

Volume 10 | Issue 2

Summer 2007

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Recommended Citation

Anant Raut & J. B. Schrader, *Dereliction of Duty: When Members of Congress Vote for Laws They Believe to Be Unconstitutional*, 10 N.Y. City L. Rev. 511 (2007).
Available at: 10.31641/clr100216

DERELICTION OF DUTY: WHEN MEMBERS OF CONGRESS VOTE FOR LAWS THEY BELIEVE TO BE UNCONSTITUTIONAL

*Anant Raut**
J. Benjamin Schrader†

[Y]ou swore an oath, as I did, when you became Members of this body to uphold the Constitution of the United States. . . . You cannot . . . ignore your own duty properly to interpret the Constitution, which you have inherited after 200 years of history. . . . [T]o duck your responsibility on the ground that sometime, at some future date, the Supreme Court will have final authority over the question is to ignore the oath which you swore when you became a Member of this body.

—Senator Slade Gorton (R-WA), 1984¹

INTRODUCTION

Members of Congress have an obligation not to vote for legislation they believe to be unconstitutional. That obligation stems from the oath that every Senator and Representative takes to support and defend the Constitution, and is bolstered by the deference afforded by the courts which presume that Congress does not intentionally pass unconstitutional legislation.

Occasionally, however, some Senators and Representatives vote for legislation they believe to be unconstitutional. This occurred most recently with the passage of the Military Commissions Act of 2006, during which two Senators and one Representative voted in favor of the legislation despite their belief that it did not pass constitutional muster. This Article argues that voting in such a manner is a dereliction of constitutional duty. Furthermore, this Article demonstrates how the modern legislative climate became conducive to this sort of behavior by tracing the shift from a Madison–Jackson model of coordinate construction to one of judicial superiority in which members of Congress defer questions of

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¹ Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 721 (1985) (citing 130 CONG. REC. 10844, 10862 (1984) (statement of Sen. Gorton)).

constitutionality to the courts without conducting a searching constitutional analysis themselves. This Article then examines the potential consequences of this voting posture for (i) the Senators and Representatives who willfully vote for a bill they believe to be unconstitutional; (ii) a President faced with signing such a bill; and (iii) the courts which will later hear challenges to the new legislation. This Article concludes with a prediction of how these consequences may permanently change legislative debate.

I. CONGRESSIONAL DERELICTION OF DUTY AND THE MILITARY COMMISSIONS ACT OF 2006

In September 2006, Senator Arlen Specter (R-PA) took to the Senate floor to decry what he believed to be a patently unconstitutional provision in the proposed Military Commissions Act of 2006 (MCA).² The section of the MCA in question purported to strip U.S. federal courts of jurisdiction over the habeas corpus claims of alien enemy combatants, including detainees held at the U.S. Naval Base in Guantánamo Bay, Cuba.

Senator Specter identified two significant problems with that section. First, the provision sought to eviscerate recent Supreme Court decisions³ granting the detainees a right to have their habeas claims heard in the District Court of the District of Columbia.⁴ Senator Specter feared that the removal of habeas corpus jurisdiction over these cases would “set back basic rights by some 900 years.”⁵

Second, and more fundamentally, Senator Specter believed that this section of the legislation ran contrary to the plain text of the Constitution.⁶ Under Article One, Section 9 of the Constitution, Congress may only suspend the writ of habeas corpus in times of “rebellion or invasion”;⁷ it was clear to Senator Specter that America was experiencing neither. In an impassioned speech before the National Press Club prior to the vote, Senator Specter vowed not to “support a bill that’s blatantly unconstitutional,”⁸ and

² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

³ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

⁴ 10 U.S.C.A. § 950g (West 2006).

⁵ 152 CONG. REC. S10264 (daily ed. Sept. 27, 2006) (statement of Sen. Specter).

⁶ *Id.*

⁷ U.S. CONST. art. I, § 9, cl. 2.

⁸ Nat Hentoff, Editorial, *Protect the Constitution: Terror Suspects Deserve Habeas Corpus Right*, WASH. TIMES, Oct. 16, 2006, at A21.

introduced an amendment that would have excised from the proposed legislation the section purportedly stripping the courts of habeas corpus jurisdiction.⁹ His proposed amendment failed by a razor-thin margin, 51 to 48,¹⁰ and the provision that he had a day earlier lambasted as unconstitutional remained part of the bill.¹¹ And yet, incredibly, he voted in favor of the bill.

Nor was Senator Specter the only one to make such a choice. The same habeas-stripping provision gave Senator Gordon Smith (R-OR) “pause.”¹² According to Senator Smith, denying detainees habeas corpus rights amounted to a “frontal attack on our judiciary and its institutions, as well as our civil rights laws” that threatened to destroy a “cornerstone of our constitutional order.”¹³ Yet, despite these grave reservations as to its constitutionality, Senator Smith voted in favor of the MCA as well.¹⁴

On the House floor, a third member of Congress, Representative Robert Andrews (D-NJ), expressed “severe reservations” with respect to the MCA.¹⁵ He found the habeas-stripping provision to be constitutionally “ambiguous,” and, to boot, “not very wise.”¹⁶ He knew that the bill would require modifications in the Senate or in the Conference Committee to cure its glaring constitutional defects. Yet, to “move it forward,”¹⁷ he punched “yes” from his House seat and voted for the bill as well.¹⁸

The vote of each of these politicians in support of a bill he believed to be unconstitutional constitutes a dereliction of his sworn duty to support and defend the Constitution. U.S. Senators and Representatives are bound by the Constitution not to vote for laws they believe to be unconstitutional. This Article examines the origins of this voting obligation, and how a shift from a traditional Madison–Jackson model of coordinate construction has fueled the misperception in the minds of legislators that the role of the judiciary is to “clean up” whatever unconstitutional laws Congress may pass. This Article explores the punitive consequences for Senators and Representatives who vote for legislation they believe to be unconstitutional; the obligations of the President with respect to such

⁹ 152 CONG. REC. S10263 (daily ed. Sept. 27, 2006) (statement of Sen. Specter).

