

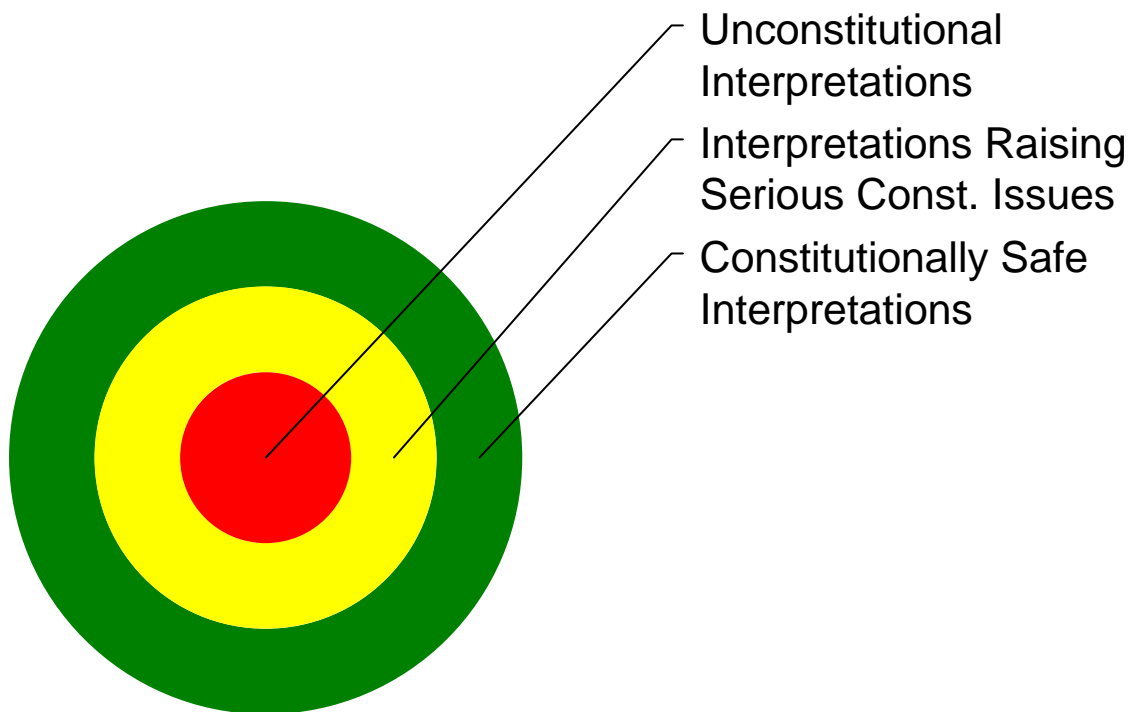
# Presuming Doubt or Constitutionality?

A Target for Peace in the  
Constitutional “**Danger Zone**”

