

**Exam with Sample Answer**

[This exam had 2.5 hours of essay and 45 minutes of multiple-choice questions.]

**Part I (2.5 hours)**

There are two questions in Part I of the examination, each with subparts. The stated time allocations correspond to my assessment of the relative difficulty and weight of each question. You should thoroughly explain your answers as if the reader knows nothing before beginning to read. If you know more about one part of a question than another, it is sensible to spend your time where you can use it most effectively. But do not ignore any major issues in favor of more thorough discussion of another question.

**I. (90 minutes)**

Congress recently passed the following statute:

Any person who, in or affecting interstate or foreign commerce, smokes in an automobile containing a child under the age of six shall be punished by imprisonment up to six months.

Smoking is defined to include burning of any substance.

18 U.S.C. § 10 contains this definition:

The term “interstate commerce,” as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. The term “foreign commerce,” as used in this title, includes commerce with a foreign country.

Jim Bob Local, a resident of Dufus, Texas, has never left the confines of his home county. He drives a vehicle that was manufactured in Japan, but he bought it 8 years ago in Dufus and has no idea how it got there. He purchases gasoline at the local “Handy Dandy” convenience store owned by his neighbor Billy Joe – Jim Bob has never given any thought to where the gasoline comes from or where it is refined except that he knows he doesn’t like America’s “dependence on foreign oil” (pronounced “farn awl”).

- a. If Jim Bob is arrested for smoking in a car with his 5-year-old daughter while driving on a local street (no federal funding has gone into either construction or maintenance of this street), what defenses could he raise and how should a court decide them?
- b. Would it matter if he were arrested on an Interstate highway which was built with 40% federal funding?
- c. Recognizing that there may be constitutional difficulties in this statute, Congress could consider requiring the states to adopt this legislation. Would that be valid?
- d. If Texas did adopt this legislation as a matter of state law and applied it to Libretta Sorensen, a Utah resident who was traveling through Texas on her way to Florida with her 5-year-old son, what additional defense(s) might she assert and how should it or they be decided?

**II (60 minutes)**

Assume that President Obama, in his Inaugural Address on January 20, 2009, announces that he will be removing all U.S. troops from Iraq immediately. In a series of interviews and congressional hearings over the next few days, Pentagon officials and military leaders describe the withdrawal. A fleet of 350 jumbo passenger planes will be assembled from bankrupt U.S. airlines and flown to Baghdad to engage in a

programmed airlift. U.S. civilians who might be at risk will be evacuated first, moving under protection of U.S. troops. Meanwhile, all military and para-military (security) personnel will slowly pull back into a perimeter around Baghdad International Airport. On the basis of 300,000 people (150,000 uniformed soldiers and 150,000 civilians) at 500 per airplane, it will take approximately 600 flights or a little over two weeks to evacuate all personnel from the country (the price of jet fuel means that this will result in transfer of another \$8 billion to Saudi Arabia).

Military planners state that all weapons and related equipment can be taken out by air or truck to Kuwait but that approximately \$40 billion worth of supplies and equipment will be left behind. The analysts supporting the exit point out that our military presence in the country is costing about \$10 billion per month, so the tradeoff is sensible. Other objections, such as that we can't bring equipment back without cleaning it for transport, can be met by moving everything to Kuwait and cleaning it there. *See Gregory Cochran, Easy Out, THE AMERICAN CONSERVATIVE* (Sept. 24, 2007).

This strategy meets with a great deal of disfavor with members of Congress, some of whom have defense industry establishments in their districts or generally feel that their constituents' economic interests could be threatened by a decrease in government spending, while others worry that a precipitous U.S. exit will embolden our enemies in places like Afghanistan and the Sudan to increase their attacks on U.S. facilities and personnel. A majority of the members of Congress state publicly that if the President does not back off, they will pass a resolution prohibiting his planned course of action.