¹⁰ 152 CONG. REC. S10369 (daily ed. Sept. 28, 2006) (rollcall vote no. 255).

¹¹ *Id.*

¹² 152 CONG. REC. S10364 (daily ed. Sept. 28, 2006) (statement of Sen. Smith).

¹³ *Id.*

¹⁴ 152 CONG. REC. S10420 (daily ed. Sept. 28, 2006) (rollcall vote no. 259).

¹⁵ 152 CONG. REC. H7540 (daily ed. Sept. 27, 2006) (statement of Rep. Andrews).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

legislation; and how the taint of improper voting should influence a court examining the constitutionality of this bill and others passed under similar circumstances.

As a final note, this Article is not about Senators and Representatives voting for legislation that they believe to be constitutional, though labeled unconstitutional by opponents. Such characterizations are part of the rhetoric of impassioned legislative debate. Nor is it about Senators and Representatives who vote for legislation that they believe to be constitutional, but that is later held by courts to be unconstitutional. What is mandated is not perfect prescience of the courts' behavior, but rather a good faith belief in the constitutionality of the legislation for which they are voting.

In addition, the conclusions of this Article are unaffected by Arrow's Theorem, which postulates that Senators and Representatives, due to the nature of the voting process, are frequently not able to vote for the version of a bill they would prefer, and must instead vote for what they consider to be the lesser of two evils.¹⁹ The constitutional obligations of Senators and Representatives with respect to voting are absolute. The Constitution is unambiguous in this respect. No matter which version of a bill members of Congress ultimately vote for, they may not vote for a version that they believe to be unconstitutional. This Article is thus limited to an examination of the consequences of those instances in which Senators and Representatives, believing proposed legislation to be unconstitutional, vote in favor of it anyway.

II. ROOTS OF THE CONGRESSIONAL OBLIGATION

The primary source of the obligation of members of Congress not to vote for legislation they believe to be unconstitutional is the Congressional oath, taken by every member when he or she is sworn into office.²⁰ Support for this obligation can be found in the modern judicial system, which habitually defers to the judgment of Congress in presuming that legislation passed by Congress is constitutional. Additional validation is found within scholarly literature on the matter.

¹⁹ See Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 CAL. L. REV. 1745, 1777 (2006) (defining Arrow's Theorem as "the idea that a vote involving a three-way split of opinion can create a majority result that no majority actually supports").

²⁰ See 5 U.S.C. § 3331 (2000) (setting forth the required oath of office for elected officials).

A. *The Constitution*

The oath of office stems from the requirement in Article Six of the Constitution that members of Congress take an oath of office.²¹ The modern version of the congressional oath is set forth in 5 U.S.C. § 3331:

I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose or evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.²²

It is true that neither the Constitution nor the congressional oath explicitly prohibits members of Congress from voting in favor of legislation they believe to be unconstitutional. However, a close textual analysis divines this meaning. The obligation embodied in the Congressional oath is to “support” the Constitution. The Oxford English Dictionary defines “support” as “[t]o endure without opposition or resistance,” or “[t]o strengthen the position of by one’s assistance, countenance, or adherence; to uphold the rights, claims, authority, or status of; to stand by, back up.”²³ By a plain reading of the Oath, members of Congress are thus obligated to *strengthen the position of* the Constitution, to *uphold the authority of* the Constitution, and to *stand by* the Constitution. It is this commonsense reading of the Oath that lays the foundation for the widely held belief that Senators and Representatives are obligated not to vote in favor of unconstitutional laws.

Louis Fisher highlights two sections of the Constitution as further evidence of the implicit obligation of members of Congress to conduct an independent analysis of the constitutionality of legislation prior to voting. The explicit instructions contained within these sections necessitate a preliminary determination of constitutionality.

The Constitution mandates, for example, that “No Bill of Attainder or ex post facto law *shall be passed.*” Accordingly, members should make a constitutional determination on this issue prior to, not after, a bill’s passage. Similarly, the first amendment commands that “Congress *shall make no law* respecting an estab-

²¹ U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution . . .”).

²² 5 U.S.C. § 3331 (2000).

²³ OXFORD ENGLISH DICTIONARY (2d ed. 1989).

lishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” It would be unseemly for members to legislate blindly, expecting the judiciary to correct the constitutional problem at some future date.²⁴

Fisher’s position is supported by the fact that there is nothing, either in the cited language or the remaining language of those sections, that in any way suggests that the required analysis would be *in contrast* to the ordinary expectations of Congress. The language serves as guideposts for a preliminary constitutional analysis it assumes members of Congress have already undertaken.

