

## Common Law S5 Ep 4: Payvand Ahdout Episode Transcript

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**Risa Goluboff:** Today on Common Law, the consequences of conflict over separation of powers in the courts with UVA Law professor Payvand Ahdout.

**Payvand Ahdout:** If we really want the hurly-burly back and forth of Congress and the President to be doing the work, then it matters that we have the right legal baseline, and we know that what we're getting from court is not necessarily that right legal baseline.

[THEME MUSIC UP, THEN UNDER AND OUT]

**Risa Goluboff:** Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean.

**John Harrison:** And I'm John Harrison, a professor at UVA Law.

**Risa Goluboff:** John and three of our colleagues are helping invite and interview guests on topics ranging from constitutional law – one of your many fields of expertise – to corporate law and beyond. We are affectionately calling this season "Co-Counsel: the Appeal."

**John Harrison:** Does that mean that next year it will be called "Certiorari."

**Risa Goluboff:** That's a good federal courts joke, if I ever heard one.

[LAUGHING]

**John Harrison:** If there is such a thing.

**Risa Goluboff:** Exactly.

**John Harrison:** Risa, it's good to be here. In this episode, we're going to be talking to our colleague, Professor Payvand Ahdout. Payvand's scholarship is about separation of powers, the structure of government, federal power, and the federal courts and their relations to the other parts of the government.

**Risa Goluboff:** And it's worth mentioning that Payvand won the Yale Law Journal's inaugural "Emerging Scholar of the Year" award this year.

**John Harrison:** She did. And today we'll be talking about her new paper, "Separation of Powers Avoidance," which will shortly be coming out in the Yale Law Journal. The paper is about how the federal courts, in recent years, have been avoiding directly confronting or deciding questions about separation of powers in cases in which Congress and the executive branch are more or less directly in conflict.

[THEME MUSIC CREEPS IN]

**Risa Goluboff:** We will be right back with Payvand Ahdout.

[THEME MUSIC UP, THEN UNDER AND OUT]

**John Harrison:** Hi Payvand. Welcome to the podcast.

**Payvand Ahdout:** Thank you so much for having me. I'm finally on the Common Law Podcast.

**Risa Goluboff:** Finally!? Have you been waiting a long time?

**Payvand Ahdout:** Every time I see a new episode has uploaded, I wonder, what do I have to do to get on that podcast?

[LAUGHING]

**John Harrison:** I know this is going to have been worth waiting for, Payvand.

**Risa Goluboff:** Oh, that's the right answer.

**Payvand Ahdout:** Thanks.

**John Harrison:** Please tell us why you decided to write this paper. What inspired you?

**Payvand Ahdout:** Yeah, so the paper is called "Separation of Powers Avoidance," and how I come to write my papers is to first look at doctrine, maybe coming from the Supreme Court, and see then how is

that being applied on the ground by lower federal courts when they get sort of broad mandates from the Supreme Court. And then we get this picture of what happens in the lower federal courts that I think people don't always think about, they don't know about, because we're TOO focused on what it is the Supreme Court has said. And so, in this paper, what I've been looking at is mostly lower federal courts having to make decisions about whether to compel a high-level coordinate branch officer – so the president, the vice president, Cabinet officials, senators – to take a particular kind of action or to refrain from taking a particular kind of action. And so I'm looking at how all of these doctrines sort of fit together from discovery, mandamus, also sort of unexpected doctrines like congressional standing – how these all fit together to give us a picture of this reluctance that courts have, a principle that I'm calling separation of powers avoidance, to involve themselves in actually compelling a coordinate branch officer to take a particular kind of action.

**John Harrison:** When you say that this is an avoidance practice or doctrine, what is it they're avoiding?

**Payvand Ahdout:** Courts are trying to avoid compelling officers to do something. That's the main thrust of this paper. But I think that has a whole host of implications for how it affects the merits and getting decisions on the merits. For example, if a federal court says, "We're not going to require the executive branch to claim executive privilege in court before narrowing a discovery order," then we know something about how executive privilege operates in court. There's a prophylactic rule that's sort of around executive privilege when the executive comes to court. That's going to impact that particular case and what happens with that particular district judge and that particular ask. But it's also going to impact the doctrine of executive privilege generally moving forward. And what I document throughout the paper is this idea that it's sort of trans-substantive. It crosses lots of different areas where courts say, "Hey, we're not going to consider that. We're going to try to avoid the issue here and not compel a coordinate branch officer to do something."