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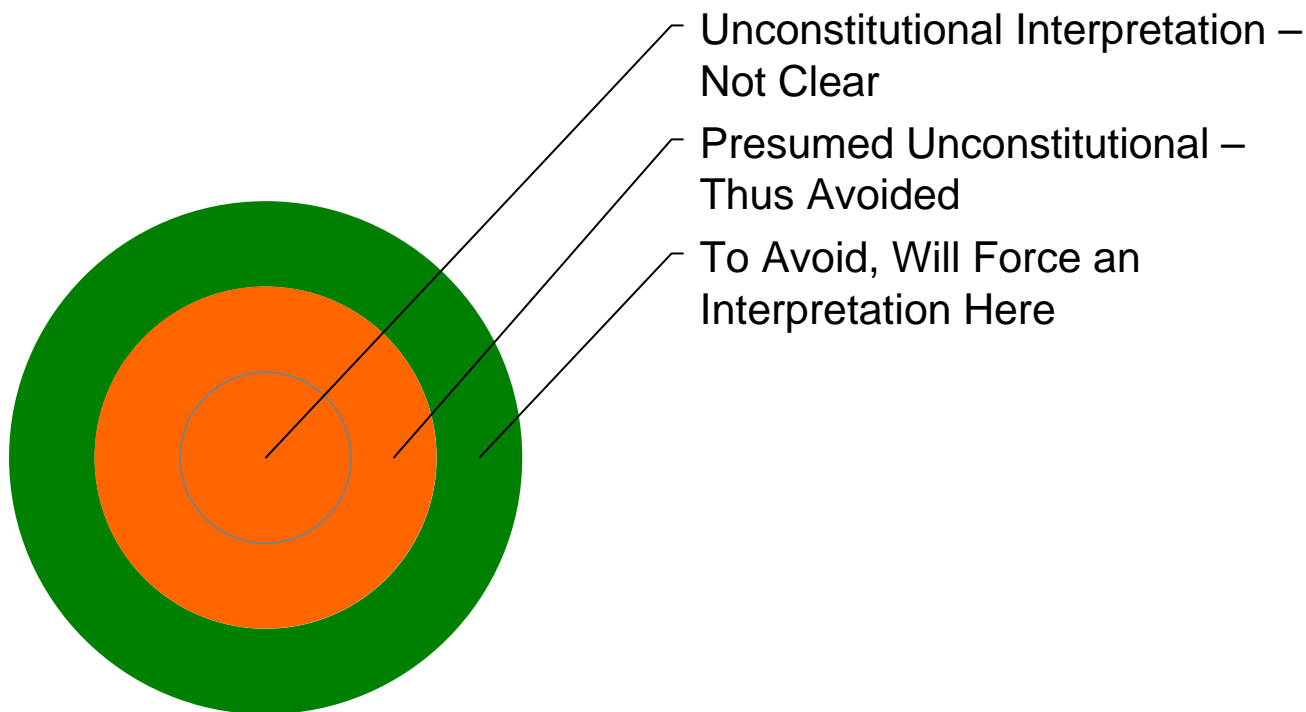
When interpreting a statute, a court will find possible interpretations to fall into three basic zones: 1) Constitutionally Safe (Green); 2) Interpretations Raising Serious Constitutional Issues (a.k.a. the “Danger Zone”); and 3) Unconstitutional Interpretations. See next diagram. Two legal doctrines may be considered by courts in determining what interpretations to give a statute: 1) Constitutional Avoidance Canon; and 2) Presumption of Constitutionality. Depending upon where on the “constitutionality target” the interpretation falls, the interpretation may be used, avoided, presumed valid, or voided as unconstitutional.

# Three Zones of Statutory Interpretations & Constitutional Law



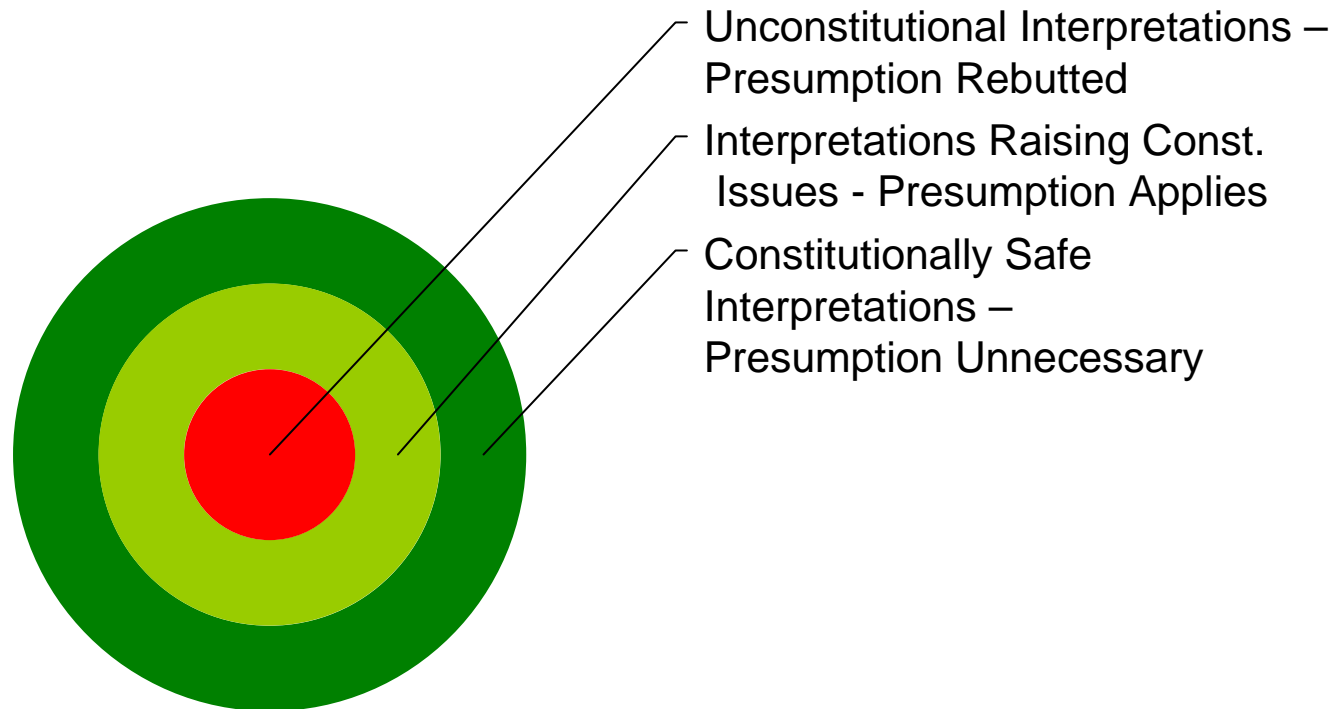
The Constitutional Avoidance canon is the canon in which a court when faced with an interpretation that raises “serious constitutional issues” will look for another viable construction that does not raise any serious constitutional issues. Generally, though, the court does not determine how close to unconstitutional the original interpretation really is. As a result, this canon has the effect of expanding the Constitution. The effect – it creates a presumption of unconstitutionality in this “constitutional danger zone.” Thus, as the diagram reflects, the previously yellow zones & red zones are orange zones that are indistinguishable and the division between them grayed. Moreover, the court will all too often force a construction into the green zone by adding amendments of its own.

