare and serious so that those in receipt of them would feel their impact.[164] As part of the process for determining whether the House should issue a subpoena, Speaker Pelosi's legal team would weigh questions like (1) whether the subpoena was likely to be ignored; (2) whether the House would likely have to hold

[159] Id.

[160] Id.

[161] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (June 26, 2024). This stands in contrast to the Senate, where staffers stated that internal practice hews more closely to the codified rules. Id.

[162] Interview with Senior Staffer (June 13, 2024) ("By House tradition, all committee subpoenas go through the Counsel. But a lot of times that was in a sense pro forma . . . . In this situation, [Speaker] Pelosi made clear that the [House] Counsel was supposed to be reviewing them for substance.").

[163] Interview with Senior Staffer (June 13, 2014).

[164] Id.

people in contempt; and (3) whether a subpoena was really necessary or whether they could get cooperation instead.[165] Although those most familiar with the process claimed that Speaker Pelosi never blocked a subpoena that the Committee requested, they emphasized considerable back-and-forth over the wisdom of issuing them in advance of formalizing a request.[166]

Setting aside friendly subpoenas, which have no real risk of noncompliance or institutional diminishment, Speaker Pelosi's first question—whether the subpoena was likely to be ignored—raises questions about the endogeneity of a congressional subpoena's issuance. If truly recalcitrant witnesses are less likely to be subpoenaed than semi-recalcitrant witnesses, that speaks to the efficacy and power behind the congressional subpoena itself.[167] They are not used because of their lack of potency in precisely the contexts that one might anticipate Congress needs them.

There were two exceptions to Speaker Pelosi's general process for subpoenas. First, friendly subpoenas would not need to go through the full process in the official channel, further highlighting how different they are from unfriendly subpoenas.[168] Second, the Committee sought hundreds of telephone records. Phone companies have agreements with their end users that require notice when the phone company turns records over to the government. Because of the sheer volume of phone record subpoenas, it was not practical to elevate every decision through the formal process, so those too were subject to a more truncated process.[169]

Each staffer talked about the import and impact of Congress's subpoena power, attributing compliance to something like patriotism or its perceived weight. One called it the "*in terrorem* effect": maybe the recipient would feel enough fear to comply.[170] But all also recognized their limits, particularly against claims of executive privilege. One staffer

[165] Id.

[166] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (July 15, 2024).

[167] There is analogous practice in the judicial branch where courts, in separation-of-powers cases, embed separation-of-powers considerations into existing doctrines, such as discovery, to avoid compelling coordinate branch officers to take actions. See Ahdout, supra note 7, at 2378–86.

[168] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (July 19, 2024).

[169] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (July 15, 2024).

[170] Interview with Senior Staffer (June 13, 2024).

put Congress's subpoena power succinctly: "It works, except in separation of powers cases, where it doesn't work. But in the main, it works."[171]

The first set of subpoenas that the Committee issued went to Trump's former White House Chief of Staff, former Deputy Chief of Staff, former advisor Steve Bannon, and former Chief of Staff to the then-Acting Secretary of Defense.[172] These subpoenas, one staffer confirmed, were deliberately issued first: they set the stage for media messaging that the Committee was "working on all cylinders," and that it was willing to issue "the most controversial subpoenas" first.[173] The Chief of Staff to the then-Acting Secretary of Defense ultimately came in for an interview with the investigators roughly three months after he was subpoenaed,[174] but Bannon and the former Deputy Chief of Staff did not. For those two, the Committee would move forward to more coercive measures.

3. Contempt

The Committee theoretically had three coercive measures to deal with witnesses who defied subpoenas: (1) criminal contempt referrals to the Justice Department; (2) civil contempt; and (3) inherent contempt.

The Committee elevated its response to four recalcitrant witnesses: the former Chief of Staff, the former Deputy Chief of Staff, and the former advisors Steve Bannon and Peter Navarro. The Committee recommended that each of them be held in contempt and referred those individuals to the Justice Department for prosecution.[175] The Committee elevated its response for these individuals because it believed that they were in

[171] Interview with Senior Staffer (July 18, 2024); see also Interview with Senior Staffer (July 15, 2024) ("The tools were not perfect, but the threat of them often got people to come in.").

[172] See Ryan Nobles & Annie Grayer, January 6 Committee Issues First Subpoenas for Witness Testimony to Four Trump Loyalists, CNN, https://www.cnn.com/2021/09/23/politics/january-6-subpoenas-trump-loyalists/index.html [https://perma.cc/HJX7-546M] (last updated Sept. 24, 2021, 2:50 PM).

[173] Interview with Senior Staffer (July 19, 2024).

[174] Hannah Rabinowitz, Jamie Gangel, Annie Grayer & Zachary Cohen, Former Trump Admin Official Kash Patel Meets with January 6 Committee, CNN, https://www.cnn.com/2021/12/09/politics/kash-patel-january-6-committee/index.html [https://perma.cc/UUV6-467U] (last updated Dec. 9, 2021, 6:38 PM) ("[T]he committee is facing delay and stonewalling tactics from top Trump allies on multiple fronts . . . . [M]any of their top profile targets have been granted postponements for their depositions as the parties involved work out the arrangements for their depositions."); Interview with Senior Staffer (July 19, 2024).

[175] H.R. Rep. No. 117-152, at 1 (2021); H.R. Rep. No. 117-284, at 1 (2022); H.R. Rep. No. 117-216, at 1 (2021).

possession of highly salient information, and they were not willing to play ball at all.[176] Whereas other recalcitrant witnesses would at least show up or engage in a back-and-forth, according to investigators, these four were brazen in their noncompliance. But decisions to refer recalcitrant witnesses for prosecution are not just about the individual, but also about the broader investigation. On the one hand, these criminal referrals could convey a message of seriousness. These DOJ contempt referrals were the first referrals to result in prosecution in about fifty years; the last one was for a witness with ties to the mafia who refused to comply with a subpoena.[177] On the other hand, criminal referrals can magnify the evidence that the Committee has not been able to get and can influence other recalcitrant witnesses.[178] Although criminal contempt referrals seem like they are strong medicine, none of these individuals was moved by the referral.

Another individual was, however, motivated by the prospect of a DOJ contempt referral. The Committee recommended that the former Assistant Attorney General be held in contempt of Congress.[179] As the Committee prepared to recommend that he be referred for criminal prosecution, the former Assistant Attorney General responded that he intended to meet with investigators and assert his Fifth Amendment privilege. The Committee paused its process for criminal referral, and, nearly two months later, the former Assistant Attorney General met with the Committee.[180]

In response to the other four referrals, the Justice Department brought prosecutions against Bannon and Navarro, alleging that their claims of

[176] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (July 15, 2024).