But one of the areas that I think is particularly interesting is what I call the process model. And that's when, on appeal, an appellate court says, 'Hey, your decision below wasn't separation of powers-y enough. I'm not going to tell you it was right or it was wrong. Instead, I'm going to remand for you to reconsider the effect of what it is you have done or what it is you have decided on the separation of powers. And that model, the process model, which I think is really the ascendent form of how this

takes place in court, is the one that has the greatest potential to affect the substantive merits of a decision because it keeps pushing the can down the road. And we may never get a decision, for example, on when it is that Congress can subpoena a former president, because by the time a court finally gets there beyond, after layer and layer of avoidance and sending things back and adding time to the clock, the case is going to become politically moot. No one's going to be there to press the case going forward.

**Risa Goluboff:** So do you take that to be the point of the process model, or does that turn out to be a consequence of it – intended or unintended, but a consequence rather than the point?

**Payvand Ahdout:** One of the points of the process model is to kick the can down the road. So we see this kind of reasoning in the opinion Trump versus Mazars, where the chief justice says, "Ordinarily, we want disputes between Congress and the president to go through the sort of hurly-burly, back-and-forth accommodations process between Congress and the president. Like, let them go back and hash it out and not be in court. And so that means we want this to delay, we want to send it back." But in this particular context, what had happened is the case went all the way down to the district court to consider the separation of powers ramifications of what was going on. President Trump was no longer the sitting president. He's now the former president. The case comes back up to the D.C. Circuit and the D.C. Circuit says, "Okay, we've now considered the separation of powers consequences. We think we've exhausted all of accommodations. There's no point anymore to sending this back. You're not going to resolve it. And so we're going to tell you you have to turn over this set of information that's been requested here." And so that should have been the end of the matter. But former President Trump went to the Supreme Court and said, "Block the subpoena." So whether it's the point or a consequence, I think the point is: Let's keep the federal courts out of this. But it has the effect very much of running out the clock, and I'm seeing that, I'm tracking it in real time right now.

**Risa Goluboff:** It sounds like what you're saying also though, Payvand, is that the courts are kind of playing hot potato amongst themselves.

**Payvand Ahdout:** Correct.

**Risa Goluboff:** Is part of the dynamic here that each level of court is trying to avoid answering the question and trying to get a different level to do so?

**Payvand Ahdout:** I think the Supreme Court definitely played hot potato in this case, and I think the D.C. Circuit on remand just said, "I'm going to send it back to the district court without reconsidering this to let it decide in the first instance." But I think the higher you go up on appeal, the higher the stakes in some ways of reaching the merits. And I think it very much was a hot potato up there, but the District Court hasn't passed the buck. The District Court has said, "Turn over the materials" and has said that for years.

**Risa Goluboff:** Mm-hmm.

**John Harrison:** Is a certain amount of delay in cases like this inevitable, where it's going to be a higher court, either the Court of Appeals or the Supreme Court, that actually lays out what the relevant criteria are, but they have to be applied to the particular facts by the lower court. Courts do that a lot and it slows things down. But is there a way to avoid that inevitable delay that comes from sort of the way the federal judiciary is structured?

**Payvand Ahdout:** So I think you're right that there is this idea that federal courts and courts of appeal will send cases back down and have district courts decide things in the first instance. But one of the things that I found so striking in this context is how much things are slowed down, given the parties before the court. So ordinarily, when Congress issues a subpoena to a private individual, there's a rule in federal court to sort of get to the disposition as quickly as possible because a coordinate branch of government needs that information and the courts want to facilitate finding out the answer. But here, courts have taken the opposite approach and there's nothing barring a court of appeals or the Supreme Court from taking the standards that it articulates and applying them in the case at hand instead of remanding to a court of appeals, to then remand to the district court to start all over in the first instance. So it's the disparity between the separation of powers cases involving the executive and Congress as parties, and non-separation of powers cases that might involve similar doctrines that it is particularly striking for me.

