

Constitutional Law Examination

May 15, 2015

6:00 p.m. - 9:00 p.m.

Josh Blackman

Instructions:

You will have three hours to complete this exam. There are two essay questions. Each question is worth 50% of the final score. Each question has a 1,000-word limit. Anything you write past 1,000 words will not be read. Both answers combined should not total more than 2,000 words. Please use the word-count feature to check the length of each answer. If you hand-write the exam, please do a manual word count.

The exam is completely open-book. You can use anything you wish, so long as that it was printed *before* the distribution of this exam. Obtaining any new information from anyone or anything *after* the exam is prohibited.

Please don't turn the page until the proctor signals that the exam has begun.

Good luck!

Question 1 (50%)

Instructions: The year is 1960. In the waning days of the Eisenhower presidency, fifteen years after the conclusion of World War II in Europe, hostilities re-emerge in Germany. President Eisenhower takes a series of executive actions to counter to these threats. In response, the House of Representatives approves four articles of impeachment, and a trial will be held in the Senate. You are an advisor to the United States Attorney General, who will be defending the President during the impeachment trial. He has asked you to prepare a memo of no more than 1,000 words addressing five issues present in this trial.

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The year is 1960. Fifteen years earlier in 1945, victory in World War II was declared in Europe. At the conclusion of the war, Germany's government--the National Socialist German Workers' Party, commonly known as the Nazis--was removed from power. Adolf Hitler, the government's Chancellor, was dead. The United States and the Soviet Union divided Germany into two separate countries: a democratic West Germany, and a communist East Germany. The city of Berlin, the former capital of Germany, was divided in the middle by the Berlin Wall--half of the city was in West Germany, and the other half in East Germany. New governments were formed in each nation.

But not everyone accepted the cessation of hostilities. Followers of Adolf Hitler's legacy plotted to reunify the Fatherland as a new nation called "The Nazi State." On May 9, 1960--the 15th anniversary of Victory in Europe--a group of Nazi militants conquered Berlin, reunifying the City, and the Country. The Nazi State raised a new flag over the Reichstag, the site of the German government, and assumed control of the nation. The Nazi State, unlike Hitler's Nazis, did not seek world domination, and had no aggression towards the United States. They simply wanted to reunify Germany under a single rule.

That same day, the Secretary of Defense informs President Eisenhower about the coup in Germany. Eisenhower, who during World War II served as the Supreme Allied Commander and vanquished the Nazis, was very concerned. Eisenhower learns that the Nazi State was advancing towards a small Jewish village on top of a mountain, where they planned to murder all of the residents.

Twenty minutes later, Eisenhower issued **Executive Order #1**, titled, "*Actions Against the Government of Germany.*" He instructed the United States Air Force to attack the German Government, drop bombs throughout Berlin, including on the Reichstag government building, and to destroy the forces advancing on the Jewish village. No ground troops were authorized to engage the Nazi State. The bombings commenced immediately.

President Eisenhower justified his decision to attack the Nazi State based on the Declaration of War signed by President Franklin D. Roosevelt on December 11, 1941 against the Government of Germany. It provides:

JOINT RESOLUTION Declaring That a State of War Exists Between The Government of Germany and the Government and the People of the United States and Making Provisions To Prosecute The Same

Whereas the Government of Germany has formally declared war against the Government and the people of the United States of America:

Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Government of Germany which has thus been thrust upon the United States is hereby formally declared;

and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Germany;

and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.

Approved December 11, 1941 3:05 PM E.S.T.
(Signed) Franklin D. Roosevelt

President Eisenhower transmits immediately a message to both houses of Congress informing them of Executive Order #1. The next day on May 10, 1960, the Democratic-controlled House of Representatives passes a resolution declaring that Executive Order #1 was unconstitutional, as the President did not have the authority to wage war on the Nazi State. The Republican-controlled Senate announces that no votes will be taken on this matter. (Eisenhower is a Republican).

On May 11, 1960, the President issues **Executive Order #2**, titled “*Creation of Spy Program to Infiltrate the Nazi State.*” In order to infiltrate the Nazi State, the United States will send spies to join the government in Germany, and report on secret programs. To ensure that the spies look authentic, and blend in, all members of the program had to be white males, with blond hair and blue eyes. The President noted in the Order that any agents sent to the Nazi State that did not fit this description would be outed, and tortured and killed.

On May 12, 1960, the President issues **Executive Order #3**, titled “*Halting Immigration from the Nazi State.*” In 1955, Congress passed an immigration law that capped at 100,000 the number of visas available annually to immigrants from West and East Germany. Through Executive Order #3, the President determined that even though Congress gave him the discretion to issue up to 100,000 visas, and appropriated the money to fund those visa, he would issue zero visas. He insisted that the United States should not admit *any* immigrants from the Nazi State—even Jewish refugees seeking asylum from the Nazi State.