President Obama respectfully thanks these members of Congress for their opinion but states that he will proceed with his plans. Congressman Eagle of Montana then introduces a joint resolution to prohibit the withdrawal of all forces from Iraq, requiring a military presence of at least 50,000 troops through 2010. You are the legislative assistant to Congressman Dove of Massachusetts, who wants an analysis of whether Congress has the authority to pass this resolution, what effect it would have if passed, and whether it would matter if the resolution were changed to a concurrent resolution. Please respond to her questions.

## Sample Answers 08

### Question 1

#### Part A.

A federal court is likely to rule in favor of Jim, because the Congressional statute in question is an impermissible use of the Commerce Power to regulate behavior that is neither inherently commercial nor national in its nature.

The U.S. Constitution limits Congress to the enumerated powers outlined in Art. 1, Sec 8. These include the power to “regulate commerce...among the several states.” While the Commerce Clause has been interpreted as a grant of very broad federal authority, it is not limitless. Indeed, Congress does not have a “police power” i.e. it cannot pass general laws pertaining to health, welfare and safety unless such laws also fall within the parameters of one of the enumerated powers. The police power instead resides in the states, which according to the 10th Amendment reserve the lawmaking authority not given to the Congress.

There has historically been great tension at the outer boundaries of the Commerce Power. Where does the legitimate use of Congressional authority to regulate interstate commerce end, and the infringement of the states police power begin? The debate began in *Gibbons v. Ogden* (1824), in which the Supreme Court held that a New York law regulating steamboat travel on waterways between states was invalidated by a conflicting federal statute. Justice Marshall explained that “commerce” includes far more than just buying and selling; rather, it refers to any kind of commercial intercourse and the activities (such as steamboat travel) associated with it. Justice Marshall justified this wide Congressional authority on two levels: first, because the Supremacy Clause in the Constitution demanded that federal laws override any conflicting state laws; second, because the Articles of Confederacy had failed specifically because there was not enough federal commerce authority.

The holding in *Gibbons* laid the groundwork for modern commerce authority. Although it was temporarily contracted in the early years of the New Deal, the Supreme Court has in the last 60 years presided over nearly unchecked expansion of the Commerce Power. In *U.S. v. Darby* (1941), the Supreme Court overruled a previous precedent and held that the Commerce Power “acknowledges no limitations, other than those prescribed in the Constitution.” There, the Court upheld a federal law that prohibited the interstate shipment of any goods manufactured by workers making less than minimum wage. This was thus a severe restriction of what local employers could pay their workers, even before the goods produced entered the flow of interstate commerce.

The traditional ideas of state sovereignty also did little to check this expansion of the Commerce Power. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Court again overruled a prior case in order to add to Congress' authority. In that case, the court held that the 10th Amendment was a “mere truism” and that the only protection afforded state sovereignty in the area of commerce was structural i.e. the fact that each state had senators and congressmen representing it in Washington.

The Commerce Power is now almost unlimited. The modern test used by the federal courts for examining the legitimacy of a law passed under the rubric of the Commerce Power has two parts: 1) the activity regulated must have a “substantial effect” on interstate commerce, and 2) the means chosen by Congress to regulate that activity must be “reasonably related” to the objective sought. Throughout the 20th century, the Supreme Court's holdings have shown that this test does not keep Congress from regulating a substantial amount of commercial activity that is almost entirely local and intrastate. In *Wickard v. Filburn* (1942), the Court held that Congress could regulate how much winter wheat was grown by a farmer even when nearly all of the produce was used by the farmer himself and not sold on the market. Because the farmer's consumption eliminated demand that would otherwise be satisfied by interstate market, and because the

impact of thousands of other farmers doing the same thing would ruin a legitimate regulatory scheme, the Court held that the regulation was justified. In *Katzenbach v. McClung* (1964), the Court held that federal civil rights legislation applied to a backwoods barbecue joint under the Commerce Power, even though the restaurant had no obvious connection to interstate commerce.