B. Validating the Obligation: The Courts

In first-impression analyses of new laws, courts routinely begin with the presumption that the law is constitutional. It is a well-established principle that federal courts assume the constitutional validity of legislation passed by Congress, “[f]or it cannot be presumed that [Congress] would have expressly ratified and sanctioned laws which they considered unconstitutional.”²⁵ As Senator Specter himself seemed to recognize, “[b]ecause Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional.”²⁶

This presumption dovetails with the judiciary’s “canon of constitutional avoidance,” which “comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction”²⁷ When this occurs, “the Court must adopt the one that avoids grave and doubtful constitutional questions.”²⁸

The canon of avoidance is limited to cases of statutory ambiguity. Its bias towards presumptive constitutionality²⁹ is premised on

²⁴ Fisher, *supra* note 1, at 719 (internal citations omitted).

²⁵ *Ogden v. Saunders*, 25 U.S. 213, 312 (1827).

²⁶ *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990).

²⁷ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 140 (2005) (citing *Clark v. Martinez*, 543 U.S. 371, 385 (2005)).

²⁸ *Harris v. United States*, 536 U.S. 545, 546 (2002).

²⁹ This presumption of constitutionality fades when the law in question facially threatens fundamental constitutional rights. As articulated by the Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938):

There may be [a] narrower scope for [the] operation of the presumption of constitutionality when legislation . . . [is] within a specific prohibition of the Constitution, such as those of the first ten Amendments [L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,

the assumption that Congress would not intentionally pass unconstitutional legislation.³⁰ As articulated in *Rust v. Sullivan*, declaring an “Act of Congress unconstitutional ‘is the gravest and most delicate duty that this Court is called on to perform.’”³¹ This principle is “followed out of respect for Congress, which [the Court] assume[s] legislates in the light of constitutional limitations.”³² Justice Brandeis expressed the same in his concurrence to *Ashwander v. Tennessee Valley Authority*.³³

C. Validating the Obligation: Scholarly Literature

The scholarly literature is awash with support for the premise that members of Congress are obligated not to vote for legislation they believe to be unconstitutional. As stated above, this obligation is drawn first and foremost from the congressional oath. “Faithfulness to their oath necessarily requires members of Congress . . . to consider the constitutionality of proposed policies as an important aspect of performing their duties.”³⁴ John Yoo and Saikrishna Prakash state this obligation more plainly, arguing that, consistent with their duty to support the Constitution per the oaths clause, “congressmen cannot enact laws that are unconstitutional. Individual members of Congress . . . have the independent duty to review the constitutionality of proposed legislation before them and to oppose unconstitutional laws.”³⁵

Along those lines, it is not “improper for a member [of Con-

is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation.

Id. Note that this caveat is restricted to a discrete class of legislation, and as such, presents a narrowly-tailored exception to the general presumption of constitutionality. Congress should not count among its obligations an ability to predict the court’s reaction with unerring accuracy to legislation it passes. Even assuming such a remarkable gift of prescience, we do not take the position that Senators and Representatives are obligated to vote exclusively for legislation that they believe will not be overturned by a court, merely not for legislation that they believe to be unconstitutional.

³⁰ See Note, *Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798, 1801 (2003).

³¹ 500 U.S. 173, 191 (1991) (citing *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

³² *Id.*

³³ 297 U.S. 288, 354 (1936) (Brandeis, J., concurring) (recognizing the “long established presumption in favor of the constitutionality of a statute”).

³⁴ Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 216 (1990).

³⁵ Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1556 (2005).

gress] to think seriously about constitutional . . . matters.”³⁶ Rather, “[m]embers of the House are expected to consider the constitutional issue when voting on the merits of the [proposed legislation].”³⁷ But as their own statements show, members of Congress have at times shirked their responsibility.

III. THE MILITARY COMMISSIONS ACT OF 2006

The political momentum that culminated in the passage of the Military Commissions Act can be traced back to three Supreme Court decisions that undermined the Bush administration’s stance with respect to certain military actions after the terrorist attacks of September 11, 2001. The U.S. invasion of Afghanistan in the fall of 2001 prompted the arrival of the first planeload of detainees at the Naval Station in Guantánamo Bay, Cuba, on January 11, 2002.³⁸ For two years, the U.S. government attempted to keep these individuals in complete isolation, arguing that they were afforded the protection of neither U.S. laws nor the Geneva Conventions.³⁹ The United States took the further position that detainees could be held there indefinitely under the commander-in-chief’s expanded powers during wartime.⁴⁰

On June 28, 2004, the Supreme Court rejected the government’s assertion that the detainees had no right to bring their cases to the U.S. court system, holding in *Rasul v. Bush* that Guantánamo detainees had a right to be heard in the District Court of the District of Columbia.⁴¹ That same day, the government’s position was dealt another blow when the Supreme Court ruled in *Hamdi v. Rumsfeld* that U.S. citizens held in the United States as enemy combatants could not be held indefinitely, but must be given a meaningful opportunity to contest the factual basis of their detention.⁴² Following the *Hamdi* decision, the U.S. government hastily constructed a review tribunal system to make a showing that all detainees were being given an opportunity to challenge the basis for their

³⁶ Mark V. Tushnet, *The Law, Politics, and Theory of Federal Courts: A Comment*, 85 NW. U. L. REV. 454, 463 (1991) (emphasis omitted).