[177] Interview with Senior Staffer (July 18, 2024). See Marcello v. United States, 196 F.2d 437, 437–40 (5th Cir. 1952) (addressing the criminal contempt prosecution of Carlos Marcello for his refusal to answer questions or produce documents before the Senate subcommittee investigating organized crime).

[178] See Aaron Zebley, James Quarles & Andrew Goldstein, Interference: The Inside Story of Trump, Russia, and the Mueller Investigation 74 (2024) (explaining the strategy behind the decision to prosecute a witness in the context of the Mueller investigation: "To some potential witnesses, public charges for lying to the FBI might show how serious we were. But to others, it would reveal that [the witness] wasn't cooperating, potentially giving them an incentive to lie or shade the truth or, if arrested, to refuse to cooperate as well.").

[179] H.R. Rep. No. 117-200, at 4 (2021).

[180] Holmes Lybrand, Annie Grayer, Ryan Nobles & Zachary Cohen, Former Trump DOJ Official Jeffrey Clark Met with January 6 Committee for Nearly Two Hours, CNN, https://www.cnn.com/2022/02/02/politics/jeffrey-clark-january-6-committee/index.html [https://perma.cc/Y8HM-3WDZ] (last updated Feb. 2, 2022, 6:54 PM).

executive privilege were unsupported, and ultimately securing convictions against both individuals.[181] What is notable is that Bannon's and Navarro's claims of executive privilege were so weak that the Justice Department initiated criminal prosecutions against them. That is exceedingly rare. Contempt of Congress prosecutions are not generally initiated when the recalcitrant witness relies on claims of executive privilege because the executive generally is not incentivized to cabin the privilege's reach.[182] And that is revealed in the DOJ's choice not to pursue prosecutions of the former White House Chief of Staff and former Deputy White House Chief of Staff for Communications. Those two held official positions much closer to the President. Each of those two had a more colorable claim of privilege that the executive branch—as an institution—had an incentive not to undermine.

The House also had the ability, at least in theory, to enforce its subpoenas civilly, as it had in *Committee on the Judiciary of the United States House of Representatives v. McGahn*. Indeed, the House had favorable precedent in the U.S. Court of Appeals for the D.C. Circuit that it has standing to enforce its subpoenas.[183] Taken together, this means the House was likely to win affirmative enforcement action in the courts.

Yet, unlike *McGahn*, where the House filed affirmative litigation to enforce its subpoena,[184] the Committee took a different approach. With incentives that were not perfectly aligned, the Committee relied on the DOJ to pursue action to address contempt of Congress. Some staffers expressed that there was just no time to go down the civil contempt path

[181] H.R. Rep. No. 117-663, at 119–20 (2022); Indictment at 5–7, United States v. Navarro, No. 22-cr-00200, 2024 WL 2161418 (D.D.C. Feb. 8, 2024); Indictment at 4–9, United States v. Bannon, No. 21-cr-00670, 2024 WL 2867955 (D.D.C. June 6, 2024); Lindsay Whitehurst, Trump White House Official Peter Navarro Convicted of Contempt After Defying House Jan. 6 Subpoena, PBS News (Sept. 7, 2023, 4:38 PM), https://www.pbs.org/newshour/politics/trump-white-house-official-peter-navarro-convicted-of-contempt-after-defying-house-jan-6-subpoena [https://perma.cc/N76B-ARZY]; Ashraf Khalil, Steve Bannon Convicted on Contempt Charges for Defying Jan. 6 Committee Subpoena, PBS News (July 22, 2022, 4:13 PM), https://www.pbs.org/newshour/politics/steve-bannon-convicted-on-contempt-charges-for-defying-jan-6-committee-subpoena [https://perma.cc/3KJF-9835].

[182] See Ahdout, supra note 7, at 2388. It is the Office of Legal Counsel's position that "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege." Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 102 (1984).

[183] See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc).

[184] See supra Subsection I.B.1 (discussing *McGahn* in detail).

in this investigation.[185] Indeed, the delay involved in *McGahn* itself was fresh on the Speaker's mind.[186] The Committee chose not to sue these recalcitrant witnesses in federal court and instead focused its resources on pressing forward with other aspects of its investigation.

What this reveals is that in the context of this high-stakes investigation, a tool attributed to the House was functionally off the table because of time. "The House lasts only two years," one staffer explained. "There is a special rule that if you are in litigation over a subpoena and the same party retains control over the House and it wants to continue, you could. But if you lose control of the House or the House just gets bored, it starts again."[187] And, quite the opposite, the threat that a witness would force the Committee to go to court, knowing that it could be a successful delay tactic, prompted the Committee and the investigators—in at least some circumstances—to narrow their requests and settle for less than they truly believed that they were entitled to.[188]

One final theoretical tool bears brief mention: inherent contempt. Some have asserted that the House could or should use its authority forcibly to bring witnesses in to testify, perhaps by deploying the Sergeant at Arms.[189] Although one member of the Committee was enthusiastic about the possibility, not even the former Sergeant at Arms took that suggestion seriously.[190] One individual recalled an inside joke with the Sergeant at Arms about the Speaker deploying them to arrest a witness and the Sergeant at Arms having a good laugh about how his gun was locked away in his office.[191] Those with information thought that enforcement by the Sergeant at Arms was extremely impractical: there is no jail and,

[185] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (July 15, 2024).

[186] Interview with Senior Staffer (June 13, 2024). Cf. Peterson, supra note 47, at 221 ("Until now, [lawsuits to enforce a subpoena] have been of little use to Congress for a variety of reasons, most of which are linked to the long delay between the time a suit is filed and the resolution of the conflict between the legislative and executive branches.").

[187] Interview with Senior Staffer (June 13, 2024).

[188] Interview with Senior Staffer (July 15, 2024).

[189] See, e.g., Chafetz, supra note 44, at 1152 (suggesting that "each house [of Congress] has a sergeant-at-arms and the Capitol building has its own jail. The sergeant can be sent to arrest contemnors and, if necessary, hold them in his custody until either their contempt is purged or the congressional session ends"); Theodore Sky, Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?, 31 Geo. Wash. L. Rev. 399, 400 (1962).

[190] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (June 26, 2024); Interview with Senior Staffer (July 16, 2024).