Despite this, Jim has a strong argument that the federal statute applied to him is unconstitutional. While the Court has been very cooperative in allowing Congress to wield the Commerce Power, it has still balked at giving the federal government license to have a general police power. In *U.S. v. Lopez* (1995), the Court struck down a federal law making it a crime to possess a firearm within 1000 feet of a school. This occurred for two reasons: first, Congress made no explicit findings that such firearm possession had any substantial effect on interstate commerce; second, there was no jurisdictional nexus to the law i.e. it would affect weapons bought and possessed locally just as much as it would guns that moved interstate. The Court further held that allowing such a law would open the door to federal legislation on nearly any subject; in other words, would allow an impermissible federal police power. A similar limitation was put on Congress in *U.S. v. Morrison* (2000). There, the Court struck down the federal Violence Against Women Act, which created a cause of action in federal court for any woman whose civil rights were affected by domestic violence. In this case, Congress produced voluminous findings as to the impact that domestic violence against women had on interstate commerce. But because the activity (violence) was in no way “economic in nature,” and because the Court found it necessary to distinguish between “what is truly national and what is truly local,” the Court declined to exercise its usual deference toward Congress. Thus, in order to pass muster under the Commerce Power, the activity regulated must be at least somewhat economic or commercial in nature, and must be at least colorably national as opposed to local activity.

Jim's activity -- smoking in a vehicle with a child under six -- is far more analogous to *Morrison* and *Lopez* than it is to either *Wickard* or *Katzenbach*. Jim was driving on a local street, one which was neither federally funded nor has any direct connection to interstate commerce. While his driving did in fact involve products (his car and his gasoline) that had moved in interstate or foreign commerce, it would be a major stretch to say that Jim himself was thus a participant in interstate commerce. Were this the case, then everyone who drives a car or rides a bus or takes a train would be subject to federal legislation on a variety of topics on a daily basis. This seems to cross the line from an exercise of Commerce Power into an impermissible attempt at police power. Furthermore, Jim's activity (smoking in a car) is just as non-commercial and inherently local as violence against women. Since Congress has apparently not published findings on the subject, it could indeed be said that the connection to commerce is even more tenuous. Jim has a strong argument that the government has failed to show that his activity had any “substantial effect” on interstate commerce. Finally, the court could look at the intent of the federal law -- apparently the protection of the child's health. While protecting such health is a legitimate interest, in and of itself it has almost nothing to do with interstate commerce (at least no more than guns near schools or violence against women does). Thus, any federal court is likely to show the same reluctance as shown by the Court in *Lopez*. While the federal courts show great deference to Congress in economic matters, this is one case where such deference is likely to be overcome and the Congress promptly reined in. If there is a legitimate interest here, it is for the states to regulate and enforce.

Part B:

Had Jim been driving on an interstate highway built with federal funds, it is possible that Congress would have a stronger claim for exercising its Commerce Power to regulate Jim's activity.

There are four broad categories in which Congress' Commerce Power is almost entirely unchallenged: 1) the channels of interstate commerce i.e. the roads, waterways and air routes used to move goods; 2) the instrumentalities of interstate commerce i.e. the ships, cars, trucks and trains used; 3) the articles that move in interstate commerce; and 4) any other activities that have a “substantial effect” on interstate commerce. In this case, the use of an interstate highway would seem to put Jim's activity much more firmly in the first

category, and possibly the second.

There are many examples in which Congress has been able to regulate purely intrastate activity under the guise of regulating the channels and instrumentalities of interstate commerce. In the *Shreveport Rate Case* (1914), the Court upheld federal regulation of commercial train fares even though the trips occurred entirely within the state of Texas. In *Stafford v. Wallace* (1922), the Court upheld the regulation of stockyards on the theory that they are “but a throat” through which the stream of interstate commerce flows. In this case, Congress has a colorable claim that Jim's activity falls under the same umbrella of authority. At the time of his arrest, Jim was using an interstate highway -- a channel that was specifically designed, funded and built to smooth the flow of interstate commerce. As a user of the channel, he would fall under Congressional authority. Moreover, the fact that the activity took place inside Jim's car could make him come under the “instrumentalities” category. The federal government regulates many such activities -- for example, interstate truckers are required by federal law to get a certain amount of sleep in every 24 hours. The case here seems analogous.