³⁷ Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 362 (1987).

³⁸ Katharine Q. Seelye, *First ‘Unlawful Combatants’ Seized in Afghanistan Arrive at U.S. Base in Cuba*, N.Y. TIMES, Jan. 12, 2002, at A7.

³⁹ See Linda Greenhouse, *Justices, 5–3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1.

⁴⁰ See *id.*

⁴¹ 542 U.S. 466 (2004).

⁴² 542 U.S. 507 (2004).

detention.⁴³ The due process provided by the highly restrictive Combatant Status Review Tribunals was suspect, however, and well over 300 of the more than 500 detainees ultimately filed habeas corpus petitions in the District Court of the District of Columbia.⁴⁴

In response to what was characterized by the Administration and its allies in Congress as a spate of frivolous litigation,⁴⁵ Congress passed the Detainee Treatment Act of 2005 (DTA) to prevent detainees from filing any new habeas petitions in the D.C. District Court by stripping courts of jurisdiction to hear the petitions.⁴⁶ Its retroactive application to pending habeas cases was a matter of contention, however, and the government's stance was once again rejected by the Supreme Court.⁴⁷ In 2006, in *Hamdan v. Rumsfeld*, the Supreme Court ruled that the ad hoc military commissions established by the U.S. government to try the handful of detainees actually charged with a crime were not authorized by Congress and were in fact in violation of the Uniform Code of Military Justice and the Geneva Conventions, and therefore illegal.⁴⁸ The Supreme Court also noted, in response to a jurisdictional issue briefed after passage of the DTA, that the DTA did not apply retroactively.⁴⁹ But some members of the Court did make one additional, and significant, point: they noted that the Court openly invited⁵⁰ Congress to act, either by ratifying the procedures the Ex-

⁴³ Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

⁴⁴ Supplemental Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005 at 13, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062-05-5064, 05-5095-05-5116).

⁴⁵ U.S. SENATE REPUBLICAN POLICY COMM., ENSURING LAWFUL DETENTION OF ENEMY COMBATANTS WITHOUT CREATING NEW HABEAS CORPUS RIGHTS 7-8 (Dec. 18, 2006), available at http://rpc.senate.gov/_files/Dec1806HABEASBB.pdf.

⁴⁶ Detainee Treatment Act of 2005, Pub. L. No. 109-48, § 1005(e)(1), 119 Stat. 2680, 2741-43 (to be codified primarily at 42 U.S.C. §§ 2000dd-2000dd-1).

⁴⁷ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2763-69 (2006).

⁴⁸ *Id.* at 2759.

⁴⁹ *Id.* at 2763-69.

⁵⁰ Notably, Justices Kennedy and Breyer authored concurring opinions inviting Congress to respond to the Supreme Court's ruling.

In sum, as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in §§ 836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

Id. at 2808 (Kennedy, J., concurring). This invitation for congressional action is premised upon the control of domestic statutes in this case. The subsequent conclusion

ecutive already had in place or by devising a new set of procedures for the executive to use in trying enemy combatants.⁵¹

The MCA was designed to gain back the ground the Supreme Court had taken away. It established a new system of military commissions with the stamp of Congressional approval.⁵² It vested the President with nearly unprecedented discretion to interpret the United States' obligations under the Geneva Conventions.⁵³ It also sought to extend the habeas-stripping provisions of the DTA retroactively, such that all pending Guantánamo habeas cases would have to be dismissed for lack of jurisdiction.⁵⁴ The MCA ultimately passed the Senate by a vote of 65 to 34,⁵⁵ and the House by a vote of 253 to 168.⁵⁶ One of the most hotly contested points was whether Congress could and should strip courts of jurisdiction over habeas petitions brought by the detainees.

Given the history and tradition behind the congressional oath, how could members of Congress have willfully voted in favor of legislation they publicly stated was less than constitutional? The answer lies in the changing relationship between the legislative and judicial branches.

III. WHERE CONGRESS LOST ITS WAY

The historical record reflects that for the first hundred or so years of its existence, Congress spent a considerable amount of time debating the constitutionality of proposed legislation. This controversy was a reflection of the overlap among many of the original Framers of the Constitution and the country's first members of Congress. The current climate, in which the courts are viewed as supreme arbiters of constitutionality and members of Congress have a diminished obligation to perform an independent first review, is the result of a nearly two-hundred-year shift away from what

is that "[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so." *Id.* at 2800 (Kennedy, J., concurring). One concurrence goes on to find "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary." *Id.* at 2799 (Breyer, J., concurring).

⁵¹ *Id.* at 2800 (Kennedy, J., concurring).

⁵² 10 U.S.C.A. § 948b(a) (West 2006).

⁵³ § 948b(b) & (f).

⁵⁴ § 948d.

⁵⁵ 152 CONG. REC. S10420 (daily ed. Sept. 28, 2006) (rollcall vote no. 259).

⁵⁶ 152 CONG. REC. H7560 (daily ed. Sept. 27, 2006) (rollcall vote no. 491).

we term the Madison–Jackson model of coordinate construction to one of judicial superiority.