[191] Interview with Senior Staffer (June 13, 2024).

ultimately, how would the Sergeant at Arms—one person with one firearm—stand up to an executive official with a security detail?[192]

* * *

From the investigation's structure, to its negotiations with witnesses, to the Committee's use of coercive tools, the Committee's use of authority in practice diverges from theory. Although we use terms like "subpoena" and "contempt" to describe powers that Congress has, those words bear little resemblance to their judicial homonyms. Those within the House rely on their *in terrorem* effect, not on their legal enforceability. No doubt the House has prevailed in many apex cases in the lower courts and confirmed its ability to enforce subpoenas.[193] Nonetheless, the House's wins have come in the lower courts, and many of those decisions have been vacated.[194] Each time a recalcitrant witness raises challenges, legal uncertainty sets in, and the cases use up the House's precious resource of time.[195]

Investigators on the Committee confirmed that time factored into their strategic decision-making and put them in a place of strategic disadvantage in their negotiations. Knowing that witnesses were stalling for time, investigators were forced to engage in negotiations with one hand tied behind their back. And when some of those witnesses appeared and claimed privilege, the investigators were very selective about which claims they would press back on—even when they were confident that they had the legal high ground—because they could not afford the time to litigate every claim (particularly because their ability to litigate at all would be challenged anew).

To the extent their experiences are representative, staffers told a story that shows most of the time, an investigative committee will choose not to litigate to enforce its powers even when it believes that it is entitled to more information. In the instances where it does choose to sue, that indicates the issue is both institutionally and politically important enough to bring litigation. The fact that politics enters into the calculation makes it no less important. If checks and balances are exercised most robustly in times of divided government through the separation of parties, then a

[192] Id.

[193] See supra Section I.B.

[194] See infra Section III.B.

[195] By House rules, subpoena litigation is authorized for the term of the House and has to be reauthorized if litigation extends beyond the House term. Rules of the House of Representatives, 119th Cong., r. XI, cl. 2(m)(1) (2025).

political motive to litigate is part of the architecture that presses back against coordinate overreach.

III. THE JUDICIAL ROLE IN APEX CASES

Federal judges occupy a complex role when they adjudicate separation-of-powers conflict. The procedural life of apex cases further highlights the unique and under-theorized role that federal courts play in contests between Congress and the executive. This Part examines how political mootness sheds light on the judicial role. It argues that the prevailing frames in the federal courts' canon—dispute resolution and law declaration—are ill-suited to explain the role that courts play in apex disputes. Instead, federal courts are in dialogue with the coordinate branches when they adjudicate apex cases.

This Part proceeds in two sections. Section III.A brings in the traditional models of adjudication—dispute resolution and law declaration—that have dominated the federal courts canon and examines how political mootness fits into those frames. In contests between Congress and the president, federal courts act neither in their dispute resolution nor in their law declaration capacities. Focusing on separation-of-powers settlements, I argue that the three branches have created a functional endpoint in these contests that requires federal courts to step out of their traditional roles. Drawing on *Munsingwear* vacatur and debates over vacatur on consent, I argue that courts have crafted a new exception to the *Munsingwear* doctrine for separation-of-powers settlements. Although the presumption is against *Munsingwear* vacatur on consent of the parties in ordinary civil litigation, the presumption is turned on its head in apex cases: *Munsingwear* vacatur is universally granted when the House and the executive ask for it. This practice implies a different role for adjudication in apex cases beyond law declaration and dispute resolution. Borrowing from civil procedure and rights-based constitutional law scholarship, Section III.B shows what alternative models of adjudication might look like and argues that apex adjudication is a space for tripartite constitutional dialogue.

A. The Models of Adjudication, Munsingwear*, and Apex Conflict*

The traditional federal courts canon centers the judicial role on two models: dispute resolution and law declaration.[196] The first model maintains that federal courts' primary role is to provide the litigants before it with a decision; any judicial clarification of the bounds of law is ancillary to the primary goal. The law declaration model, by contrast, recognizes that federal courts have an independent duty to explicate legal meaning separate from any dispute resolution role. There is a push and pull between these models and neither alone captures the reality on the ground. The paradigmatic hypothetical federal court is one of both dispute resolution and law declaration.

These models of adjudication have informed our understanding of the Supreme Court's certiorari jurisdiction and decision-making,[197] the fit of the nationwide injunction remedy in the district courts,[198] recent developments in the law of public standing,[199] and the role of immunity doctrine in promoting robust articulation of underlying constitutional rights.[200] And the models are most influential for framing debates about the powers and constraints of federal courts. Article III's case-or-controversy requirement—a paradigmatic dispute resolution constraint—

[196] See, e.g., Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 672 (2012).

[197] See id. at 668–69; Benjamin B. Johnson, The Active Vices, 74 Ala. L. Rev. 917, 945 (2023) ("[T]he Court's shift from an arguably less political case-adjudication model to a more politically engaged law declaration model corresponds with its turn toward protecting individual rights and its enhanced certiorari powers." (footnote omitted)); Eric Berger, When Facts Don't Matter, 2017 BYU L. Rev. 525, 592 (building on Henry Monaghan's observation of the Supreme Court's embrace of the law declaration model to argue "[t]he Court's treatment of congressional facts, then, is part of a larger phenomenon in which the Court has moved more aggressively to shape its own agenda and announce the country's core constitutional commitments"); Allison Orr Larsen & Neal Devins, The Amicus Machine, 102 Va. L. Rev. 1901, 1952 (2016) (arguing that the "amicus machine" is normatively desirable as it "suits the modern Court's turn towards law declaration").

[198] See Ahdout, supra note 29, at 974 (arguing that the nationwide injunction remedy "often transforms district courts' role from dispute resolution to law declaration").

[199] See Seth Davis, The New Public Standing, 71 Stan. L. Rev. 1229, 1260 (2019) ("The new public standing is also a consequence of a federal judiciary committed to a law declaration model."); Aaron-Andrew P. Bruhl, One Good Plaintiff Is Not Enough, 67 Duke L.J. 481, 552–53 (2017) (explaining that the "one-plaintiff rule" for standing has largely been unquestioned because it "makes sense when one considers that it stands comfortably alongside other relatively recent developments, like routine nationwide injunctions, that reflect and reinforce notions of judicial power that emphasize law declaration over retail-level dispute resolution").

[200] See John C. Jeffries, Jr., Reversing the Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115, 123.

lends support for the prohibition on advisory opinions, requirements for standing, mootness, and ripeness. It also helps frame the reasons Article III courts generally—at least in the lower courts—are limited to arguments the parties make.[201] On the other side, the law-declaration model explains the predominant role the Supreme Court is thought to occupy[202] and reinforces (and perhaps has in part mis-justified) our reliance on the judicial branch as expositors of the Constitution.[203]

Although these models of adjudication are useful, they are incomplete.[204] When the facts on the ground do not align with either of these models, it may cast doubt on justiciability. One could argue that if federal courts perform *neither* law declaration nor dispute resolution, then the case before them is not fit, as an Article III matter, for judicial review. Or the lack of fit between these models and the facts on the ground may mean there are other constitutionally legitimate models of adjudication that we should consider and develop. In apex cases, federal courts generally act neither in their law declaration nor in their dispute resolution

[201] See, e.g., United States v. Sineneng-Smith, 140 S. Ct. 1575, 1578 (2020) (holding that the Ninth Circuit's sua sponte appointment of amicus curiae to argue First Amendment issues departed from party presentation requirements).