Later that day, both Houses of Congress passed resolutions, declaring that Executive Order #3 was unconstitutional, as the President failed to take care that the laws were faithfully executed. The President disregards the resolutions.

At 9:00 a.m. of May 13, 1960, in protest of Executive Order #3, the Secretary of State resigns. He insists the order is unconstitutional, and refuses to enforce it. At 10:00 a.m., the President officially nominates Adlai Stevenson as the new Secretary of State. The Senate Majority leader informs the President that he will not bring the nominee for a vote until Executive Order #3 is revoked. At noon, all of the Senators go on their usual one-hour lunch break (two hours if two martinis are involved). During that break, the President announces that he has appointed Stevenson using his recess-appointment power, citing the urgency of national security, and the fact that the Senate refused to hold a vote.

Enraged, on May 20, 1960, the House of Representatives approves four articles of impeachment against President Eisenhower:

1. In his conduct while President of the United States through **Executive Order #1**, Dwight D. Eisenhower, has willfully waged war on the Nazi State without a Congressional declaration of war.
2. In his conduct while President of the United States through **Executive Order #2**, Dwight D. Eisenhower, has willfully denied equal protection of the law, and discriminated on the basis of race and gender by limiting membership in the Spy Program to white males.
3. In his conduct while President of the United States through **Executive Order #3**, Dwight D. Eisenhower, has violated his duty to “take care that the law be faithfully executed” by not issuing any visas to German immigrants.
4. In his conduct while President of the United States through the alleged “recess appointment” of Stevenson as Secretary of State, Dwight D. Eisenhower willfully disregarded the Constitution’s requirement that the Senate shall provide “Advice and Consent” for “Officers of the United States.”

Wherefore, Dwight D. Eisenhower, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States.

The Senate schedules the impeachment trial, to be presided over by Chief Justice Earl Warren, for June 1, 1960.

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You are an advisor to the United States Attorney General, who will be defending President Eisenhower during the impeachment trial. The Attorney General asks you to draft a memorandum of no more than 1,000 words, citing all relevant Supreme Court decisions, addressing the following five issues:

1. What is the President's strongest defense to the first article of impeachment concerning **Executive Order #1**, charging him with waging war on the Nazi State without a Congressional declaration of war? Pay special attention to the 1941 Declaration of War against the "Government of Germany."
2. What is the President's strongest defense to the second article of impeachment concerning **Executive Order #2**, charging him with denying the equal protection of the laws by limiting the spy program to white males?
3. What is the President's strongest defense to the third article of impeachment concerning **Executive Order #3**, charging him with failing to execute the law by refusing to issue any visas to German immigrants?
4. What is the President's strongest defense that his recess appointment of Stevenson as Secretary of State was constitutional, and did not violate Art. II, Sec. 2?
5. The Attorney General is preparing his closing argument for the impeachment trial. He asks you to discuss, from a *policy perspective*, the role that *discretion* plays in the President's duties. Specifically, address how a President's obligations for protecting national security are affected when Congress refuses to vote on his agenda.

Please remember that you are offering arguments for an impeachment trial, and not a court proceeding, so concerns about standing or the role of the courts are irrelevant. What matters here--as always--is how the Congress and the President interpret the Constitution.

Question #2 (50%)

Instructions: The year is 2015. The state of New York, concerned about new guns printed with a three-dimensional printer, enacts three ordinances to regulate these weapons. Cody, who designed and shared on the internet the electronic “blueprints” for 3D-Printed Guns, is charged by the New York Attorney General for violating the three ordinances. Cody has moved to dismiss the charges, citing the recently-enacted federal *3D Firearms Protection Act*. You are an associate of the criminal defense firm representing Cody. Your senior partner has asked you to prepare a memorandum of no more than 1,000 words addressing five issues concerning this case.

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Cody, a law student at New York University, is passionate about guns, and teaching others about guns. To Cody’s disappointment, New York has very strict laws concerning the manufacturing, sale, and ownership of firearms. New York prohibits the carrying of all firearms within the state without a license. Cody’s application for a concealed carry license was denied by the Attorney General because Cody failed to demonstrate that he really “needed” the gun.

Cody decides to take matters into his own hands with the new technology known as three-dimensional printing (“3D Printing”). 3D Printing allows Cody to design an object in three dimensions on a computer. The 3D Printer then “prints” the three-dimensional physical object out of plastic, in much the same way that a traditional printer can print a two-dimensional object on paper.