Early Congresses debated constitutional issues on a frequent basis. Paul Brest points to the 1789 removal power debate and the debate in 1791 regarding the constitutionality of the first Bank of the United States charter as examples of the seriousness with which members of Congress regarded their duty to uphold the Constitution.⁵⁷ The first Congress spent over a month debating whether the President could remove without consultation officers he had appointed with the approval of the Senate.⁵⁸ The constitutionality of chartering the first Bank of the United States was debated with similar gravitas by both Houses of Congress.⁵⁹

This perception of Congress as coequal with the other branches of government with respect to constitutional interpretation is what we have termed the Madison–Jackson model. During the removal power debate, James Madison stated:

The Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.⁶⁰

Because of the seriousness with which Congress treated its obligation, the Supreme Court accorded a high degree of deference to constitutional issues debated and resolved by the first Congress. In deciding *Myers v. United States*, in which the presidential removal power was expressly challenged, Chief Justice Taft looked to the congressional debate of 1789, stating:

[T]his was the decision of the First Congress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification . . . and . . . because that Congress numbered among its leaders those who had been members of the Convention.⁶¹

More recently, Justice Stevens, in his dissent in *Eldred v. Ashcroft*, stated that the “earliest acts of Congress” should be given special

⁵⁷ Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 83–84 (1986).

⁵⁸ *Id.* at 83.

⁵⁹ *Id.* at 84.

⁶⁰ Fisher, *supra* note 1, at 710 (citing 1 ANNALS OF CONG. 500 (Joseph Gales ed., 1834)).

⁶¹ 272 U.S. 52, 136 (1926).

weight because of the “overlap of identity between those who created the Constitution and those who first constituted Congress.”⁶²

An oft-cited first step on the road to judicial superiority was the landmark case *Marbury v. Madison*, in which Chief Justice John Marshall famously asserted that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁶³ *Marbury* would mark the start of a gradual shift of deference to the courts. According to Brest, “[b]y the second half of the twentieth century, both the House and the Senate had abandoned the tradition of deliberating over ordinary constitutional issues.”⁶⁴ He cites as examples the legislative debates over the Communist Control Act of 1954, in which neither house succeeded in genuinely considering the constitutional arguments,⁶⁵ and the passage of the Gramm-Rudman-Hollings Act, in which many institutional checks and balances that govern the lawmaking process — namely committee hearings, outside experts, and committee reports — were circumvented to bring the bill to a vote.⁶⁶

Scholars, and even members of Congress themselves, have recently argued that members of Congress are not even capable of evaluating the constitutionality of new legislation. This may be partially attributed to a change in the perception of the role of the elected official. According to Owen Fiss, legislatures “are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people—what they want and what they believe should be done.”⁶⁷ Former judge and member of Congress, Abner Mikva attributes the lack of constitutional debate to a number of factors:

Structurally, both houses are large, making the process of engaging in complex arguments during a floor debate difficult. For the most part, the speeches made on the floor are designed to get a member’s position on the record rather than to initiate

⁶² 537 U.S. 186, 237 (2003) (Stevens, J., dissenting).

⁶³ 5 U.S. (1 Cranch) 137, 177 (1803). While the decision in *Marbury* did shift the American court system away from the English model (in which courts merely interpreted laws passed by the legislature without questioning the right of the legislature to pass such laws) to a more robust model in which the judiciary asserted its own independent right to review the constitutionality of legislation, it avoided a direct confrontation with the executive branch by refusing to issue the writ of mandamus demanded by *Marbury*. *Id.*

⁶⁴ Brest, *supra* note 57, at 85.

⁶⁵ *Id.*

⁶⁶ *See id.* at 90.

⁶⁷ Owen M. Fiss, *The Supreme Court 1978 Term, Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979).

a dialogue. Because of the volume of legislation, the time spent with constituents, and the technical knowledge required to understand the background of every piece of legislation, it is infrequent that a member considers the individual merits of a particular bill. Often a vote is determined by a thumbs up-or-down sign by the party leader, or by a political debt that needs to be repaid.⁶⁸

Ultimately, Mikva concludes that Congress “is not designed to consider adequately the constitutional implications of every bill before it.”⁶⁹ Brest attributes the failure of Congress “to develop a tradition of trustworthy constitutional decisionmaking” to the “widespread assumption that issues of constitutional law belong exclusively to the courts.”⁷⁰

However, there is a difference between supremacy and exclusivity, and nothing in *Marbury* implies that courts are the *sole* arbiters of constitutionality. In 1832, Andrew Jackson offered a theory of coequal powers of interpretation that could trace its roots directly back to James Madison:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.⁷¹

This is the essence of the Madison–Jackson model of coordinate construction; that each house of Congress and the President have an individual responsibility to assess the constitutionality of all proposed legislation they are asked to pass into law. It is a philosophy that has been articulated by members of Congress throughout the years. Said Representative Fisher Ames (1st–4th Congresses): “Let us examine the Constitution, and if that forbids our proceeding, we must reject the bill”⁷² Senator Sam Ervin (83rd–93rd Congresses) reiterated this sentiment: “Every Congressman is

⁶⁸ Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983).

⁶⁹ *Id.* at 610.

⁷⁰ Brest, *supra* note 57, at 59.

⁷¹ Fisher, *supra* note 1, at 713 (citing 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1145 (James D. Richardson ed., 1897)).