[202] See Monaghan, supra note 196, at 668–69.

[203] See, e.g., Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 Ind. L.J. 1, 2 (2003) ("The juricentric Constitution imagines the judiciary as the exclusive guardian of the Constitution. It allows the Court's coordinate branches to enforce the Constitution only insofar as they enforce judicial interpretations of constitutional meaning . . . ."); Ahdout, supra note 7, at 2416–18 (critiquing the Court's outsized role in providing structural constitutional meaning); Christopher Jon Sprigman, Congress's Article III Power and the Process of Constitutional Change, 95 N.Y.U. L. Rev. 1778, 1783–84 (2020) ("The prospect that judges are acting as partisans when they 'say what the law is' should lead us to ask anew whether it is necessary to democratic constitutionalism that unelected judges possess, in every case, the final word on the Constitution's meaning. . . . Or could we, and should we, favor Congress using its Article III power to establish 'qualified' judicial supremacy: a revised and more democratic form of constitutionalism where the political branches retain the power to re-claim from courts interpretive authority in particular instances and override judicial interpretations of the Constitution without resort to Article V amendments."); Nikolas Bowie & Daphna Renan, The Separation-of-Powers Counterrevolution, 131 Yale L.J. 2020, 2026–27, 2107–08 (2022) (exploring alternatives to judicial supremacy in the separation-of-powers realm); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346, 1353 (2006) (contending that judicial review does not focus "on the real issues at stake" and maintains an undemocratic composition "privileging . . . unelected and unaccountable judges").

[204] Scholarship has recognized areas of overlap between the models. See, e.g., Bert I. Huang, A Court of Two Minds, 122 Colum. L. Rev. F. 90, 91 n.3 (2022) (arguing the Supreme Court is an appellate/curator of law and that this model "cuts across" the traditional law declaration/dispute resolution "dichotomy").

capacities. It would be one thing if any of these conflicts were resolved by a judgment on the merits. But for the last two decades, every case became politically moot—either through legal mootness, a separation-of-powers settlement, or through enforcement discretion.[205] This suggests that federal courts operate in a different capacity in these cases than those contemplated by conventional models of adjudication.

When protracted judicial review rubs up against the end of an electoral term, there generally is not a final judgment on the merits. The tension between process and electoral timelines means that there is usually just not enough time to get to a final judgment before elections change the interested parties and their legal interests. Certainly, there may be intermediate decisions issued by lower courts, but because process and appeals take time, none of the cases practically can be said to end in a final judgment that resolves the parties' claims. Of course, civil litigation between private parties often ends in settlement, and we still recognize the role that courts play in shepherding those cases to that settlement as fitting within dispute resolution, even if settlement prompts skepticism about how the court uses its dispute resolution power. But we might feel differently about that if every single case ended in settlement and not in a final judgment, as apex clashes do.[206] For apex clashes, the process of judicial review itself and intermediate decision-making may nudge the parties closer in their negotiations. But there is generally no final, binding judgment that itself resolves the issue.

In apex cases, courts also generally do not perform in their law declaration capacity. When cases do not get to a final judgment, one can hardly say that the judicial opinion provides doctrinal development in a positive law sense.[207] Further, most of the cases end with a settlement between the political branches that then includes vacatur of any judicial opinion on the merits.[208] This means that intermediary judicial opinions are stripped of their law-declarative effect and their common law role in

[205] See supra Part I.

[206] See Charlotte S. Alexander, Nathan Dahlberg, Alexandra D. Lahav & Peter Siegelman, No Adjudication 21 (2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4909655 [https://perma.cc/3D9E-8WTW] (reevaluating theories of motion practice in light of the fact that 60% of cases are resolved with only a complaint or a complaint and answer; 10% exit the system by remand; and only 30.5% include the filing of a dispositive motion).

[207] See Ahdout, supra note 7, at 2374–76.

[208] See supra Section I.B (describing such settlements in examples such as the forced resignations, Operation Fast and Furious, and the ACA litigation).

doctrinal development. What is more, when some of the judicial opinions are maintained and others are vacated, it is because of a bargain reached by Congress and the president, not some independent analysis by the federal courts.[209] This sets apex cases apart from other civil litigation in federal court.

In *United States v. Munsingwear*, the Supreme Court formalized into doctrine its practice of vacating judgments in civil cases that become moot while review is pending.[210] The Court explained that such a practice "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary."[211] With this as its practical foundation, *Munsingwear* vacatur reads as a doctrinal solution for a dispute resolution problem: it is about ensuring that the parties before the court have a clean slate when time moots a case that the parties still contest.

But *Munsingwear* has an important exception that recognizes the judiciary's law-declarative function: "mootness by reason of settlement does not justify vacatur of a judgment under review."[212] In *Bancorp Mortgage, Co. v. Bonner Mall Partnership*, the Court returned to the effect of settlement on *Munsingwear* vacatur and held that when parties settle in the shadow of judicial opinions, courts of appeals no longer vacate the decision to give the parties a clean slate in a hypothetical future case. The reason is that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."[213] In other words, there

[209] See supra Subsection I.B.1 (discussing *McGahn* case).

[210] 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.").

[211] Id. at 40.

[212] U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994).

[213] Id. at 26 (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). See Chapman v. Doe ex rel. Rothert, 143 S. Ct. 857, 858 (2023) (Jackson, J., dissenting from order to grant, vacate, and remand with instructions to dismiss the case as moot) ("[O]ur common-law system assumes that judicial decisions are valuable and should not be cast aside lightly . . . .").

is public value to doctrinal development[214] that parties to a case cannot negate through a settlement. One would think that there is even greater public value for doctrine in apex cases where the legal questions being examined are about the content of governing authority and how checks and balances can be exercised.

Munsingwear's application on the ground is a bit more complicated than the language of these cases would suggest. In *Munsingwear* itself, for example, vacatur was framed as an exceptional practice warranted only when the equities demand it—a bar that the facts of that case did not even clear.[215] Together with *Bancorp*, one might think that vacatur on consent of the parties would be universally rebuked. That is not quite the case, and *Munsingwear*'s bounds are currently being molded and contested at the Supreme Court. For example, Justice Ketanji Brown Jackson has registered opposition to the Court's use of *Munsingwear* vacatur, reinvigorating the argument that judicial opinions provide public value.[216] Although she notes an uptick in grants of *Munsingwear* vacatur, in ordinary civil litigation, there is still a presumption against vacatur on consent of the parties.

