THE REPUBLICAN STUDY COMMITTEE
Rep. Jim Jordan, Chairman
Paul Teller, Executive Director
RSC
202.226.9717
rsc.jordan.house.gov

RSC Policy Brief:
Congress's Role and Responsibility in Determining the Constitutionality of Legislation

June 27, 2012

On the eve of the expected landmark Supreme Court decision on the constitutionality of President Obama's health care reform law ("Obamacare"), this Policy Brief underscores the principle that all three branches of the federal government—Legislative, Executive, and Judicial—have a responsibility to examine the constitutionality of laws. This Policy Brief will focus upon the role that the Legislative branch has in assessing the constitutionality of laws it passes.

Overview:

Laws are validated by the authority provided in the U.S. Constitution. Thus, a law that violates the U.S. Constitution is not merely at odds with the intentions of our Founders, and the public's understanding when they ratified the document, but it technically is also legally null, void, and unenforceable. In other words, *there is no law if it is not based upon constitutional principles.*

For these reasons, our elected representatives have a responsibility to ensure that legislation is supported by, and consistent, with the Constitution and not to defer to court action, which may be delayed or barred by jurisdictional rules. If a proposed law is not authorized under the Constitution, but it is still deemed desirable by the Congress, then it is the legislator's responsibility to advocate for a change – i.e., an amendment – to the U.S. Constitution that would enable the legislation that the Congress seeks or to change the proposed bill to conform with the Constitution.

However, the Founders deliberately intended to make changes to the Constitution difficult. In fact, some research has shown that our Constitution may be more difficult to amend than the constitutions of any other country as explained by Alexis De Tocqueville in "Democracy in America":

> "In France the constitution is (or at least is supposed to be) immutable; and the received theory is that no power has the right of changing any part of it. In England the Parliament has an acknowledged right to modify the constitution; as, therefore, the constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a legislative and a constituent

> assembly. The political theories of America are more simple and more rational. An American constitution is not supposed to be immutable as in France, nor is it susceptible of modification by the ordinary powers of society as in England. It constitutes a detached whole, which, as it represents the determination of the whole people, is no less binding on the legislator than on the private citizen, but which may be altered by the will of the people in predetermined cases, according to established rules. In America the constitution may therefore vary, but as long as it exists it is the origin of all authority, and the sole vehicle of the predominating force." (Chapter VI)

One important reason for this difference was to protect the rights of the minority from oppression by the majority – to avoid the "tyranny of the majority." Our Founding Fathers also were well versed in history. They understood that democratic institutions were previously led astray by majorities emboldened by their short-sighted passions, rather than by foresight and deliberation.

The Constitution provides a framework on what powers the consent of the governed grant to our government. It legally ensures that even in times of war, impeachment, and other destabilizing events, there is a deliberative process for deciding important governmental matters. This framework includes "firm weights" designed to set the rules in advance for such inclement events. For example, prohibitions on quartering troops in the homes of citizens were written into the Constitution after learning from the lessons of British colonial occupation. Others, such as the Second Amendment, were derived from a longer view of history. They originate from the conception that the United States should be a land where the legislative and executive bodies govern with the consent of the governed.

Congressional Role in Assessing Constitutionality:

1. *Assessing a law's constitutionality is not, and should not be, the sole dominion of the judicial branch. All three branches were designed to assess constitutionality.*

Congress has an obligation to assess the constitutionality of all legislation out of fidelity to the Congressional Oath of Office. Good intentioned citizens can and should debate matters of constitutional interpretation, but failing to consider whether legislation is constitutional, particularly when given evidence that it is not constitutional, directly violates the Congressional oath. Further, Congress has sworn to protect and defend the Constitution against all enemies, including those that are domestic. When the Congress passes and the President signs *unconstitutional* laws, they have violated their oaths of office to uphold and defend the Constitution:

> **Presidential Oath:**
> "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."

Congressional Oath:
"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 of 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."

Congress has an obligation to assess the constitutionality of all legislation. Failure to do so in good faith may therefore be a "high crime" under the Constitution's Impeachment Clause.