However, I would not expect that the use of an interstate highway would save the government's case here. As explained above in Part A, the activity itself is likely to be seen as far too local and non-commercial in nature to fall under the Commerce Power. While the use of an interstate makes the issue a closer one, I would still predict that Jim would prevail.

Part C:

Congress cannot require a state to adopt legislation pursuant to a federal law. This was the holding of the Supreme Court in *New York v. United States* (1992), in which a federal law requiring states to “take title” of radioactive waste was struck down. While the federal Commerce Power is very broad, the Court balked at allowing Congress to hijack the sovereign lawmaking authority of the states in

order to widen the scope of federal regulatory authority. Therefore, any attempt by Congress to coerce the states into adopting the anti-smoking legislation would likely be invalidated. In addition, Congress would be unable to require officers of the state executive branch to take any affirmative action to enforce the policy. In *Printz v. United States* (1997), the Court struck down a portion of the Brady Handgun Act that required state law enforcement to conduct background checks prior to handgun purchases. Despite the fact that such action was simple, temporary, and in many cases was being done by these state officials already, the Court refused to allow it. The same idea could be a limitation here, because it would likely have to be state policemen who would enforce the federal anti-smoking ban.

It should be noted, though, that Congress could use “conditional appropriation” in order to achieve the same effect. In other words, Congress could use its Tax and Spend Power to withhold highway funds unless the states passed the anti-smoking law. Congress did exactly that in *South Dakota v. Dole* (1987), where they made a certain percentage of the federal highway funds conditional on the state passing a 21 year drinking age. So long as the condition was made “unambiguously” and the amount of funds withheld was not so great as to constitute coercion, this action would be allowed by the Court.

Part D:

If Texas adopted the legislation and applied it to out-of-state travelers, then Libretta's main defense is that Texas has impermissibly burdened interstate commerce and thus violated the Dormant Commerce Clause. In this case, it is likely that a federal court would disagree and allow the Texas anti-smoking ban to stand. (Note: I am assuming here that the federal anti-smoking law previously referred to is not in effect. Were this federal law in effect, then Libretta would have no argument that Texas was acting impermissibly.)

The Dormant Commerce Clause limits the extent to which states, in exercising their police power, can place an obstacle in the way of interstate commerce here. There are essentially two competing interests: first, the federal government has a strong interest in maintaining a smooth flow of interstate commerce; second, the

states often have a competing interest in ensuring the health and welfare of their citizens. The modern Court uses a three-part test: 1) the state regulation must pursue a legitimate state end; 2) the regulation must be rationally related to that end; and 3) the state's interest must outweigh any burden on interstate commerce and any discriminatory effect caused by the law.

In this case, Libretta could argue that the Texas law places a major obstacle in the way of interstate commerce and that this burden outweighs any putative benefit to be gained from not having children exposed to second-hand smoke. She could not argue that the law is itself discriminatory, since it applies equally to Texas residents and does not seem to burden out-of-staters any more than it does the locals.

Libretta would likely be encouraged by the Supreme Court's decisions dealing with the dormant commerce clause. In general, the Court will act to remove burdens from interstate commerce; a tie, in other words, usually favors the feds. This idea goes all the way back to *Cooley v. Board of Wardens* (1851), in which the Court first recognized that a state rule could be overridden whenever the Congress has an interest in regulating an economic activity of a national nature. In addition, the Court will often strike down a state law if it produces a conflict with laws in surrounding states. In *Bibb v. Navajo Freight Lines*, for example, the Court struck down a law that required a different mud flap than that required in other states. Such a conflict produces a substantial burden on commerce that should be removed, particularly if the benefit to be had by the states is minimal. Here, the argument made by Libretta would be similar. Unless the state can show that the state's interest in protecting kids from secondhand smoke in cars is very strong, then the court should arguably remove the burden on interstate commerce and eliminate conflicts between the states.

