

Question 2

To protect the nation against terrorism, the President proposed the enactment of legislation that would authorize the Secretary of Homeland Security (“the Secretary”) to issue “National Security Requests,” which would require businesses to produce the personal and financial records of their customers to the Federal Bureau of Investigation (“the FBI”) without a warrant. Congress rejected the proposal.

Thereafter, in response, the President issued Executive Order 999 (“the Order”). The Order authorizes the Secretary to issue “National Security Requests,” which require businesses to produce the personal and financial records of their customers to the FBI without a warrant. The Order further authorizes the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records.

Concerned about acts of terrorism that had recently occurred in State X, the State X Legislature passed the “Terrorism Prevention Act” (“the Act”), requiring businesses in State X served with National Security Requests pursuant to the Order to produce a copy of the records to the State X Department of Justice.

1. Is the Order within the President’s authority under the United States Constitution? Discuss.
2. Assuming the Order is within the President’s authority, does the Order preempt the Act? Discuss.
3. Assuming the Order is within the President’s authority and does not preempt the Act, do the Order and the Act violate the Fourth Amendment to the United States Constitution on their face? Discuss.

Answer A to Question 2

1. Is the order within the President's authority under the United States Constitution?

Order 999

Order 999 was issued by the President after an identical piece of legislation proposed by him was rejected by Congress. The Order requires business[es] to produce the personal and financial records of their customers to the FBI without a warrant upon issuance of a "National Security Request" by the Secretary of Homeland Security. It is unclear what the use of such information so produced would be, other than the President's stated goal of protecting the nation from terrorism.

As an initial matter, assuming that the Order is valid (see below), it would not be a violation of the nondelegation doctrine. The President may delegate executive power as he sees fit to other members of the executive [branch].

Congressional Authorization

The President's power is at its apex when he acts pursuant to power given him by Congress. The U.S. Supreme Court has said that when he acts in the face of Congressional disapproval, he may only do so if the power he exercises is vested in him alone by the Constitution and denied to Congress. Where he acts in the face of Congressional silence on a matter, he acts in a "gray area". The case law is split as to whether Congressional rejection of a proposed power (but not the enactment of some act disallowing the President's use of that power) is silenced or disapproval, but the cases tend toward disapproval.

In this case, the President has issued Order 999 in the face of Congressional rejection of an apparently identical piece of legislation. The courts would likely treat such an action as occurring in the face of Congressional disapproval. Therefore, the court will only allow the Order if it is within the powers that only the President may exercise. If the court treats Congress' disapproval of the proposed legislation as silence, then the court will treat the Order as in the "gray area" of executive power and probably approve it if it is within the President's power. In this gray area, the court will likely look to the legislative history surrounding the defeat of the President's proposed legislation to divine some intent from the defeat.

Congress, on the other hand, could have authorized the act (assuming it is not unconstitutional under the 4th Amendment, see below). Congress has the power under the Commerce Clause to regulate the people, channels and instrumentalities of interstate commerce, as well as those things having a substantial effect on interstate commerce. The personal and financial information of individuals in America are most likely instrumentalities of commerce, and almost certainly have an effect on interstate commerce. So Congress does not have the ability to regulate in the field.

Congress is not bound by the Contracts Clause, so it does not pose a problem.

Given the fact that the power to make an Order such as this is not exclusively vested in the President, and the fact that he acted in the face of Congressional denial of his proposal to do so, the court will likely treat his act as outside his authority.

The President's Domestic Affairs Powers

The President has some domestic affairs powers reserved to himself. These include the appointment and removal powers, the pardon power, the commander in chief power, and the duty to execute the law. The President may make an argument that the latter two powers support the Order.

As an exercise of the commander in chief power, the President has the exclusive power to control the deployment of troops and their day-to-day control. There is a very weak argument that turning over financial records supports this role.

There is a better argument that the duty to execute the law supports the Order. In order to keep the nation safe, the President will argue, he must allow the FBI access to personal and financial records of all Americans. This is still a weak argument and there is no law to support it.

The President's Foreign Affairs Powers

The President shares foreign affairs powers with Congress, but has some reserved to himself, including the power to conduct foreign negotiations, to deploy troops overseas, and to make executive agreements.