⁷² Note, *supra* note 30, at 1809 n.71.

bound by his oath to support the Constitution, and to determine to the best of his ability whether proposed legislation is constitutional when he casts his vote in respect to it.”⁷³ Strom Thurmond (83rd–107th Congresses), a lion of the Senate for nearly fifty years, argued on the Senate floor that a Member’s oath required that “the very first step that he must or should take [in evaluating legislation] is to determine, [i]s this legislation constitutional? And if he decides it is not, then he shouldn’t go any further.”⁷⁴

Even as the legislative branch shifted from a Madison–Jackson model to one of judicial superiority, many members of Congress have stridently opposed a shunting of their responsibilities onto the court system. During the debate over the 1964 Civil Rights Act, Senator Paul Douglas (81st–89th Congresses), a proponent of the bill, encouraged his colleagues to simply pass the legislation and let the Supreme Court determine its constitutionality.⁷⁵ His proposal brought swift rebuke from his colleagues Senators John McClellan (78th–95th Congresses) and Ervin, who argued that every Senator is under an obligation to not vote for a bill he believes to be unconstitutional.⁷⁶

As Senator McClellan articulated during the same legislative debate from which Senator Thurmond is quoted above, legislators are “personally abdicating the responsibility with which [they] are charged . . . if [they] do not ascertain . . . whether proposed legislation is constitutional . . . before it is enacted”⁷⁷ Commentators have similarly castigated members of Congress who seek to rid themselves of this obligation:

Most scholars think that members of Congress fail to honor their oaths to uphold the Constitution, or at least do not operate at their best, if they respond to such questions by saying, “That’s for the courts to decide.” Even worse, most scholars believe, is the response, “Sure, the legislation is unconstitutional, but let’s enact it anyway and let the courts sort things out—or take the heat for invalidating a popular program.”⁷⁸

⁷³ Brest, *supra* note 57, at 61 (quoting PETER SCHUCK, *THE JUDICIARY COMMITTEES* 175 (1975)).

⁷⁴ Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095, 1131 (2005) (quoting 110 CONG. REC. 10381 (1964) (statement of Sen. Thurmond)).

⁷⁵ DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* 325 (1966).

⁷⁶ Brest, *supra* note 57, at 88.

⁷⁷ Goldstein, *supra* note 74, at 1131 (quoting 110 CONG. REC. 10381 (1964) (statement of Sen. McClellan)).

⁷⁸ Mark Tushnet, *Flourishing and the Problem of Evil*, 63 TUL. L. REV. 1631, 1639 (1989).

In sum, as Charles Mathias so cogently phrased it: “[T]here is a positive obligation upon . . . each member of Congress . . . to interpret the Constitution in the course of their daily duties.”⁷⁹

IV. CONSEQUENCES

We now turn to the question of consequences for those who either vote for legislation they believe to be unconstitutional, or who are confronted by legislation tainted in that way. How ought Congress discipline Senators and Representatives who cast this type of vote? Under the Madison–Jackson model, how must a President view legislation passed with improper voting? In the judiciary, how does improper voting impact the canon of avoidance?

A. *Consequences: Members of Congress*

The Constitution vests only the legislative branch with the power to punish or expel its own members,⁸⁰ in part because political pressures stemming from the electoral process were thought to be a sufficient check to allow Congress to police itself. Reality, however, tells a far different tale, as Congress has only rarely resorted to punitive measures in dealing with members who have violated Congressional protocol.

Not once in the more than 220-year history of Congress has a member ever been expelled (or even disciplined) for voting in favor of a law he or she believed to be unconstitutional. This history would seem at first to implicate the members referenced in this Article as guilty of an ethical lapse never before seen in the halls of Congress. A careful review of the history of Congressional discipline provides a more plausible explanation, however: the willingness of Congress to discipline itself has simply grown weaker over time.

Expulsion, the harshest punishment available to Congress, reached its zenith at the time of the Civil War, and has rarely been used since. In the history of Congress only five members of the House of Representatives and fifteen Senators have ever been expelled.⁸¹ Of the five Representatives, three were expelled when

⁷⁹ Charles McC. Mathias, Jr., *Original Intent and the Constitution, Response to Comments*, 47 MD. L. REV. 234, 235 (1987).

⁸⁰ U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

⁸¹ Kathy Kiely, *Last Expulsion from House Was in 1980*, USA TODAY, July 25, 2002, at A10.

their states seceded in 1861; the remaining two were expelled for bribery and corruption in 1980 and 2002.⁸² Fourteen of the fifteen Senators were expelled because their states seceded, and the fifteenth was expelled for treason in 1797.⁸³

In recent times, Congress' self-discipline measure of choice, the censure, has itself given way to tongue-lashings of diminishing force. The current rules of the House Committee on Standards of Official Conduct authorize six levels of discipline: (1) expulsion from the House of Representatives; (2) censure; (3) reprimand; (4) fine; (5) denial or limitation of any right, power, privilege, or immunity of the member if under the Constitution the House of Representatives may impose such denial or limitation; or (6) any other sanction determined by the Committee to be appropriate.⁸⁴ Twenty-two members of the House have been censured, eleven of these for insulting or treasonous language.⁸⁵ Congress has recently taken to issuing reprimands which amount to even less severe sanctions imposed by the full House.⁸⁶

The Senate, over time, has similarly moved away from severe sanctions. The Senate in its history has censured seven of its members, two for violations of Senate ethics,⁸⁷ as would likely be the charge levied against a Senator voting for a law he or she believed to be unconstitutional. The Senate has also, in recent times, used "denunciations" and committee-level "reprimands," both of which are understood to be somewhere below censure on the disciplinary scale.⁸⁸

The historical record establishes that, over time, Congress has grown increasingly hesitant to punish its members in meaningful ways, preferring instead to rely on the ostensibly self-correcting mechanisms of the political process and upon less severe actions that bear a greater resemblance to rhetorical flourishes than meaningful punishments. From a practical standpoint, the likelihood that members of Congress, were they even to characterize another

⁸² *Id.*

⁸³ Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 408 (1994).