For apex cases, the presumption goes the other way: vacatur on consent is universally granted.[217] This reflects a departure from *Munsingwear* and its progeny. It is a distinct rule that has been developed and applied by federal judges for this set of cases.

In vacating on consent in apex cases, courts recognize that their law-declarative function—that "[j]udicial precedents are presumptively

[214] See Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 Harv. L. Rev. 603, 608 (1992) (recognizing that "decisions on the merits" in socially salient cases "would have served the public interest" in their law declarative effect).

[215] 340 U.S. at 41.

[216] See *Chapman*, 143 S. Ct. at 858 (Jackson, J., dissenting from order to grant, vacate, and remand with instructions to dismiss the case as moot) ("While [vacatur] principles warrant an exceedingly cautious approach to *Munsingwear* vacatur requests, our recent practices reflect a sharp uptick in the number of vacaturs awarded. I would not add this far-from-exceptional case to that growing list.").

[217] In the 1990s, scholars debated the practice of vacatur on consent of private parties in civil litigation. See, e.g., Judith Resnik, Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century, 41 UCLA L. Rev. 1471, 1477 (1994) [hereinafter Resnik, Whose Judgment]; Andrew S. Tulumello, Comment, Shopping for Legal Precedent Through Settlement-Related Vacatur, 1 Harv. Negot. L. Rev. 213, 214 n.7 (1996). Judith Resnik's article is instructive; she explores the complexity of the practice for the parties before the court, the tradeoffs of vacatur on consent, and, ultimately, the role of adjudication. See generally Resnik, Whose Judgment, supra.

correct and valuable to the legal community as a whole"[218]—does not outweigh the attendant benefit to the parties—Congress and the executive—of giving them a clean slate when disputes arise again in the future. This is not some small, one-off exception to *Munsingwear*. To the contrary, although the number of cases is small, the effect is outsized for the area of structural constitutional law. Federal courts have agreed *not* to perform their law-declarative function in apex cases. By design, courts clear "the path for future relitigation of the issues between"[219] Congress and the executive.

If federal courts do not act in their dispute resolution capacity and tailor rules to avoid law declaration, then what role do federal courts play in these cases? At one level, one could argue that if neither mode of adjudication applies, then these cases are not "fit" for judicial review: these cases either are not—or should not be—justiciable. On this view, when congressional investigative power and executive privilege clash, neither Congress nor the executive should be able to call on a federal court. That would be a mistake.[220] First, it leaves Congress without the ability to call on the courts to enforce its powers. Second, it negates the dialogic role that courts can play in explicating the structural constitution.

B. Tripartite Dialogue

Apex litigation is the only space for tripartite dialogue between the branches.[221] When federal courts resolve a separation-of-powers dispute,

[218] *Bancorp*, 513 U.S. at 26 (quoting *Izumi*, 510 U.S. at 40 (Stevens, J., dissenting)).

[219] *Munsingwear*, 340 U.S. at 40.

[220] Indeed, there are other areas in which federal courts neither declare law nor resolve disputes. See, e.g., Resnik, Whose Judgment, supra note 217 at 1477 ("A final challenge to vacatur on consent posits that it violates public values because it is (somehow) basically incompatible with the role of courts. That complaint is undermined not only by the existence of analogous practices, such as consent decrees, but also by a myriad of contemporary developments that promote, as a matter of public policy, the settlement of disputes . . . .").

[221] Procedure scholars have long freed themselves of the two models of adjudication as they have reconsidered, shaped, and critiqued the role of courts and judges. As the first wave of public law litigation emerged, proceduralists looked directly at the role that judges play in shaping litigation and public values. See, e.g., Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 949 (2000); Owen M. Fiss, Comment, Against Settlement, 93 Yale L.J. 1073, 1085–86 (1984); Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 2 (1979) (recasting adjudication as "the social process by which judges give meaning to our public values"). These scholars forced attention to the ways in which judges shape procedure and how procedure, in turn, shapes substance. See, e.g., Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 377–78 (1982) (revealing the then-hidden managerial powers that courts

they are not mere expositors of the separation of powers; instead, they are participants in the separation of powers.[222] Save for the Chief Justice's role in impeachment, appearing for congressional hearings, and participation in rulemaking, the way judges participate in the separation of powers is through cases, whether a final judgment is rendered or not. We should recast our thinking of adjudication in apex disputes not as dispute resolution or law declaration, but instead as participatory and dialogic.

Dialogue has deep roots in constitutional theory. Rather than adhering to strict judicial supremacy in structural constitutional interpretation, the concept of constitutional dialogue recognizes judicial decisions as *one piece* of the interpretive puzzle.[223] Scholars have written about a range of interlocutors with the federal courts, including the public, "legal culture," or the other branches.[224] Apex litigation, I argue, can be viewed as a forum

possess and critiquing their use); Judith Resnik, Managerial Judges: The Potential Costs, 45 Pub. Admin. Rev. (L. & Pub. Affairs) 686, 686–87 (1985). This scholarship upended then-conventional narratives about what civil litigation is and how it functions and, in the process, unlocked richer debates about its role in American society. See Andrew Hammond, The Democratic Turn in Procedural Scholarship, 42 Rev. Litig. 267, 268 (2023). Theoretical debates are far from settled. See, e.g., Alexandra D. Lahav, The Roles of Litigation in American Democracy, 65 Emory L.J. 1657, 1662–63 (2016) (arguing that the process of litigation functions to sustain American democracy and has its own distinct role in adjudication, separate from law declaration or dispute resolution); Matthew A. Shapiro, Democracy, Civil Litigation, and the Nature of Non-Representative Institutions, 109 Cornell L. Rev. 113, 118 (2023) (critiquing the move away from political elements of democracy in civil litigation scholarship); Rachel Bayefsky, Remedies and Respect: Rethinking the Role of Federal Judicial Relief, 109 Geo. L.J. 1263, 1270 (2021) (arguing that "judicial actions that provide relief by expressing respect for dignity—regardless of whether these actions produce any more 'concrete' benefit—are constitutionally legitimate, normatively desirable, and practically feasible exercises of federal judicial power").

[222] Ahdout, supra note 7, at 2363.

[223] See generally Louis Fisher, Constitutional Dialogues: Interpretation as Political Process (1988) (providing a comprehensive analysis of how constitutional dialogue actually occurs through various cases and doctrines).