The Order is not even arguably within his foreign affairs powers, as it concerns Americans' financial records at home, and gives them to the FBI, the government's domestic law enforcement agency.

Commandeering

Finally the Order poses a problem with commandeering; that is, the federal government's forcing the states to act. The Constitution as interpreted by the Supreme Court prohibits the federal government from requiring the states to enforce its laws. The Order forces law enforcement officials to "assist" the FBI. While the Congress could, for instance, condition spending to the states on such help, the President cannot force the states to do so. The Order violates the Constitution to that extent as well.

2. Does the Order Preempt the Act?

State X has passed an Act requiring business[es] in the state to provide the information they provide to the FBI under the Order to the state's DOJ as well. This section assumes that the Order is valid and treats it as federal law.

Preemption

Federal law can preempt state law in two ways, express and implied. In either case, where there is preemption, the state law is invalid under the Supremacy Clause of the Constitution. Express preemption occurs when the federal law by words states that it is the only regulation allowed and state regulation is prohibited. The Order does not contain an express preemption.

Implied preemption can occur in one of three ways, by direct conflict with state law, by so-called field preemption, and where the state law interferes substantially with the federal objective. Here, there is no direct conflict between the Order and the Act. The Act does not call for state business[es] to do anything they are prohibited from doing under the Order and vice versa. The Act merely requires businesses to provide a separate copy of their response to the Request to the state DOJ. This is not direct conflict.

Field preemption occurs when it appears from the legislative history of a federal law or from the law itself that it intends to be the only regulation in the area (for instance, environmental regulations typically provide that they are intended to fully occupy their fields). There is no legislative history for this Order other than the President's statement that it is to protect the nation from terrorism, and there is no language that a court might read as field preemption.

When a state law substantially interferes with the objectives of federal law, the state law will give way. Here, it does not seem like the Act interferes at all with the objectives of the Order. The Order provides that financial records go to the FBI (federal law enforcement) and the Act provides that a copy will go to state law enforcement. The Act is therefore not preempted.

Congressional vs. Executive Action

The above analysis assumes that an Executive Order can preempt a state law. The case law is unclear as to this point but it might be instructive to look to the President's authority to preempt state law under his power to make executive agreements with foreign governments. Because an executive agreement preempts state law, it is reasonable to assume that a court would declare an executive order to do so as well.

Contracts Clause

The Contracts Clause prohibits the states from substantially interfering with the obligation of existing contracts unless they have a substantial and legitimate reason for doing so and the means are reasonable and narrowly tailored to do so. Here, in the absence of the Order, the Act might have interfered with private contracts requiring businesses [to] keep their customers' records confidential. However, because the Order already breaks those contracts, and the Act goes no further, if the Order is valid, so is the Act.

3. Does The Order and Act Violate the 4th Amendment On Their Face?

The 4th Amendment applies to the federal government directly and to the states via incorporation by the 14th Amendment. The Order and Act call for the same information to be passed to equivalent agencies upon the same request. Therefore, the Order and the Act are essentially the same for the purposes of the 4th Amendment and will be analyzed together in this section.

The 4th Amendment

Purpose

The 4th Amendment prohibits unreasonable searches and seizures. The purposes [is] to prevent police and law enforcement misconduct. The Order and Act involve law enforcement collection of data without a warrant and therefore are generally within the scope of the 4th Amendment.

Use

The 4th Amendment generally provides that all evidence unreasonably seized be excluded (subject to some exceptions, for instance, for impeachment) from criminal prosecutions. The 4th Amendment is satisfied where a warrant has been issued and does not apply where there is an exception to the warrant requirement. The exceptions to the warrant requirement include searches incident to a lawful arrest, automobile searches, plain view, consent, stop and frisks, hot pursuit and evanesce. None of those exceptions apply here. There are also reduced requirements for so-called administrative warrants issued in highly regulated industries. However, that likewise does not apply here, as there is no warrant issued in a Request setting.

Government Action

The 4th Amendment only applies to government action. Here, the Order and Act require that private businesses turn over their records to law enforcement. In and of itself, this might not be considered government action, but the fact that the Order and Act [are] triggered by the Secretary's issuance of a Request (clearly government action) brings them within the scope of the 4th Amendment.