**John Harrison:** Do you think it's possible that in the last couple years the Supreme Court has gotten a little sensitive about criticism of their

acting summarily through what's called the "shadow docket," through their applications docket, and maybe the Supreme Court wants to be really procedurally regular about this, so they don't draw more criticism about just, sort of, deciding cases without sort of adequate ventilation, so they're making sure everything goes through the process. Might that be part of it?

**Payvand Ahdout:** I might be a little bit too cynical to say that that's part of it. And the reason that I'll say that is the court is still quite active on its shadow docket, certainly in the death penalty context, but even in the executive power context with these subpoena cases. So they're getting applications all the time, and they're deciding them, and they're deciding them summarily or with just a few paragraphs of guidance. So just yesterday, the court denied on its shadow docket a petition filed by Senator Lindsey Graham where he asked for the protection of the speech or debate clause to keep him from having to testify before a Georgia grand jury. And the court articulated just in three paragraphs that this isn't necessary, given what's happened in the lower federal courts and that they've articulated that Lindsey Graham can invoke the speech or debate clause as to particular questions. And so they're giving slightly more explanation, I think, on the shadow docket than they would have for what we saw a couple of years ago. But I don't think that that's seeping into the merits docket in quite the same way that you suggest.

**Risa Goluboff:** So you've mentioned a few examples – so, congressional standing, discovery, subpoenas – so, can you give us a sense of the whole landscape? What are the different places where this is popping up?

**Payvand Ahdout:** The sort of hottest areas that I'm seeing now are the subpoena cases. Congress is really, really active in trying to get information in the oversight committees and in legislative committees also, from the former president. And I think the litigation that I see is really tied to particular kinds of events that have transpired over the last five years. So the reason we see, for example, a case involving Senator Lindsey Graham is because of the January 6th insurrection. And the interest in Georgia of finding how it is that Lindsey Graham may have played a role in their election process in 2020. And so I think the litigation is a natural outgrowth of events that we've seen. So most of it is related to the sort of extraordinary events in time that can spawn lots of litigation. And some of it is tied to just having a really active Congress wanting to engage in oversight. And I think that if Congress were to flip hands and there's a Democratic president and a Republican-controlled

House, we're still going to see the same sort of things pop up because this has become the new normal.

**John Harrison:** I was just about to ask about whether this is the new normal, because one possibility is that the Trump administration was unusual and that issues associated with it will sort of gradually fade away, and maybe kicking the can down the road is going to be a successful strategy. But if both the executive branch and Congress have sort of learned from these events and discovered we have additional tools and Congress gets more interested, this kind of clash might be the new normal, and this might go on for decades. How, how likely do you think that is?

**Payvand Ahdout:** So let me say I love that question, because I'm always told like, "These seem like aberrational events." Right? Hopefully we don't have a mob try to break into the U.S. Capitol regularly. And I think that's totally right. But when you look back and see where doctrines like executive privilege had their outgrowth from, like where they come from, most cases have at their inception something going on during the Nixon era, right? And I think that anyone who was observing at the time what was going on during the Nixon era would think, "Well gee, this is really aberrational." But I think that these doctrines take on a life of their own. And the executive privilege that Nixon was claiming is the same one that Barack Obama was claiming, right? And so I don't think that once you create a tool or you create a doctrine or develop a doctrine or however it is you want to put it, that you can then take the worms and put them back in the can.

[LAUGHING]

**Payvand Ahdout:** Or some metaphor that makes sense, right? So I don't think you can go backwards and you can undo the clock. I think, and I hope that some more challenging aspects of real life that have led to this litigation dissipate, but I think that the results, the outputs that we get from court, those are going to live on.

**Risa Goluboff:** And you think that the fact of judicial avoidance is a, a negative, right? You think that that process is going to be disserved by the judiciary's reluctance to weigh in.

**Payvand Ahdout:** So I actually don't take a position in this paper, and I haven't completely decided whether I think it's a good idea for courts to

avoid this sort of interaction with a coordinate branch. We do have to understand that the doctrine we're getting out of court isn't telling us exactly what the constitutional contours of executive privilege is, for example.

**Risa Goluboff:** So these avoidance approaches, they have real consequences.

**Payvand Ahdout:** Exactly. And so if we're relying on courts to tell us, "This is what the law is," what we're getting is not an articulation of what the law is. And if we really want the hurly-burly back-and-forth of Congress and the president to be doing the work, then it matters that we have the right legal baseline and we know that what we're getting from court is not necessarily that right legal baseline.