⁸⁴ COMM. ON STANDARDS OF OFFICIAL CONDUCT, SUMMARY OF ACTIVITIES ONE HUNDRED NINTH CONGRESS, H.R. REP. NO. 109-744, at 51 (2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr744.109.pdf.

⁸⁵ Ray, *supra* note 83, at 413.

⁸⁶ *Id.* at 414-15.

⁸⁷ *Id.* at 410. Hiram Bingham was censured for his involvement with a lobbyist and Thomas J. Dodd for misuse of campaign funds. *Id.* at 411.

⁸⁸ *Id.* at 411-12.

member's vote as a dereliction of duty, would actually punish such colleagues is very small. This is due, in part, to the natural reluctance each member likely harbors for the idea of punishing a colleague (and, equally importantly, one who could retaliate by punishing him or her down the road).

Moreover, with respect to impropriety in the votes for the MCA, the party that would have led the sanctioning effort—the GOP—is also the party whose President sought passage of the bill so fervently. From a political standpoint, then, there would be little to gain—save perhaps a stand on principle—from a reprimand of any sort of these members, whom the Administration was no doubt pressuring strongly for an “aye” vote.⁸⁹

B. Consequences: The President

In line with the Madison–Jackson model of coordinate construction, knowledge of voting impropriety should not affect the President's independent obligations. As with members of Congress, the roots of the President's obligation are found in the oath of office, as found in Article II, Section 1 of the Constitution: “I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.”⁹⁰

The language “preserve, protect, and defend” parallels the language of the congressional oath (“support and defend”),⁹¹ and arguably imparts a heightened responsibility upon the chief executive compared to that of a member of the legislative body. The similarity in language connotes a similar obligation on the President to independently analyze new legislation and not vote for legislation he or she believes to be unconstitutional. By extension, if presented with a bill he or she believes to be unconstitutional, the

⁸⁹ The rise of the political party in contributing to this shift should not be understated. The road to powerful committee chairmanships in the House and Senate runs through the political parties, who favor loyalty and seniority when making those decisions. Rare is the maverick Senator or Representative who is able to buck the party line for very long and still retain positions of authority in a given Chamber. To deepen the problem, these Senators and Representatives depend upon the parties for political support—financial and otherwise—in their reelection campaigns. The net result of this sort of political environment is members who kowtow to their political party to the point of sacrificing fundamental obligations they owe to the Constitution and to their constituents.

⁹⁰ U.S. CONST. art. II, § 1, cl. 8.

⁹¹ 5 U.S.C. § 3331 (2000).

President, regardless of the political benefits of signing the bill into law, is obligated by oath to veto it.

Does the President's obligation change when he is confronted with a bill he believes to be constitutional, but that members of Congress voting in favor of it believe to be unconstitutional? The answer is no. As described above, the Madison–Jackson model imposes upon each branch of government the obligation to perform an independent analysis of constitutionality. Ultimately, the President swears an equal and independent oath to that of members of Congress, and must make an independent determination of the constitutionality of new legislation. If President Bush believed the MCA to be constitutional, he was under no obligation to take into account any voting impropriety by Congress in the bill's passage.

C. Consequences: The Courts

The voting pattern described above rebuts the presumption underlying the canon of avoidance, namely, that Congress does not vote in favor of unconstitutional legislation. How, then, should this influence a court weighing the constitutionality of legislation bearing a clear record of voting impropriety?

The constitutional misgivings of the previously-identified members of Congress were limited to the jurisdiction-stripping provisions of the MCA. As the individual provisions of the MCA are severable,⁹² we limit our discussion to how a court should decide the constitutionality of the jurisdiction-stripping provision alone.

As previously noted, the canon of avoidance is limited to instances of statutory ambiguity. Where such ambiguity exists, the court is directed to choose the statutory interpretation that would avoid addressing issues of constitutionality.

⁹² The MCA does not contain a severability provision. But see Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 243 (2004) for a summary of the holding in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987): “[S]tatutes are presumed to be severable unless . . . (1) Congress ‘intended otherwise’ . . . or (2) the remaining statutory structure cannot function independent of its unconstitutional parts.” As restated in *United States v. Booker*, 543 U.S. 220 (2005), the Court must “refrain from invalidating more of the statute than is necessary.” *Id.* at 258. “Indeed,” the Court continued, “we must retain those portions of the Act that are (1) constitutionally valid, (2) capable of ‘functioning independently,’ and (3) consistent with Congress’ basic objectives in enacting the statute.” *Id.* at 258–59 (citations omitted). We leave analysis of the constitutionality of the military commissions themselves to other scholars, and simply note that the jurisdiction-stripping provision, addressing as it does a topic entirely separate from the military commissions, is severable. Indeed, the title of the legislation itself suggests that the jurisdiction-stripping provision is not an essential component.