[224] See, e.g., Robert C. Post, The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 8 (2003) (arguing that the Supreme Court "commonly constructs constitutional law in the context of an ongoing dialogue with culture"); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 653–79 (1993) (arguing that federal courts should be seen as in "dialogue" in their constitutional interpretive role); Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 29 (1975) (arguing that the Supreme Court opens a dialogue with Congress when it prescribes regulatory remedies for constitutional violations); Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 239–40 (1962) (arguing that courts are in a "continuing colloquy" with the political branches and society more broadly).

for tripartite constitutional dialogue.[225] In this model, constitutional interpretation happens between the three branches within a courtroom and concurrent with adjudication. One way to think about apex litigation is as forming a piece of a combination process of litigation and accommodation that cannot and should not be artificially distinguished. There is a single process of pursuing resolution "in the presence of courts."[226] When Congress and the executive come to federal court, they litigate while continuing to engage in accommodation. Accommodation is a literal dialogue between Congress and the executive over disputed constitutional authority. When either of those parties goes to court to shore up its constitutional claim of authority, it is inviting courts into that dialogue. So one cannot describe the role that courts play in disputes between Congress and the president without simultaneously talking about the parallel—and sometimes integrated—process of accommodation.[227]

Accommodation is a *political* process. This means that when courts encourage Congress and the executive to pursue continued accommodation,[228] they are engaging in a political—not a legal—role. And politics is more fluid than law and doctrine. I use the word "political" deliberately and distinguish it from "partisan." Just as the president and Congress are the "political" branches, the argument is that the judiciary takes on a political role when adjudicating apex conflict alongside an accommodation process.

[225] The notion of inter-branch dialogue over another element of the structural constitution—the scope of federal court authority—has been explored by others. Barry Friedman has argued, for example, that the structural bounds of the federal judiciary's jurisdiction should be "resolved as the result of an interactive process between Congress and the Court on the appropriate uses and bounds of the federal judicial power." Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1, 2–3 (1990). See also Lee, supra note 214, at 612–16 (arguing that mootness doctrine should be de-constitutionalized to permit dialogue between Congress and the judiciary over the scope of judicial power).

[226] See Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1341–42 (1994) (using the word "litigotiation" to describe the combination process of litigation and negotiation between private parties in civil litigation).

[227] Others have also recognized a potential overlap between dispute resolution in the private context and in the separation-of-powers context. In a recent article, Todd Peterson argues that district courts should borrow from arbitration processes and set ground rules for negotiations over congressional subpoenas that face claims of executive privilege. Peterson, supra note 47, at 285–91.

[228] Ahdout, supra note 7, at 2377–95.

By recognizing that apex powers litigation is not litigation in a vacuum, but instead litigation against the backdrop of political accommodation, we can recast how we think about several aspects of separation-of-powers doctrine. Court opinions stop looking like the final word and start to look more like negotiating chips. When a court holds that executive privilege must yield, it does not mean that it will. Instead, it means that Congress is strengthened in the negotiation over particular material. More often than not, though, courts do not get to articulate the merits in such clear terms.[229] Instead, they avoid reaching the truly challenging question in favor of more time and process in court and more accommodation outside of court. Delay stops looking like ensuring process, and starts to look more like compressing the negotiating window or, perhaps, changing the players at the negotiating table. This does not mean that judges are partisan, though they may be. It means that judges play a political—instead of legal—role in mediating this type of dispute to its resolution. With this lens on adjudication, it becomes clear that federal courts have participated in entrenching some of the disparities in negotiating power between Congress and the executive. More process and more time inures, institutionally, to the benefit of the executive.

A dialogue lens reveals insights about how structural constitutional law is developed. One question left by the practice of vacatur on consent in apex litigation is whether the vacated cases have remaining legal value for the separation of powers.[230] Of course, once courts engage in adjudication, the opinion is publicly available: online and as covered in the public discourse. Those opinions have some public-facing value.[231] Take apex conflict without litigation as the relevant comparator. If Congress and the president typically negotiate between themselves, then that process can take place entirely in secret. What we know about those negotiations will come from publicly available Office of Legal Counsel ("OLC") opinions, news reports, and interviews with those who were in

[229] In his opinion in *Goldwater v. Carter*, 444 U.S. 996 (1979), Justice Powell joined in vacating a lower court opinion with directions to dismiss the complaint on the grounds that Congress had not issued a formal resolution opposing the termination of the treaty in dispute. Id. at 997–98 (Powell, J., concurring). Had Congress taken such a step, the dispute would not merely be political but would be elevated to something the federal judiciary could hear. One might think of this as "political ripeness."

[230] Cf. Resnik, Whose Judgments, supra note 217, at 1492 (discussing the legal value of judicial opinions vacated on consent of private parties).

[231] Cf. id. at 1498–99 (describing the online publication practices of Lexis and West for vacated opinions).

the room. On the one hand, apex litigation at least presents the tip of the structural constitutional iceberg for public consumption and evaluation. On the other hand, that perspective does not capture what is submerged.

In a substantive area in which there is such a dearth of legal doctrine,[232] we might expect any judicial opinion on a case to be cited in subsequent judicial opinions on related issues and to be taken seriously as legal authority outside of judicial opinions as well. The judiciary treats the vacated cases with mixed weight: some cite the cases, others minimize their import, but in most instances, the cases are not cited at all.[233] OLC, by contrast, reckons with the cases but uses their vacated status to undermine their validity or at least reduce their application.[234] It seems, then, that by vacating on consent, the judiciary is creating a body of decisions that is not binding doctrine, but is valued more than nothing. It seems to be a body of advice on structural constitutional questions. It has some persuasive authority within the judiciary, but limited value for inter-branch conflicts that do not involve the judiciary. This is potentially a valuable attribute of political mootness. Rather than depending on a judiciary correctly deciding structural constitutional law questions that it sees so rarely, Congress and the executive also have a role in defining structural constitutional law.

What courts hold is not an immovable command; it is subject to further development by the coordinate branches and by the judiciary as well. If we view apex litigation as a vehicle for constitutional conversation rather than as a forum for judicial review, then the juricentric notion of

[232] See supra note 40 and accompanying text; Ahdout, supra note 7, at 2374–75 (exploring the concept of "constitutional deserts").

[233] Two cases have considered the line between Congress's power of the purse and the president's enforcement discretion: *United States House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57 (D.D.C. 2015), and *United States House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 18 (D.D.C. 2019). In *Mnuchin*, the district court minimized *Burwell*'s applicability. See *Mnuchin*, 379 F. Supp. 3d at 18 ("This leaves the House with a single, non-precedential case in its support . . . . This slender reed will not sustain the House's burden."). And the Court of Appeals opinion did not cite the case at all. U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

[234] See, e.g., Testimonial Immunity Before Cong. of the Former Couns. to the President, 43 Op. O.L.C. 1, 12 (May 20, 2019) ("Only one district court has ever addressed the testimonial immunity of the President's senior advisers . . . . Although the district court held that presidential advisers were not entitled to absolute immunity from compelled congressional testimony, the court of appeals stayed that decision pending appeal, and the parties settled without any appellate decision on the merits."); id. at 14 (reiterating that "[t]he case settled and the appeal was dismissed before any further action by the court of appeals").

constitutional interpretation articulated in *Marbury v. Madison*[235] does not apply to these structural constitutional fights. Judicial decisions are not the final word on executive privilege, presidential immunity, or the appropriations power. Instead, judicial decisions begin to look like a judicial opinion on the matter that can factor into the other branches' actual resolution.[236] Framed as dialogue, precedent would appear less precedential than advisory. Although the federal courts have long disclaimed authority to issue advice,[237] this seems to be a way in which they have embraced an advisory role. Viewed through the lens of tripartite dialogue, the long-settled ground rules of Article III adjudication—like the prohibition on advisory opinions or the application of mootness doctrine—are opened to renewed debate.