# Constitutional Avoidance Canon's Impact on Interpretation Zones



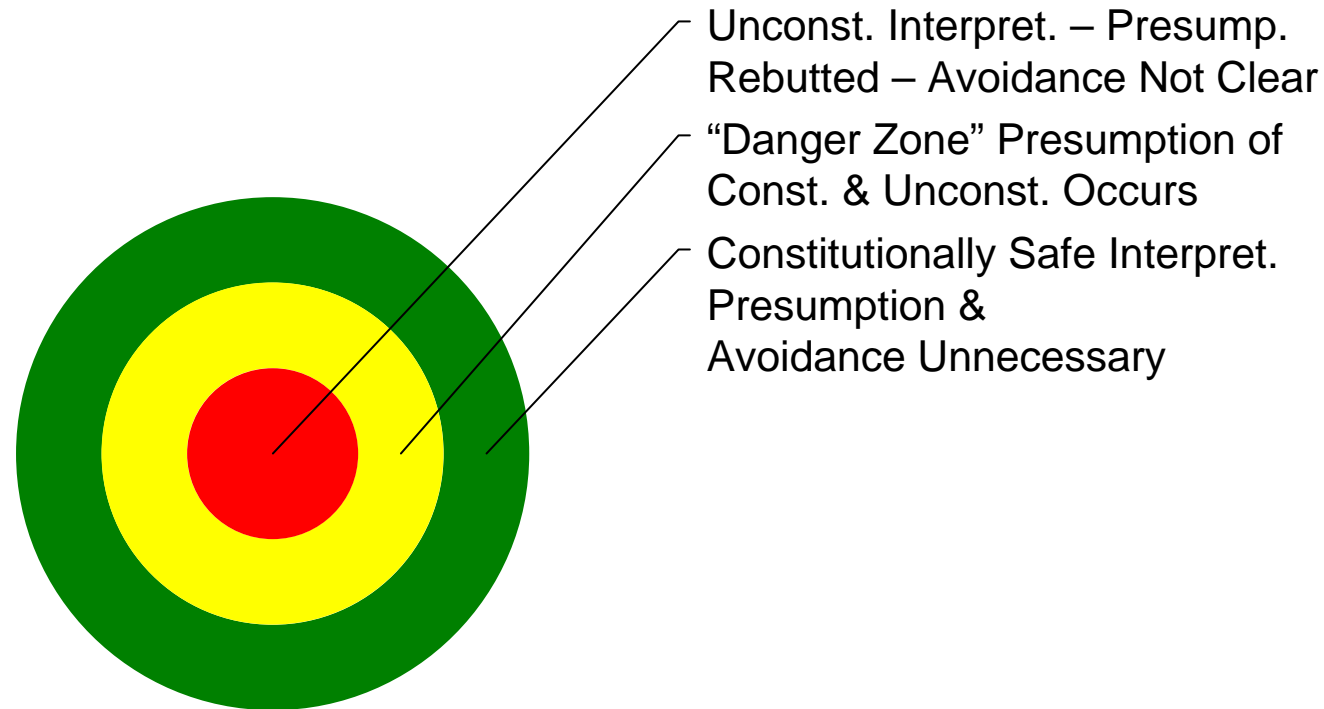
By contrast, the court might find itself with a construction of the statute that falls within the “danger zone” and apply the presumption of constitutionality. The presumption of constitutionality, which is based upon the legislature’s own duty to obey the Constitution, starts with the presumption that a statute is constitutional. Applying the presumption, an interpretation within the unconstitutional red zone will be rebutted. In the constitutionally safe zone, the presumption is unnecessary. But, in the constitutional “danger zone,” the presumption should govern and the interpretation be presumed constitutional. Thus, the constitutional danger zone is changed from yellow to a light green to indicate the tendency toward the interpretations constitutionality. See next diagram.