2. *Assessing a law's constitutionality is not the sole dominion of the courts, and it was never intended to be so.*

The President, the courts and the Congress each have a sworn duty to uphold the Constitution by assessing the constitutionality of legislation. In spite of the oft-cited - and often incorrectly cited - Supreme Court decision in *Marbury v. Madison* furthering that the judicial branch is the sole arbiter of a law's constitutionality, President Andrew Jackson explained the following upon vetoing legislation for the proposed Second National Bank:

> "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."

The Court has long held that acts of Congress are "presumptively constitutional,"[1], and the Supreme Court stressed that the presumption of constitutionality accorded to Acts of Congress is "strong."[2]. The Supreme Court has explained: "This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power."[3] This precedent presents a serious problem if Members of Congress assume that the Supreme Court will be the arbiter of constitutionality.

For these reasons, it is incumbent upon Congress to assess the constitutionality of all legislation upon which they vote. Before the Supreme Court firmly assumed the role of constitutional review, it was normal for the Congress to have vigorous debates on a law's constitutionality in addition to the law's merits. This is important because sometimes the court can abuse its

[1] Turner Broadcasting System, Inc. v. FCC, 507 U.S. 1301, 1301 (1993)
[2] United States v. Five Gambling Devices Labeled in Part .. Mills," and Bearing Serial Nos. 593-221,346 U.S. 441 , 449 (1953); see, e.g., Gonzales v. Raich, 545 U.S. 1, 28 (2005) (noting that the "congressional judgment" at issue was "entitled to a strong presumption of validity")
[3] Five Gambling Devices Labeled in Part... Mills," and Bearing Serial Nos. 593-221, 346 U.S. at 449.

constitutional responsibility by incorrectly deciding cases (see *Dred Scott, Plessy v. Ferguson, Wickard v. Filburn, etc.*). With or without judicial review, the Congress should return that precedent to Congressional Chambers, as practiced and envisioned by our Founding Fathers and stop unconstitutional legislation before it can get to the President.

The House Rule requiring all introduced bills to cite the constitutional authority is a step in the right direction. It is also encouraging that the Rules Committee included 20 minutes of exclusive debate on the constitutionality of major patent reform legislation the House considered last June (H.R. 1249). But more action is needed.

3. Inaction by Congress can validate unconstitutional actions

Even if Congress were to assess the constitutionality of all legislation passed in either chamber, this is not itself sufficient to fulfill the requirements of upholding the Constitution. Inaction by Congress can have the effect of validating unconstitutional actions. This inaction may then be followed as precedent.

For example:

A. Congress has stopped officially declaring war since World War II, and it has become considered constitutionally acceptable for the President to act unilaterally or with an authorization for the use of force. This authorization for the use of force is well below the constitutional requirements for a declaration of war, a provision that our Founding Fathers argued and debated to place in the Constitution to avoid perpetual un-declared wars. The following large scale military engagements were never declared wars:

- Korea
- Vietnam
- Afghanistan
- Iraq

> *"As the executive cannot decide the question of war on the affirmative side, neither ought it to do so on the negative side, by preventing the competent body from deliberating on the question."*
> ***- Thomas Jefferson***

B. Congress has abdicated its responsibility to at least provide an authorization for the use of force. Last year's lack of congressional authorization, or serious oversight under a violation of the War Powers Act, during the engagement in Libya, may have effectively given a green light to future military engagements with no congressional authorization that violate the War Powers Act, provided that the engagements do not involve boots on the ground.

> *"The executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war."*
> ***- James Madison***

C. Despite the fact that the Constitution explicitly states that legislation on revenue shall originate in the House of Representatives, the Senate sometimes originates legislation in violation of this clause, thus effectively working around this "technicality." The Origination Clause is not a "hyper-technical budget issue," as explained by Senate Majority Leader Harry Reid (R-NV). Instead, the Founders made it clear that this distinction matters, "this power of the purse. . . may, in fact be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people" (Federalist No. 58).