Reasonable Expectation of Privacy – Standing

The 4th Amendment prohibits unreasonable searches and seizures. The court has interpreted this to mean that it prohibits intrusions in areas where a person has a reasonable expectation of privacy. The facts do not state exactly what information is subject to the Requests. The case law is mixed on what sort of information is subject to a reasonable expectation of privacy. Pen registers (which record phone numbers dialed but not conversations) and bank account balances are not subject to the reasonable expectation of privacy, but it appears that the Requests go beyond those and will most likely be struck down if such information is used against an individual in a criminal prosecution.

Use of Information Discovered

In and of themselves, the Order and Act do not violate the 4th Amendment. However, any use of information in a criminal prosecution found thereby would violate the 4th Amendment, so, while the Order and Act are constitutional, they are essentially useless for criminal prosecution. For other purposes where the 4th Amendment does not apply (for instance, grand jury proceedings, parole revocation proceedings, immigration proceedings), the use of information discovered pursuant to the Order and Act is likely constitutional.

Answer B to Question 2

1) Is the Order Within the President's Authority Under the United States Constitution?

There are several potential sources of authority for the order in question. Unlike Article I, which vests specifically enumerated legislative powers to Congress, Article II, Section 1 vests "all" executive authority with the President. The President could claim that orders of this nature are inherently part of the "executive" power imbued in his office by the so-called "vesting" clause. This does not amount to an executive "police power," but it does allow the executive to take actions traditionally taken by heads of state. There is little case law on this clause, so it is uncertain whether it would provide sufficient justification for the President's actions.

The President could also seek to justify the order under his foreign affairs power. The President's powers in this area are plenary and expansive. The President would argue that the Order is designed to prevent and deter acts of international terrorism. Given the plenary and complete nature of the President's authority in this arena, this is a potentially solid grounding for the President's ability to enact the order.

Relatedly, the President could seek grounds for his order in his war powers. This claim would be based on the assertion that the United States is engaged in a "war" on terror. The Order would be seen as part of the President's efforts to defend the country from potential terrorist attacks. This grounding, however, probably goes too far. While the President's war powers are expansive, even in the case of a non-declared war, they are unlikely to justify an order of this nature. In dealing with the deployment and movement of troops, the President's powers are plenary. However, when dealing with civilian matters unrelated to the armed forces, his authority is greatly diminished.

Finally, the President could attempt to find a basis for his actions here in the "Take Care" Clause. The President is charged to ensure to "take care" that the laws be faithfully executed. Here, he would argue that terrorism, by its very nature, precludes and disrupts the execution of the laws of the land. His Order would be seen as a necessary step to ensuring that the laws are indeed faithfully executed.

The President's actions here would be unaffected by the test for executive authority set forth in the Steel Seizure case. Under that tripartite formula, the President's powers are at their highest when acting pursuant to congressional legislation; they are lessened if there is no congressional legislation on the matter, and they are at their lowest when he is acting in the face of congressional legislation. In this case, the President's proposal was indeed rejected by Congress. However, if that rejection did not come in the form of legislation barring the President from taking such action, it is unlikely that the rejection would have much impact on his authority to enact the Order. The mere refusal to enact a bill does not put the President's actions in the third Steel Seizure category. Thus, it appears that the President's actions fall in the middle ground-with no congressional legislation on the matter.

Thus, in this case, the President appears to be operating in an area where he is not bound or backed by congressional authority. In such an arena, the President's actions are bolstered by past acts of the executive. Here, the "National Security Requests" operate in much the same way that national security letters operate in the current system – FBI or DOJ can issue such letters and demand documents in return, without a warrant. It is likely therefore that the bulk of the Order would appear authorized under some combination of the vesting clause, the foreign affairs power, or the Take Care Clause.

A contrary argument would be that executive Orders are only binding on officials within the executive branch. As such, since this order attempts to control the actions of those outside the executive branch (the businesses), it is unconstitutional.