IV. EVALUATING POLITICAL MOOTNESS

Political mootness may be a feature and not a bug of our separation-of-powers system. Legal doctrine and precedent are often—though not inexorably—fixed. Fixed rules concerning governing power may be counterproductive to the smooth functioning of congressional and executive conflict, which demands some flexibility. In a world in which most apex conflict is handled sans courts, we may prefer roles for courts to be interlocutors, not dispute resolvers or law declarers.

But there are some structural problems made visible by political mootness. The distortionary effects of time do not affect Congress and the president evenly. This Part first examines how the branches came to political mootness. It then moves on to suggest how we might evaluate political mootness.

A. Political Mootness as Structural Equilibrium

From each branch's vantage point, political mootness makes sense. As elections take place and time passes, partisan and institutional forces shift in the political branches. Each of the branches prefers mootness—and

[235] 5 U.S. (1 Cranch) 137, 177 (1803).

[236] This would open up "space" in which the co-equal branches could act. See Sprigman, supra note 203, at 1784 ("The Constitution's indeterminacy opens a space for Congress to reclaim authority, in particular cases, over constitutional interpretation.").

[237] Of course, advisory opinions have long been thought to fall outside of Article III's limits. Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), *in* 13 The Papers of George Washington: Presidential Series 392, 392–93 (Christine Sternberg Patrick ed., 2007) (declaring that the judicial power does not include the power to issue advisory opinions).

vacatur—to continuing the dispute. Because political mootness has both political and institutional dimensions to it, political and institutional incentives can show how it came to be. The following discussion should not be taken as a defense of political mootness, but merely an exploration of the parties' incentives.

1. The Executive

From the perspective of the executive, the incentives are perhaps most clear. By the time a separation-of-powers settlement is on the table, the executive has generally suffered losses in federal court.[238] Although the president can continue to press appeals to challenge those losses, litigation takes resources and the ends are not certain. What is more, because the president is both a person and an office,[239] a new officeholder may not feel as strongly about the substance of the prior fight as his predecessor did. It seems clear, for example, that the Trump Administration did not want to prioritize litigation about funding the ACA while the Administration was trying to repeal the statute, and that the Biden Administration did not want to prioritize litigation in defense of President Trump's former White House Counsel claiming testimonial immunity. Although they do not want to expend resources on the substance of the dispute, each administration does care about the institutional rules that the lower court set that would make their administration more vulnerable—whether it's Congress's ability to enforce appropriations challenges in the courts or Congress's ability to enforce a subpoena against a recalcitrant executive official. Vacatur of executive-unfriendly cases, then, is the main outcome a new administration wants.

2. Congress

From Congress's perspective, partisanship has significant explanatory power. When partisan forces outweigh institutional ones, Congress is more willing to relinquish favorable judicial opinions. When Congress initiates litigation, it is exclusively in times of divided government. When the rotation of power results in unified government, the party in control of the relevant house of Congress has a new priority. As a senior staffer explained, "It's awkward to litigate a case against your own Justice

[238] See supra Part I.

[239] See Daphna Renan, The President's Two Bodies, 120 Colum. L. Rev. 1119, 1133–35 (2020).

Department. So you find a way to settle it."[240] But even if you are a House staffer at the start of a unified administration, history teaches that the midterms may be bad for your party, so the most immediate beneficiaries of preserving pro-Congress federal-court precedent is the opposition party when they retake the Chamber.

What is surprising is not that institutionalism gives in to partisanship,[241] but that there are cases in which it does not. This is why *Committee on the Judiciary of the United States House of Representatives v. McGahn* and *United States House of Representatives v. Mnuchin* are so significant: the Democratic-controlled House negotiated with the Democratic-controlled White House and did not give up all the Congress-favoring doctrine. The evidence in *McGahn* is clearest. Although the parties settled and agreed to vacate the D.C. Circuit's en banc opinion on cause of action, they did not agree to vacate the D.C. Circuit's en banc opinion on congressional standing to enforce subpoenas.[242] The evidence of institutionalism in *Mnuchin* is a bit more hidden. In a time of unified government, the Biden Administration filed a cert petition with the Supreme Court seeking *Munsingwear* vacatur.[243] The House opposed, arguing that the limited decision on congressional standing should not be disturbed.[244] In the context of unified government, this opposition is significant.

The House's legal actions in these two cases demonstrate at least some desire to advance the institution's interests in federal court, which is a departure from the norm. Two staffers underscored how challenging these decisions—to press against a common party in the White House—were, both internally to the House and with the DOJ.[245] These cases indicate that, from the perspective of Congress, political mootness may not be the first choice, but it is an acceptable one.

To be sure, Congress has played a role in reaching political mootness. But *McGahn* and *Mnuchin* indicate that it could push to move away from political mootness. If so, federal courts should be open to that change,

[240] Interview with Senior Staffer (June 26, 2024).

[241] See Levinson & Pildes, supra note 68, at 2312.

[242] See supra Subsection I.B.1.

[243] Petition for a Writ of Certiorari at 11, Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021) (No. 20-1738).

[244] Brief in Opposition at 9–10, *Yellen*, 142 S. Ct. 332 (No. 20-1738).

[245] Interview with Senior Staffer (June 13, 2024); Interview with Senior Staffer (June 26, 2024).

particularly in light of how difficult it is to overcome the forces of partisanship in Congress.

3. The Judiciary

Political mootness is also supported by the federal courts. In prior work, I have documented the practice of federal courts employing techniques to avoid compelling coordinate branch officers to act.[246] Like a hot potato, federal courts use legal doctrine, jurisdiction, and process to avoid using their authority and imprimatur to force action on a coordinate branch. It is not a wonder, then, that judges welcome political mootness and vacatur on consent of the parties. These challenging cases are off the docket, and courts can reserve their limited capital in separation-of-powers cases for those that more directly implicate judicial prerogatives.[247]

B. Political Mootness and the Public

Although political mootness can be explained by the various incentives at play, the question remains whether it serves the public.