4. *The Court may not be able to consider the constitutionality of all legislation because of questions of standing, ripeness, or a lack of bandwidth to hear all cases.*

There are many examples where laws may not be able to be challenged. In order to bring a case, a petitioner must have "standing," and the case must be considered "ripe." Standing basically means that the party that is suing must be affected by the law in a tangible way. Further, in order for the case to be ripe, the case needs to still be relevant and not have previously resolved itself or been made moot by events.

After the passage of certain unconstitutional bills, it is unclear who might have standing to sue in the federal court system. The courts have determined (rightly or wrongly) that Members of Congress do not generally have standing to do so. Therefore, there are many cases in which an unconstitutional act of Congress cannot be reviewed by the courts.

Of all the legislation that passes Congress each year, only a small number of those cases can be heard by courts on its constitutional merits. Lower courts are bound by the decisions of higher courts and the higher courts have very limited ability to hear cases. The Supreme Court in particular only grants certiorari to an extremely small proportion of their requests. Because of bandwidth issues, several major cases questioning the constitutionality of laws have not made it to the Supreme Court, leaving open questions of whether the law is constitutional or not.

The Court cannot be expected to catch all of the constitutional mistakes of an unrestrained Congress.

5. *Just because the Supreme Court rules something as constitutional—or does not rule something as unconstitutional—does not mean that Congress can't take subsequent action.*

In 1875, the Supreme Court considered a major case on whether women were guaranteed the right to vote upon the Equal Protection Clause of the Fourteenth Amendment. The Court decided that the Fourteenth Amendment did not provide such a right to vote. Justice Scalia has talked about this example and how it led to the successful passed of the Nineteenth Amendment:

> "Consider the 19th Amendment, which is the amendment that gave women the vote. It was adopted by the American people in 1920. Why did we adopt a constitutional amendment for that purpose? The Equal Protection Clause existed in 1920; it was adopted right

> after the Civil War. And you know that if the issue of the franchise for women came up today, we would not have to have a constitutional amendment. Someone would come to the Supreme Court and say, 'Your Honors, in a democracy, what could be a greater denial of equal protection than denial of the franchise?' And the Court would say, 'Yes! Even though it never meant it before, the Equal Protection Clause means that women have to have the vote.' But that's not how the American people thought in 1920. In 1920, they looked at the Equal Protection Clause and said, 'What does it mean?' Well, it clearly doesn't mean that you can't discriminate in the franchise — not only on the basis of sex, but on the basis of property ownership, on the basis of literacy. None of that is unconstitutional. And therefore, since it wasn't unconstitutional, and we wanted it to be, we did things the good old fashioned way and adopted an amendment." (Center for Individual Freedom interview with Justice Scalia)

When the Court rules that a popular idea is unconstitutional, this action should serve as an impetus for Congress to reconsider whether the policy change is wise and necessary. If it is, Congress should pursue a Constitutional Amendment through either of the methods listed in Article V.

There is a difference between what is right and what is constitutional.

Additionally, the Court may get a decision wrong. Passing the same law again, in certain narrow circumstances, may be appropriate to allow for the Court to reconsider their ruling. If Congress assumes that a Court ruling is binding forever and never passes another law, then the Court will likely not have an opportunity to change its mind on something that was wrongly decided.

Conclusion:

Assessing a law's constitutionality is not, and should not be, the sole dominion of the judicial branch. Congress has a responsibility to ensure that its legislation is consistent and enabled by the Constitution, but it also must affirmatively act when other branches are violating the Constitution – so as to not validate these un-Constitutional actions. Acts of Congress are also "presumptively constitutional" under judicial review, which means that the Court assumes that Congress has deliberated on a law's constitutionality. Congress must be mindful that the Court may not be able to consider the constitutionality of all legislation because of questions of standing, ripeness, or a simple lack of bandwidth to hear all potential cases. Lastly, if the Supreme Court has found that an action or law was constitutional or unconstitutional, this doesn't mean that Congress cannot take subsequent action – because there is a difference between what is right and what is constitutional.

RSC Staff Contact: Derek S. Khanna, Derek.Khanna@mail.house.gov, (202) 226-0718