It is not likely, however, that Libretta will convince the federal court. When the state law directly concerns health and welfare (as does this one), there is a strong presumption that the state law is valid. Furthermore, the anti-smoking ban does not seem to place a true obstacle in the way of interstate commerce. If Libretta wants to smoke while driving through Texas, then all she has to do is pull over at a rest stop. This is not the kind of obstacle that the Court usually concerns itself with. Finally, the state could argue that the law is the only way to protect children fully from the proven evils of secondhand smoke i.e. there is no less restrictive means available to achieve the same purpose. Even when there is a burden on commerce, the Court will sometimes allow the state law to stand when this kind of situation exists (as in *Maine v. Taylor*, 1986). Therefore, it does not seem likely that Libretta will prevail in her attack on the Texas law.

## Question 2

Issue 1: Does Congress have the authority to pass the resolution?

There are two competing issues at stake in the answer to this question. On one hand, the Constitution gives the Congress the sole power to declare war. On the other hand, the President has historically been far more dominant in the foreign arena than the text of the Constitution would predict. Given that reality will usually trump Constitutional theory, it does not seem likely that the Congressional attempt to force the President's hand comes from genuine authority.

Article 1, Section 8 of the Constitution gives Congress the sole power to declare war. In addition, Congress is given the sole authority to raise funds for the national defense and to maintain an army and a navy. This would suggest that the framers of the Constitution intended for Congress to exercise legislative supremacy in the fields of the military generally and the use of force specifically. Indeed, some of the framers expressed the intention that the President's role of Commander-in-Chief would be analogous to that of "first general and admiral," meaning that he would exercise fairly minimal strategic discretion and would instead be engaged in carrying out the expressed wishes of Congress in the foreign arena. Using this theory, it would be logical to assert that if Congress decides to declare war, that the President has no constitutional grounds to refuse to use the military in such a way.

The main problem here is that Congress does not seem intent on actually declaring war here. A declaration of war is fairly rare for the U.S., which has done so on only five occasions throughout its history. In all five cases, the nation was readying itself for major combat against an implacably opposed foe e.g. Nazi Germany. Here, it would be ridiculous to argue that Congress, in offering its resolution, is actually declaring war on Iraq. We have never been at war with Iraq -- the situation there now is more accurately described as MOOTW, or military operations other than war. Thus, it seems illogical for Congress to assert that it can compel the President to use force where he has chosen not to do so.

Congress might also argue that the War Powers Resolution gives it extra authority in the area of warmaking, even when the use of force falls outside the realm of a declared war. The WPR allows Congress to force the President to withdraw troops from hostilities through the use of a concurrent resolution. Even if it were analogous to this situation, the WPR has never operated as an effective check on Presidential discretion. While certain Presidents have gone through the motions of WPR compliance at times, no executive has ever accepted that the WPR really operates as a limitation on his authority as commander-in-chief. There is also considerable question as to what would occur if the President simply refused to obey a Congressional directive made pursuant to the WPR. Most experts are of the opinion that the answer is nothing. In this case, applying the WPR is almost laughably ridiculous, since here it is the President that wants to withdraw troops against the wishes of members of Congress. The clear intent of the WPR was to avoid bloody abuses of Presidential discretion such as the war in Vietnam. It was designed to make the withdrawal of troops easier, not harder. Thus, it is unlikely that Congress would find the WPR to be a useful source of authority.

Issue 2: What effect would the resolution have if it were passed?

Even if Congress stood on more solid ground, the fact remains that the President is recognized as having nearly untrammelled authority in the foreign arena. Thus, it is likely that the resolution would have no practical effect on the President's decision.