In either scenario, the portion of the Order that allows the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records is probably unconstitutional. The Supreme Court has held that the 10th Amendment prohibits Congress from "commandeering" either state legislatures or state executive officials (Printz). In other words, Congress cannot compel state governments to take action. It may incentivize [sic] action, and it may make grants of funds contingent, but it cannot demand. While the cases themselves referred to congressional action, it is likely that executive action would fall under the same rubric. In this case, the Order authorizes the Secretary to "require" state and local law enforcement to assist in the collection of records. That requirement effectively commandeers state officials and is therefore unconstitutional (there is an exception for requiring state governments to produce records already in their possession, but that is inapplicable here, as the records are not in state government possession).

2) Assuming the Order is within the President's Authority, does the Order Preempt the Act?

By action of the Supremacy Clause, federal law may "preempt" state law. Federal law is the supreme law of the land and renders any contrary state legislation void. This preemption can take several forms. Preemption can be express – in other words, the legislation may specifically indicate that it is preempting state law (express preemption does not rule out implied preemption). In this case, however, there is no indication that the Order by its express terms preempts state law.

Preemption can also be implied. In other words, federal law can preempt state law if it is clear that the federal legislation was meant to occupy the entire field of regulation, if the state law poses an obstacle to carrying out the federal law, or if the legislation conflicts with the relevant state law. These principles are generally applied to congressional action. If they only applied to congressional action, then, by definition, an executive order like the one in this case could never preempt state law. Assuming, however, that executive orders can indeed preempt state law, there is no implied preemption in this case. There is no indication that the order was intended to occupy the entire field of regulation in this area. It is plausible that states would be allowed to

assist (indeed, the Order attempted to mandate that they would assist) and in any case, there are alternative means of obtaining business records, etc. (warrants). The law does not pose an obstacle to the enforcement of the federal act, nor does it conflict with it. Again, the Act appears to be an attempt to aid the federal government in carrying out its order.

Thus, under either theory, the Act is not preempted by the Order.

3) Assuming the Order is within the President's authority and does not Preempt the Act, do the Order and the Act violate the Fourth Amendment?

Order

The Fourth Amendment applies directly to the federal government and prohibits unreasonable searches and seizures. Unreasonable searches and seizures have been deemed to be those involving state action which intrude upon an individual's reasonable expectation of privacy.

In this case, the state action element is clear. The federal government is ordering businesses to produce the records of their clients.

The next question is whether there was a reasonable expectation of privacy in the customer records. Individuals have a reasonable expectation of privacy, for example, in their homes. However, there are other things in which an individual has no reasonable expectation of privacy. Generally, items passed on to third party businesses cannot reasonably be expected to be considered private. For example, there is no reasonable expectation of privacy in bank records. By analogy, therefore, it is unlikely that there is a reasonable expectation of privacy in business records. Generally speaking, an individual has no standing to sue for the seizure of his property that is in the possession of another. On occasion, the owner of property does have standing to sue, but given the fact there is no expectation of privacy in bank records, it is unlikely applicable here.

Assuming, however, that there was indeed a reasonable expectation of privacy, the search is only permissible if there was a warrant or if the search fell into one of the exceptions to the warrant requirement. Here, it is clear that there was no warrant. A warrant must issue on the basis of probable cause, specifically describe the place to be searched or the person or things to be seized and be issued by an unbiased magistrate. In this case, while there is arguably a description of the things to be seized, there is no indication of probable cause, and the issuing authority (the Secretary) is not an unbiased magistrate (in many senses, he is akin to a prosecutor who has an interest in the outcome of the investigation).

A search may still be reasonable, however, if it falls into one of the exceptions to the warrant requirement. However, none of the main exceptions appear to be applicable. This is not a search incident to a lawful arrest, it is not a Terry stop, it is not under the automobile exception, there is no consent, there is no hot pursuit, the items are not in

plain view, and this is not an inventory search. The government could attempt to argue that this falls under the “special needs” exception to the warrant requirement, but that does not appear to be applicable. The special needs exception is justified only in extreme situations where law enforcement could not carry out its duties in any other fashion (i.e., drunk driving checkpoints, airport security searches). In this case, while the threat of terrorism may pose an extreme danger, it is unlikely that this is the only way of protecting the public.

Act

The Fourth Amendment has been incorporated against the states through the due process clause of the 14th Amendment. Thus it applies against the states in the same manner as it does against the federal government, so the analysis is the same as above.