# Presumption of Constitutionality



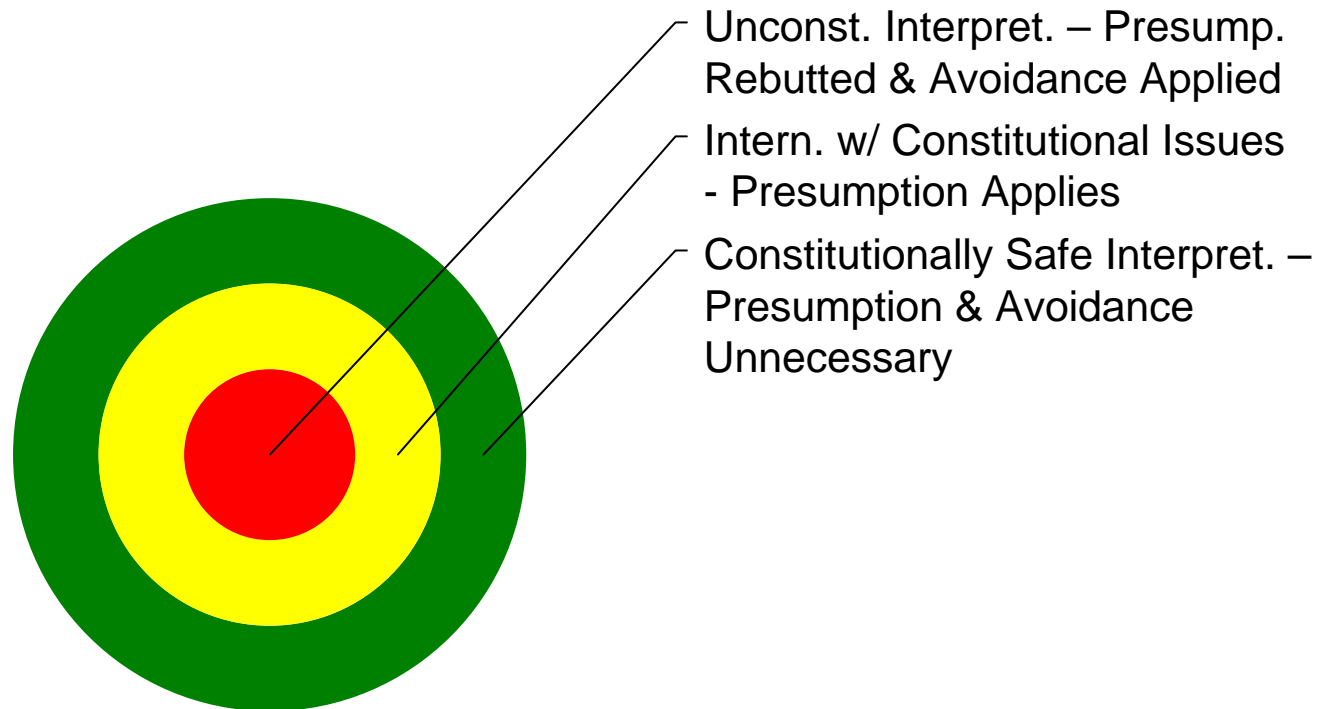
As reflected by the next diagram, the avoidance canon and presumption of constitutionality are at war over the “danger zone.” This conflict is partly due to the fact that the avoidance canon is invoked too quickly, along with its presumption of unconstitutionality, and another “safe” interpretation forced that the presumption of constitutionality is not applied.

# Avoidance & Presumption of Constitutionality – War Over the “Danger Zone”



To resolve this conflict and the presumption of unconstitutionality for interpretations that should be given a presumption of constitutionality, avoidance of the avoidance canon is proposed here. Instead of applying the avoidance canon to interpretations merely raising a constitutional issue, it should be saved for interpretations falling within the unconstitutional red zone. Yet, when an interpretation falls merely raises a constitutional issue, but is not unconstitutional, that interpretation should be presumed constitutional. Finally, interpretations falling within the constitutionally safe green zone need invoke neither doctrine. See final diagram.

# Peace in the Danger Zone – Avoiding Avoidance



For further examination of this proposal, see Slack, 56 Case W. Res. L. Rev. 1057 (Summer 2006).