The President traditionally has very wide powers with regards to foreign relations. In *United States v. Curtiss-Wright Export Corp* (1936), the Supreme Court held that the President could unilaterally ban the sale of arms to foreign countries. Further, the Court stated that in the "vast external realm...the President alone has the power to speak or listen as a representative of the nation." Thus, the President has a "degree of discretion and freedom" in the foreign arena that he is not have in the domestic sphere. That this is true is so obvious that the President's sole power over the military has seldom even been challenged. In the *Prize Cases*, for example, Lincoln's blockade of Southern ports without a Congressional declaration was upheld by a Court that stated that the President "was bound to meet the [war] in the shape it presented itself, without waiting for Congress to baptize it with a name." Further proof of presidential supremacy is found in the frequent use of the U.S. military in "self-help" operations, the likes of which have become extremely common in recent decades. The U.S. has fought only five declared wars in its history, as opposed to nearly 280 other armed conflicts. This shows that Congressional acquiescence has generally established Presidential power as being almost beyond dispute.

Applying this historical perspective, it seems unlikely that Congress could do anything to block the President's withdrawal of forces from Iraq. If the President ignored Congress' wishes, then Congress is left with two options: cut off funding, or sue. The first option is not usable, since one cannot cut off funding if one's own alternative would actually cost more money than what the President wishes to do. Even if it were an option, Congress would likely balk at upsetting the American public in this way. The second option is also a non-starter, since any federal court is likely to see matters in the foreign arena as being an untouchable federal question. In *Goldwater v. Carter* (1979), the Court refused to consider the President's withdrawal from a treaty with Taiwan. Using the six-factor test from *Baker v. Carr* (1962) is also likely to show that the Court has no judicially workable means of settling a conflict between the President and Congress over the use of the military. It seems likely that no federal court would touch this one with a ten-foot pole.

It could be argued, however, that here Congress has not acquiesced to the President's authority, thus

necessitating a different kind of analysis. In *Youngstown Sheet and Tube Co v. Sawyer* (1952), Justice Jackson's famous concurrence established a continuum for Presidential power. When Congress and the President agree, the executive gets maximum deference. When they disagree, the executive's power is at a low ebb. Where Congress is silent, his power is in a zone of twilight. Here, it could be argued that the passage of a resolution would put the President's power at a low ebb, thus the Court would give his decisions maximum scrutiny. But while *Youngstown* had indirectly to do with the foreign affairs and warmaking powers, here the President's decision is directly involved in the disposition of U.S. troops. Thus, a *Youngstown* analysis is probably inappropriate; even if it were not, the court would most likely decide that the President, even with his powers at low ebb, still has the authority to direct troops on the battlefield.

Issue #3: Would it matter if the resolution were concurrent rather than joint?

It is not likely to make any difference. In *INS v. Chadha* (1983), the Court struck down the legislative veto as being inconsistent with the Presentment Clause of the Constitution. In that case, the Congress had attempted to change an executive decision through a one-house resolution. In a sweeping decision, the Supreme Court decided that this was an abuse of legislative authority, and that Congress could only make or change laws by passing them through both houses of Congress and then presenting them to the President for approval or veto.

Here, it seems like the Congress is trying to use the same kind of loophole that was closed in *Chadha*. By authorizing the use of military force in Iraq in 2003, the Congress turned over complete authority to the President to put that decision into effect. The President has done so; now, he has decided to use his authority to withdraw the troops. Just as Congress could not unilaterally withdraw its authority from the executive in *Chadha*, it does not seem likely that they would be able to do so here. This is even more true since the authority here deals with foreign affairs, an area in which the President gets even more leeway and discretion than usual. Thus, unless Congress is willing to present a resolution to the President for approval, it is not likely to have any legal effect. Since the President seems implacably opposed to the Congressional course of action, all that a resolution seems likely to accomplish is a relatively feeble protest against the unstoppable executive power.