Soon, Cody creates on his computer the design for a handgun, and is able to print it out using his 3D Printer. It is a very simple handgun that can only hold one small bullet at a time--but it is lethal. Every time the bullet is fired, the handgun has to be manually reloaded. The gun is made entirely out of plastic, except for a piece of metal used as the firing pin (the part of the gun that strikes the bullet, shooting the projectile out of the weapon). Cody names the handgun the “Freedomaker.”

Cody posts on the internet the electronic file for the “Freedomaker”--known as the “blueprints”--along with instructions of how to print the handgun. Within hours, it becomes a viral sensation and is downloaded by hundreds of thousands of people.

The Governor of New York learns of Cody’s actions, and becomes furious. The New York State Legislature quickly enacts three ordinances to deal with this emerging threat.

1. **Ordinance #1** makes it a felony to transmit any information about 3D-Printed Guns through any electronic means. This includes posting on the internet the “Blueprints,” and any related instructions that teach someone how to manufacture a 3D-Printed Gun.
2. **Ordinance #2** makes it a felony to use a 3D Printer to create any gun or its component parts.
3. **Ordinance #3** makes it a felony to transport a 3D-Printed Gun or its components out of New York and into another state.

Cody is enraged by these three laws. Cody uploads all of his 3D Printer files to his internet file server, which is physically located in New Jersey. He prints out another Freedomaker, and puts it in a locked case. He then puts the locked case in the trunk of his car, and drives towards New Jersey. As he gets on the George Washington Bridge, a New York State Trooper starts to follow him. As soon as he gets off the gridlocked bridge into New Jersey, the Trooper turns on the sirens, pulls over Cody, and places him under arrest for the violations of Ordinances 1, 2, and 3.

Cody's arrest becomes a media sensation, and Americans nationwide are outraged that New York arrested Cody for exercising his First and Second Amendment rights. In response, Congress enacts the *3D Firearm Protection Act*. The bill has four sections:

Section 1.

- a. The Congress finds that the framers of the Constitution, recognizing free speech as an unalienable right, secured its protection in the First Amendment to the Constitution.
- b. The Congress finds that the states are infringing the rights of free speech by restricting the transmission of 3D-Printed Gun "Blueprints" and related electronic files.
- c. No state shall restrict the electronic transmission of such files, unless the regulation is narrowly tailored to serve a compelling government interest.

Section 2.

- a. The Congress finds that the framers of the Constitution, recognizing the right to keep and bear arms as an unalienable right, secured its protection in the Second Amendment to the Constitution.
- b. The Congress finds that the states are restricting the right to create 3D-Printed Guns for personal use.
- c. No state shall substantially burden the right to create a 3D-Printed Gun for personal use.

Section 3.

- a. The Congress finds that the framers of the Constitution vested Congress, and not the states, with the power to regulate commerce among the states.
- b. The Congress finds that the states are restricting the rights of Americans to carry lawful firearms, interfering with the stream of interstate commerce and the right to keep and bear arms.
- c. No state shall substantially burden the right to carry a 3D-Printed Gun in any state.

Section 4.

A person whose rights have been burdened in violation of this statute may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the state.

The President promptly signs the *3D Firearm Protection Act* into law.

Undisturbed by the new federal law, the Governor of New York instructs the Attorney General to continue the prosecution of Cody. Cody is indicted by the Grand Jury on three counts of violating Ordinances #1, #2, and #3.

Cody's defense team files a motion to dismiss the indictment, alleging that the prosecution violates Sections 1-3 of the *3D Firearm Protection Act*.

Cody also files a lawsuit in federal district court seeking damages against the state of New York, relying on Section 4, arguing that the state deprived Cody of his federal rights protected by the *3D Firearm Protection Act*.

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You are an associate at the law firm defending Cody. Your senior partner asks you to prepare a memorandum of no more than 1,000 words, citing all relevant Supreme Court decisions, addressing the following five issues:

1. Does Section 1 of the *3D Firearm Protection Act* preempt the enforcement of Ordinance #1? Specifically, does Congress have the power to enact Section 1? If so, which provision(s) of the Constitution give(s) Congress that authority.
2. Does Section 2 of the *3D Firearm Protection Act* preempt the enforcement of Ordinance #2? Specifically, does Congress have the power to enact Section 2? If so, which provision(s) of the Constitution give(s) Congress that authority.
3. Does Section 3 of the *3D Firearm Protection Act* preempt the enforcement of Ordinance #3? Specifically, does Congress have the power to enact Section 3? If so, which provision(s) of the Constitution give(s) Congress that authority.
4. Does Section 4 authorize Cody to file suit for damages against the state of New York for violating his rights protected by the *3D Firearm Protection Act*? (Assume the case is justiciable, and properly before the district court).
5. From a *policy perspective*, please discuss the extent to which Congress should use its powers to enforce civil rights in the sovereign states, and what limitation federalism and the separation of powers should impose on that authority.