But votes in favor of legislation believed to be unconstitutional negate the premise of the canon of avoidance, namely, that Congress has independently assessed the constitutionality of the legislation, which it subsequently voted for and did not find it wanting. Consequently, there is no justification for the courts to defer to the judgment of Congress in passing the legislation. Some might argue that unless the improper votes were necessary for passage of the bill, the fact that they occurred should not affect the court's posture. Regardless of the number of improper votes, the court's treatment of the legislation should be the same. Why should that be the case?

To respond, we must put the question differently: is there a meaningful difference between a law that would have passed Congress without the votes of members of Congress who believed the law to be unconstitutional, and a law that would not? The answer must be no. Our objection to the canon of avoidance is not premised upon the principle that a *sufficient number* of the members of Congress voting in favor of the legislation believed it to be unconstitutional. It is premised upon the principle that Congress does not pass unconstitutional legislation. It is about process, not tally, and just as a single drop of ink taints an entire glass of water equally, so too does the specter of improper voting taint the passage of a bill.

The canon of avoidance, therefore, should not be treated as an absolute, but a rebuttable presumption, and in instances such as the passage of the MCA, where some of its proponents believed it to be unconstitutional, courts ought to deliberately consider the statutory interpretation that raises constitutional issues, so that they might confront head-on the controversies of a particular provision. A failure to do so provides members of Congress with judicial cover to ignore their constitutional obligation, and, in addition, implicates the judiciary through its tacit sanction of procedurally unconstitutional, and possibly substantively unconstitutional, legislation. Anything less than the abandonment of the canon in situations like these necessarily undermines the integrity of the judicial branch.

CONCLUSION

With a legislative body that has historically been too collegial to stridently self-police, and a chief executive whose decisions with respect to new legislation are made independently, the real impact of improper voting by Congress must be felt by the body that has historically accorded Congress' decisions the most weight: the judi-

ciary. The canon of avoidance should simply not be adopted whenever the taint of improper voting exists.

The gradual abdication of constitutional judgment by the legislative to the judicial branch has created a perfect environment for members of Congress to vote in favor of bills they believe to be unconstitutional, purely for political gain. While a more robust disciplinary system in Congress might at first seem like an appropriate solution to this problem, the threat of sanction or censure is ultimately not likely to dissuade members of Congress from this behavior. The simple end-around is that members would simply stop vocalizing any negative opinions as to a bill's constitutionality and avoid reprimand entirely. Thus, while their consciences may be burdened by the thought of such a maneuver, there would be no political danger for them. Without a frameshift in the attitude of members of Congress back towards the Madison–Jackson model of coordinate construction, this type of dereliction of duty threatens to become a mainstay of legislative procedure.

As borne out by the subsequent history of the MCA, bills passed in this manner can be treated by the courts in a manner entirely unforeseen by the derelict members. Senator Specter seemed to assume, without much basis, that the judiciary would remedy the mistakes of Congress, saying in an interview, “I think the courts will invalidate it They’re not going to give up authority to decide habeas-corpus cases, not a chance.”⁹³

Senator Specter could not have been more wrong. On February 20, 2007, the U.S. Court of Appeals for the District of Columbia Circuit, contrary to the Senator's hopes, upheld the constitutionality of the habeas-stripping provision of the MCA.⁹⁴ Pointing to the clear language of the bill that had been passed by Congress, the Court of Appeals held that the petitioners' arguments, while “creative,” would nevertheless “defy the will of Congress.”⁹⁵ The language of the DTA stripping detainees of habeas corpus rights “could not be clearer”; it was as if the court could hear the bill's proponents “slamming their fists on the table” emphatically stripping *all* detainees of their right to habeas corpus.⁹⁶

Appellants petitioned the Supreme Court for a writ of certiorari. Sen. Specter took the unusual step of submitting an amicus

⁹³ Jeffrey Toobin, *Killing Habeas Corpus*, NEW YORKER, Dec. 4, 2006, at 54.

⁹⁴ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (U.S. June 29, 2007) (No. 06–1195).

⁹⁵ *Id.* at 987.

⁹⁶ *Id.*

brief on their behalf, urging the High Court to hear the case and ultimately restore habeas corpus rights to Guantánamo detainees. After initially denying the petition on April 2, 2007 the Court granted certiorari on June 29, 2007.⁹⁷ Unlike the *Hamdan* Court, however, the Court that heard this case included Chief Justice John Roberts, who joined the 2005 Court of Appeals opinion denying Salim Hamdan's habeas corpus petition, at a time when no habeas-stripping law was even in effect.⁹⁸ As these events make clear, no one can predict with certainty when the courts will take up the constitutionality of a new law or what the outcome will be. Congressional reliance upon the courts as a failsafe is entirely misplaced, if not foolhardy. In the meantime, of course, the law these members of Congress publicly questioned yet still voted for is the law that remains—indefinitely—on the books.

For these reasons, members of Congress must take seriously their obligation not to vote for legislation they believe to be unconstitutional. Members of Congress must treat the judiciary as the coequal branch that it is, not the safety net they may want it to be.

⁹⁷ *Boumediene v. Bush*, 127 S. Ct. 1478 (2007), *vacated*, 127 S. Ct. 3078 (U.S. June 29, 2007).

⁹⁸ *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005) (*rev'd*).