1. Clarity Versus Uncertainty

There is an argument that constitutional conflict between the branches—whether they resolve through litigation or negotiation—can create precedents that make future conflicts less likely to materialize. By airing out the conflict, the argument goes, apex disputes create social value through the clarity for legal rules, both for today and for future generations.[248] Political mootness shows just how sticky uncertainty is: full-scale litigation between the branches does not result in clarity. But if a court were to deny vacatur on consent, would that clarity of doctrine inure to the public's benefit?

[246] See Ahdout, supra note 7, at 2399–404. See also Nicholas R. Parrillo, The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power, 131 Harv. L. Rev. 685, 704–63 (2018) (documenting the practice of courts not attaching sanctions to judicial contempt orders of administrators).

[247] See Ahdout, supra note 7, at 2399–404.

[248] Posner & Vermeule, supra note 2, at 993.

The argument is that clear legal rules are valuable regardless of their content.[249] Although I am somewhat sympathetic to this position, clarity of *legal* rules is not necessarily a solution for a problem that is, in the main, *political*. To take just one example, although the legal rule on the line between Congress's subpoena power and executive privilege is far from clear, what is clear is that there is *some* amount of information to which Congress is entitled. In 2019, when Democrats gained control of the House, President Trump declared that his White House would not cooperate with any congressional investigation.[250] Full stop. The legal rule had no effect on the political conflict. The problem is that clarity of legal rules is not necessarily constraining on the parties.

2. Rebalance

The main value of judicial involvement for the public may not be in clarifying the content of the structural constitution. Instead, it is in helping to support and rebalance the negotiating table. Political mootness makes the structural imbalance of time visible. From self-constraining authority to avoid apex litigation to negotiating away doctrinal wins in furtherance of partisan harmony, time affects Congress—and the House, in particular—more acutely in conflicts with the executive branch. In interview after interview, those on the Select Committee expressed frustration with the fact that putative witnesses made far-fetched claims of privilege that could not practically be adjudicated by a court in time, so investigators were constantly up against the clock. Indeed, when William Rehnquist was an assistant in the OLC, he drafted a memo on the power of congressional committees to compel the appearance or testimony of White House staff that analyzed both legal and tactical tools at their disposal. Between Congress and the executive, the status quo generally inures to the benefit of the executive. Rehnquist put the matter succinctly:

> [T]he Executive Branch has a headstart in any controversy with the Legislative Branch, since the Legislative Branch wants something the

[249] Id. at 1010–11 ("Clarification of constitutional authority provides major benefits to the public . . . . At any given level of (expected) goodness or badness of the rules, clarity is better than lack of clarity.").

[250] See Charlie Savage, Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers, N.Y. Times (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html.

> Executive Branch has, and therefore the initiative lies with the former. All the Executive has to do is maintain the status quo, and he prevails.[251]

So too with appropriations challenges: if Congress aims to stop the president from spending money in a particular way, the president benefits from the status quo.[252] In such a world, delay is generally the tool of the executive.

Some changes to the process of apex litigation can help recalibrate the balance in negotiations. Some of these are in Congress's own hands. It can pass legislation that both defines a set of apex cases and subjects those cases to expedited procedure. This could include, for example, expedited briefing schedules and mandates. It can statutorily provide for a cause of action to enforce its subpoenas. Congress can create a judicially cognizable vocabulary by legislating motions that can be brought to expedite apex litigation. None of this should be seen as a way to guarantee a decision on the merits before the expiration of the congressional term. Instead, it should be seen as a way to increase Congress's leverage in bargains with the executive.

Of course, the way we got here is because the partisan imperative in Congress significantly outweighs the institutional one. Some statutory chances are less likely to be taken up because the party in power may fear that it will soon turn those powers over to the opposing party. But knowing that the partisan imperative outweighs the institutional one also means there is another potential solution on the table. Congress could hire staffers in key positions—like in the House Counsel's Office or as general counsel to investigative committees—who have institutional motivations and understand how the Justice Department negotiates. Hiring alone is not a panacea; representatives will need to empower them to act, especially in instances where the members will most want to intervene. This is the story of the aberrational negotiation in *McGahn*, where institutionally minded staffers fought hard to maintain some favorable precedent in the D.C. Circuit.

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[251] Memorandum from William H. Rehnquist, Assistant Att'y Gen., Off. of Legal Couns., to the Hon. John D. Ehrlichman, Assistant to the President for Domestic Affs. 6–7 (Feb. 5, 1971) (emphasis omitted), https://www.justice.gov/d9/pages/attachments/2022/10/14/la_19710205_power_of_congressional_committee_to_compel_appearance_or_testimony_of_white_house_staff_0.pdf [https://perma.cc/NY4T-R5YY].

[252] For more on the complexity of defining the "status quo," see Rachel Bayefsky, Administrative Stays: Power and Procedure, 97 Notre Dame L. Rev. 1941, 1957–58 (2022).

Other tools are in the federal judiciary's hands. Scholarship has long recognized that courts have a role when they mediate disputes that ultimately result in settlements between private parties. They have a role in how they structure their calendars and the managerial decisions they make. The same is true in these structural disputes and settlements.[253] Judges have a hand in bringing political mootness to fruition,[254] and they should not do it in ways that systemically entrench Congress's structural disadvantage. Courts should not look at themselves as neutrally pushing back a dispute to be settled between Congress and the executive. They should look at themselves as they are—pushing a dispute back to two parties that are not evenly situated in their negotiations—and make decisions actively to foster more equality in bargaining. Although this is, in some ways, the least concrete suggestion, it is one of the most impactful. If courts recognize how challenging it is for Congress to initiate litigation against the executive and they view their role not as adjudicators but instead as informing the dialogue of the structural constitution, then they can take on a more impactful role. The problem is not the lack of law declaration or the vacatur on consent; the problem is the negotiation process.

CONCLUSION

Apex adjudication is a space where the three branches are in dialogue and where law and politics converge. These cases, at least for the last two decades, have not ended with final judgments on the merits. This is because when apex litigation is initiated, Congress's legal and political interests are aligned, and the executive's legal and political interests are aligned. But as elections take place, and we move from a divided to unified government, legal and political interests diverge, and cases become politically moot. This form of litigation simply cannot be sheared of its politics.

The value of apex adjudication then is not in dispute resolution or in law declaration. Instead, it is in providing a forum for tripartite dialogue. Congress needs the ability to call on the judiciary to support its claim of authority because of structural disadvantages from which it suffers in negotiations with the executive. To take advantage of political mootness's

[253] See Resnik, Whose Judgment, supra note 217, at 1475 ("Vacatur on consent is a vivid moment of judicial involvement in settlement.").

[254] See supra Section I.C.

features and address some of its pitfalls, courts must embrace their role in rebalancing the negotiating table.