**John Harrison:** This is closely connected to one of the most interesting pieces of the paper, I think, which is the suggestion that when the other branches, Congress and the president, are in conflict and are looking to the courts for some kind of guidance, they should recognize that what the courts say that's not the view from nowhere, that's the view from Article III. And what they say and what issues they decide and what issues they don't decide are influenced by the court's own view about their own role and aren't just abstract statements about the Constitution. Does that suggest that maybe some of the recent history – if this continues as we've been saying it might – maybe some of the recent history is interestingly less relevant than one might think, because your suggestion is, "Don't take too seriously everything the courts have said, cause they have their own reasons to avoid."

**Payvand Ahdout:** So I think if people read the article and tune into this podcast and we really see everyone – when I say everyone, I really just mean Congress ...

[LAUGHING]

**Payvand Ahdout:** ... and we see Congress sort of press back on what the court has said, or we see some judicial self-reflection, right, where they break out avoidance as a separate step and acknowledge that this is something that they're doing so that we can separate out law from law reflected through the lens of avoidance, then I think the import is not that great going forward. But I think without understanding the law we have, or the common law that we have, basically, is refracted through this lens



of avoidance, I think the impact is really great. And we already see at least the Office of Legal Counsel citing these opinions and extending and building on these opinions as though they tell us something meaningful and really meaningful about the content of law that it is they're trying to take advantage of.

**John Harrison:** As opposed to about the institutional role of the courts.

**Payvand Ahdout:** Exactly.

**John Harrison:** Do you think that it matters here, both for the last couple years and, and what's likely to happen in the near future, that in a sense, both the courts and the executive branch are institutionally better set up to articulate their positions on legal issues. Courts issue opinions, they have the Supreme Court of the United States, the executive branch has OLC and you just talked about what OLC is doing with some of the things the courts have said in the avoidance cases, and it's harder for Congress because of its institutional structure to elaborate over time a consistent legal theory. Is that part of the story here?

**Payvand Ahdout:** I think it's definitely a piece of the story. I teach a lot of these cases that are part of this paper in one of the classes here at UVA, Separation of Powers in the Federal Courts. And I had a student come in today to talk about his final paper, and he said, "I really want to write about creating a congressional counterpart to OLC, right? Like what would that look like if Congress could advocate for itself what it thinks the articulation of law ought to be?" And I think as a theoretical exercise, that's incredibly interesting. But I do also think practically we need to be asking how do we empower Congress to take a consistent position over time with respect to the Madisonian ideal of pushing for congressional power because Congress itself is really mired in partisan politics, right? Probably more than any other branch, because even if the president is partisan, they still have the really high incentive to be executive-power friendly, but Congress or certain congresspeople might have the incentive to delegate over power to the president when they share a political party, right? So we don't have congresspeople acting in precisely the same way in terms of institutional self-interest as we might see or think that we might see in the other branches. And so I think it's a piece of the story. I think it's important, but I also think we can empower Congress to take that role possibly through litigation by giving them formal channels to articulate their positions.

**Risa Goluboff:** This conversation about Congress and the challenges that Congress has, both internally and externally, prosecuting its own interests, suggests that they're kind of the losers in this judicial avoidance approach, right? Is that systematic? Am I right to think that, that courts' hesitance and reluctance to intervene, does that kind of systematically redound to the benefit of the executive branch, or are there moments when it goes the other way too?

**Payvand Ahdout:** I think you're right that the systemic effect of this avoidance that I'm talking about is to inure to the benefit of the executive. I don't think that that's because of sort of executive deference like we might see in the national security context. I think it's instead because the executive branch is also the main litigator. It's who you sue when you're suing the United States, and so the executive is the one who's in court. So in all of the cases between private individuals and the United States or the executive branch that involve executive privilege, we're going to get much more doctrine refracted through the lens of avoidance that relates to the executive branch than we do with Congress, because Congress just isn't in court that often.

**John Harrison:** And the executive is the operational arm of government and so any doctrine that keeps the courts from deciding is largely a doctrine that keeps the courts from deciding AGAINST the executive, because usually it's doing something. See for example, DOMA.

