

Exam Post-Mortem
Constitutional Law I – Fall 2009
Professor Massey

Below is a brief dissection of the examination. What follows is a repetition of the essay question and a summary indication of the issues and the approach to be taken in handling those issues. *This is not a model answer.* Rather, it identifies the principal issues, outlines the analytical approach to those issues, and provides some feedback with respect to common errors or omissions. A model answer would analyze these issues thoroughly and persuasively in grammatically correct, well-organized, even elegant, prose. Organizational defects, which blurred inexorably into analytical lacunae, were not uncommon. Many of you tried to deal with every conceivable issue, even when the issues were non-existent or irrelevant. Some of you belabored the obvious, to the detriment of space devoted to the real issues. Some of you provided essays on the law but failed to apply that law to the question at hand. The range of raw scores on the multiple choice portion was 21 to 51. Because each question was worth three points, the range of correct answers was 7 to 17, out of 22 possible correct answers. The median was 12 correct answers. The range of raw scores on the essay was 1 to 13. The range of total raw scores was 28 to 64. The median was 45. The median course grade was a B+.

PART TWO
(Word Limit: 1500 words)

President Obama announces that, in order to make the executive branch more efficient and to utilize the talents of Vice President Biden, he will assign specific responsibilities to the Vice President. The President then signs an executive order that (1) directs the Secretaries of the Departments of the Interior, Commerce, Labor, Energy, Education, Homeland Security, and Housing and Urban Development to report exclusively to the Vice President, (2) proclaims that the Vice President shall have the final and exclusive authority to direct all policy initiatives that come within the purview of those departments, and (3) commands the Vice President to assume responsibility for the execution of all laws for which those departments may be responsible. You are the legislative assistant to Senator Hiram Pettifogg, who asks you to prepare a memo addressing the question of whether this arrangement is constitutionally valid and, if not, to suggest ways in which the validity of this executive order might be challenged in the federal courts. Please do so.

The executive order raises the question if whether President Obama has violated the constitutional requirement that the duty to “take care that the laws be faithfully executed” be discharged by the President. The answer turns on a consideration of the status of the Vice President and the scope of the President’s removal power. The problem is whether the executive power may be wielded by an official who is not removable by the President. While *Myers* held that purely executive officials must be subject to unilateral removal by the President, *Humphrey’s Executor* and *Wiener* held that Congress may impose limits on the President’s ability to remove “quasi-legislative” or “quasi-judicial” executive officials. That structure was essentially obliterated for **inferior officers** in *Morrison*, in which the Court stated that the test was “whether

the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty" to execute the laws.

There can be no doubt that the Vice President is not an inferior officer. He is removable only by impeachment and is immune from presidential removal. While the only rights and duties the Constitution imposes on the Vice President are the obligation to preside over the Senate, cast a vote in the event of a tie in the Senate, and succeed to the presidency in the event of a vacancy in that office, these rights and duties (particularly succession to the presidency in the event of a vacancy) strongly indicate that the Vice President is principal officer. If he is not a principal officer, who is?

The executive order purportedly vests the Vice President with the exclusive authority to direct the policies of key executive departments and to assume the duty to execute the laws that are administered by those departments. These are presidential powers and thus it would appear that the President has no authority to delegate his constitutional powers to an executive official that is not removable by the President. *Morrison* did not overrule either *Myers* or *Humphrey's Executor*; rather, the Court acknowledged that those cases remained good law. The implication is that the *Morrison* standard governs when the question is the degree of control the President must have with respect to inferior officers. Because the Vice President is not an inferior officer, but a quintessential executive official holding an office that is the proverbial heartbeat away from the Presidency itself, *Myers* is the applicable precedent.

However, even assuming the applicability of *Myers* it is possible that the executive order is valid. Of course the President may not remove the Vice President but the President may revoke or rescind the executive order at any time. Is that equivalent to the power of removal of the Vice President? With respect to the matters at issue here, the ability to rescind the executive order is actually a greater power than removal of the Vice President. If the President could remove the Vice President without revoking the executive order, he would leave the direction of those agencies (and enforcement of the laws they administer) in limbo, because the order gives the Vice President exclusive power. But if the President revoked the executive order the power to direct these agencies and enforce the laws pertinent to them would immediately and automatically revert to the President. Moreover, even without revocation of the executive order the President could remove the relevant cabinet secretaries.

On the other hand, during the time the order is in effect the President has transferred his constitutional authority to a person not the President and not removable by the President. Even a temporary transfer of this core executive power appears to violate Article II. The Constitution contemplates **one** President who has final responsibility for executing the laws.

There remains the question of whether there is some method for obtaining adjudication of this issue. The problem is finding a plaintiff who has standing to challenge the order. It is possible that a private interest affected by some law that is administered by one of the relevant agencies could challenge the order, but it is unlikely that such a plaintiff would have suffered injury in fact. The underlying law is presumably valid, and thus its execution by command of the Vice President is no different than if it were enforced by presidential command. There is no injury to the hypothetical plaintiff as a result of vice-presidential direction and enforcement.

Alternatively, Congress could enact legislation (presumably over a presidential veto) expressly negating the executive order. The continued existence of the order and action pursuant to it might be a sufficient personalized injury in fact to Senator Pettifogg and other members of Congress voting for such legislation to constitute injury in fact. This is unlike the complaint of

members of Congress who voted against the line item veto and then attempted to challenge its validity. In *Raines v. Byrd*, the Court said that “diminished effectiveness of their votes” was insufficient injury – their votes were given effect; they just lost the vote. But here the votes are not given effect if the legislation is ignored. That injury would be caused by the President’s refusal to comply with the legislation, and the injury may be redressed by a judicial finding that the executive order is invalid. Of course, it may be that Congress lacks the authority to enact this legislation, but if so that merely injects another issue into the litigation; it should not deny standing unless a court first determines that Congress had no authority to enact the legislation, at which point the claims with respect to the order would become moot.

However, even if such legislation could be enacted and even if Senator Pettifogg has standing, it may be that this presents a non-justiciable political question. The question of whether the President is faithfully executing the laws may not be demonstrably textually committed to the President or Congress for resolution, but there are probably no judicially cognizable standards for resolution of the issue. Whether the President’s retention of the power to revoke the order and his power to remove cabinet secretaries amounts to a faithful execution of the laws, even though the President has delegated his powers to the Vice-President, requires a judgment about the degree of presidential involvement in law enforcement sufficient to constitute faithful execution. However, removal issues have been found to be justiciable, and because such issues involve the degree of presidential control of his subordinates it might be that this issue is similarly justiciable. This issue does not require assessment of how much the President is involved in execution of laws, but whether he can delegate that power to another principal executive officer who is not removable by the President. Congress should attempt to enact the described legislation and members of Congress who vote for the legislation should file a lawsuit challenging the validity of the executive order.

Some of you thought that the nature of the delegation to Vice President Biden was sufficiently ambiguous that the President retained sufficient control over the departments assigned to the Vice President to avoid these constitutional questions. That was a reasonable argument, but should have been coupled with discussion of the foregoing constitutional issues. Some of you interpreted the policy control given to the Vice President to be so extensive that it deprived Congress of any ability to direct these departments via ordinary legislation. Of course, such an attempt to deprive Congress of its legislative authority would be invalid, but this argument, if made, should have been ancillary to the main points. Others thought that the non-delegation doctrine ought to apply to executive action. Perhaps, but if so this is merely a prelude to discussion of the points set forth above.