**Payvand Ahdout:** That's a great point.

**John Harrison:** Do you think there's any room here for Congress to pass a statute about avoidance and to say, in this kind of case, the courts are, under the following circumstances, to decide them? I'm not sure how to tell a court not to avoid, but is that an option?

**Payvand Ahdout:** So it kind of depends on what avoidance is, right? If avoidance is just a judicial practice that judges have ascribed to because they don't want to go there ...

**John Harrison:** Mm-hmm.

**Payvand Ahdout:** ... then I think it's really hard for Congress to force them to go there. But if instead it embodies this sort of resistance norm that judges think Congress and the president want – like, judges think Congress and the president want more time to hash things out ...

**John Harrison:** Mm-hmm.

**Payvand Ahdout:** ... then I think what Congress has to say is more important, right? And wouldn't run afoul necessarily of Article III considerations. But I think with any sort of congressional legislation telling courts how to decide a case or when to decide a case, we're going to start running into all of those tricky doctrines about Congress' role in prescribing judicial decision-making. In some cases it's totally permissible and in other ones it's a lot dicier. And so I don't know when you get to the problematic zone.

**Risa Goluboff:** I want to play devil's advocate for a minute.

**Payvand Ahdout:** Okay.

**Risa Goluboff:** Is it not the case that Congress' inability to speak as a single body might be a feature, not a bug? I mean, there's a reason why congressional interests are more varied and dispersed and how do we know whether it's really something we want for Congress to be able to articulate interests as Congress that transcend the separate interests of the members?

**Payvand Ahdout:** That's a really interesting and good question, and I think that there are a lot of contexts where we do like the fact that Congress is its members, right? It's not the unified body. But when Congress is challenging the executive branch and the executive branch has an incentive always to advocate for executive power regardless of who the party holding the presidency is, then there really is an asymmetry between someone pushing for Congress' interests and someone pushing for the executive branch's interests. And I think that the executive branch can then take all of that legal argumentation and advocate for itself in federal court through the Department of Justice, through the Solicitor General's Office with a really unified voice. And there isn't someone looking out for congressional authority beyond the House Council who's participating only recently and usually as amicus. So I really advocate in the paper if Congress wants to take the executive head-on, then it should be allowed to take the executive head-on and it should be allowed to engage in a real separation of powers conflict if it wants to. If they make the decision that this is worth it, this is where we really want to expend our capital, then that is a completely legitimate thing for Congress to choose to do, and it shouldn't be encumbered by the fact that the judiciary doesn't want to wade into that territory.

**John Harrison:** Do you think any of what the courts have been doing is explained, not only by concerns about their own institutional standing, but maybe by misguided views about what is better for Congress?

**Payvand Ahdout:** I think it's really hard to think that that's what's going on here when the House is literally a party before them saying, "Help us enforce the subpoena against the executive branch." I think there are some cases where you're right and it's a little bit easier to think that maybe courts think they're doing something good for Congress, they're doing something good for the executive branch. But when the House is literally a party before them saying, "Confirm we have the power to do this, we have the power to bring the president or the secretary of the Treasury in, or the White House Council in before us," then it's really hard to think that it's good for Congress to kick the can down the road.

[THEME MUSIC CREEPS IN]

**Risa Goluboff:** Well, Payvand, that was fabulous. Thank you so much for being with us today. I learned so much and it's super interesting and obviously really, really important.

**John Harrison:** Thank you, Payvand. And if nothing else, you've demonstrated this is not going away. These issues are going to be around for a while.

**Payvand Ahdout:** Thank you for having me here. It's one of my favorite things as an academic to be able to talk about my work. So, not only giving me this outlet, but also spending the time to engage with it and ask me all these questions. This has been so much fun.

[THEME MUSIC UP FULL, THEN UNDER]

**Risa Goluboff:** So, John, I'm curious, you know, we were talking with Payvand about whether this kind of litigation with avoidance is going to kind of, you know, fade away as times change or whether you think it really is a new normal and we're going to continue to see these kinds of cases.

**John Harrison:** Mm-hmm.

**Risa Goluboff:** What's your view?

**John Harrison:** I think there's a real chance that this is going to be the new normal. Because one thing that sometimes happens in unusual circumstances is people and institutions learn. People learned a lot about what can be done online because of the pandemic. Once they have reason to develop new tools, they discover, "Oh, maybe this tool is generally useful." I suspect that we have by no means seen the last of this kind of litigation

**Risa Goluboff:** The conversation we were having really reminds me of something Sai Prakash said when he was on our podcast: The framing and the structure of the Constitution really does assume that each of the branches is protecting its power as a central goal of its own exercise of that authority and that the Constitution and the framers didn't really anticipate just how powerful political parties would become and how powerful partisanship would be. And that one of the things we've seen is partisan interests overtaking the structural interests of a particular branch. And I'm curious what you think of that, if you think that's part of this conversation as well.

**John Harrison:** I think that is absolutely part of the conversation that political parties, as we know them, probably the most important unanticipated change that has ramifications for the whole constitutional system. There's a difference between the situation when the House is Republican and the presidency is Republican and the situation in which they're in the hands of opposite parties. And one of the things a lot of people lament is decline in congressional interest, just in the powers of Congress as an institution. I think on that score, polarization may matter. That is to say, even with partisanship, when there is lesser polarization, members of Congress of both parties may be able to agree on maintaining congressional prerogatives so that some of them are congressional prerogatives against a president of their own party ...

**Risa Goluboff:** Right.

**John Harrison:** ... whereas in times of high polarization, that's more difficult.

**Risa Goluboff:** Right. We didn't get to talk to Payvand about the analogy to qualified immunity, but that's obviously another issue that is on the minds of a lot of courts, a lot of lawyers, a lot of legal scholars these days. And, you know, the way she describes it, it really functions

in a similar way of avoidance that leads to the lack of doctrinal elaboration, right?

**John Harrison:** I think that's right. There is a similarity to qualified immunity and failure to develop the doctrine. But on the other hand, I think what's a little different about separation of powers avoidance is that the courts at least think that if THEY don't decide, there's another track, sort of the political track between Congress and the president, in which they can both work out particular issues and set precedents that may be precedents for later congressional-presidential interactions. So I think here the courts are seeing another way for the system to continue to move that doesn't involve them.

**Risa Goluboff:** Historically, in these separations of powers cases – think about Justice Jackson's opinion in the steel seizure cases – when the court does decide, or maybe as part of the court's decision about whether to decide, the court is taking into account how Congress and the president have interacted before, and what has happened before. So the court is essentially creating more and more opportunities for Congress and the president to work things out on their own in whatever fashion that the court is then going to consider going forward. So you're in a kind of a dynamic feedback loop going forward.

**John Harrison:** Yes. And insofar as judges like to be able to point to congressional and executive practice as the foundation for what they're doing, "See, all of the branches concur in how this should work," they have a reason to want to encourage the other two to work things out and generate precedence. Yes.

**Risa Goluboff:** So I wonder if this moment becomes the basis for those new kind of practice equilibriums that the court then looks to going forward, right? This new normal doesn't have to be a new normal of continuous avoidance, right?

**John Harrison:** Mm-hmm.

**Risa Goluboff:** It could be that this moment then becomes fertile as one that provides, uh, customary or practice-oriented relationships and precedents, not judicial precedents, but historical precedents that then provide the court with fodder – or all three branches, I guess really – with fodder for what those relationships look like in the future.

**John Harrison:** That can certainly happen. I think that's going to depend on the willingness and the ability of Congress and the president to work on both the judicial and the non-judicial tracks and sometimes to work things out on the non-judicial tracks, which will then become precedents that are also relevant when these cases do get into court.

[THEME MUSIC CREEPS IN]

**Risa Goluboff:** Well, it's absolutely fascinating and I really enjoyed talking to Payvand and I always enjoy talking with you, so thank you, John.

**John Harrison:** Thank you, Risa. This has been great.

[THEME MUSIC UP FULL, THEN UNDER]

**John Harrison:** That does it for this episode of Common Law. If you'd like more information on Payvand Ahdout's work, please visit our website, Common Law Podcast dot com. There you'll find all of our previous episodes, and more.

**Risa Goluboff:** We'll be taking a short hiatus over our winter break here at the Law School, and we'll return in February with Co-Counsel hosts Danielle Citron and Greg Mitchell for more explorations of how law shapes our lives. I'm Risa Goluboff.

**John Harrison:** And I'm John Harrison.

[THEME MUSIC UP FULL, THEN UNDER]

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