Lee Burgess: Welcome to the Law School Toolbox podcast. Today we're going to be talking about three different topics in Constitutional Law that are sometimes tested together: executive authority, federal preemption, and commandeering. This is another in our "Listen and Learn" series. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you can be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series. Today we are going to be talking about three different topics in Constitutional Law that are sometimes tested together: executive authority, federal preemption, and commandeering. These topics go well together because they all involve a power struggle between government entities. In the case of executive authority, the struggle is between the President and Congress. In the case of federal preemption and commandeering, the struggle is between the federal government and state governments.

Lee Burgess: Let's start our discussion of executive authority by reviewing the various presidential and congressional powers. The President has both domestic and foreign affairs powers. The President's domestic affairs powers include the power to, (1) faithfully execute the law – under the Take Care Clause – as Chief Executive of the United States; (2) appoint ambassadors, public ministers, consuls, Supreme Court justices, federal court judges, and other officers of the United States (with Senate advice and consent); (3) appoint inferior officers when such power is given to the President by Congress; (4) remove cabinet level appointees and independent regulatory agency appointees; (5) pardon federal crimes (except for crimes that lead to impeachment by the House of Representatives); and (6) act as the Commander in Chief of the military.

Lee Burgess: The President's foreign affairs powers include the power to negotiate treaties (with Senate approval), enter into executive agreements (without Senate approval), and to control and deploy U.S. troops in foreign countries. We won't delve into these powers today, but it is important to note that some of these powers – like the power to faithfully execute the law – are exclusive to the President. Other powers – like the power to appoint ambassadors and Supreme Court justices – are shared with the Senate.

Lee Burgess: Okay, that covers presidential powers. Let's quickly review Congress's powers. Congress has the power to, among other things, regulate interstate commerce, collect taxes, and spend for the general welfare.

Lee Burgess: Now, so long as the President and Congress stay in their respective lanes, there's no problem. But things can get tricky when the President and Congress want to regulate the same area.

Lee Burgess: In order to determine whether the President's action is within his constitutional power, we must look to *Youngstown Sheet and Tube Company v. Sawyer*. As you may recall, *Youngstown* involved an executive order issued by President Truman, which directed the Secretary of Commerce to seize and operate most of the nation's steel mills. This was done in order to avert the expected effects of a strike by the United Steelworkers of America during the Korean War. The Supreme Court held that the President did not have the authority to issue such an order. The Court found that there was no congressional statute that authorized the President to take possession of private property. The Court also held that the President's military power as Commander in Chief of the Armed Forces did not extend to labor disputes. The Court argued that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

Lee Burgess: While the *Youngstown* case produced a majority opinion and five concurring opinions, the rule typically relied on for executive authority issues is the three-part test from Justice Jackson's concurrence. Under that test, there are three levels of presidential authority. First, if the President acts pursuant to an express or implied authorization of Congress, he is acting within the highest level of authority, and his actions are likely to be deemed valid. Second, if the President acts when Congress is silent, the President's acts will be upheld unless he is usurping the power of another branch of the federal government. Third, if the President acts against an express or implied will of Congress, he acts within the lowest level of authority, making his actions likely to be deemed invalid unless he is acting pursuant to his exclusive authority.

Lee Burgess: Okay, that covers the rules for executive authority issues. Let's move on to preemption. Under the Supremacy Clause of the U.S. Constitution, validly enacted federal law will always preempt – or trump – conflicting state law. State law may be preempted either expressly or impliedly.

Lee Burgess: Express preemption occurs when federal legislation specifically states that the federal law is exclusive. Implied preemption occurs through, (a) direct conflict with state law; (b) field preemption; or (c) when the state law substantially interferes with the objective of the federal law, sometimes called "obstacle

preemption". Note that you might see both direct conflict preemption and obstacle preemption referred to as subcategories of a broader "conflict preemption", but for our purposes, we're going to keep them separate.

Lee Burgess: Now, let's break these down a bit further. For direct conflict preemption, it's not enough that a state law contains additional or different requirements from the federal law. A direct conflict is held to exist only when it is impossible to comply with both the federal law and the state law simultaneously. For example, if a state law required all widgets to be red and a federal law stated that no widget could be red, the state law would be preempted under conflict preemption. Field preemption exists when it appears from the law itself or its legislative history that the federal government intended to exclusively occupy a given field. A good example of this is immigration policy. States are not free to enact immigration laws, because the federal government completely occupies that field. Obstacle preemption typically occurs when a state law frustrates Congress's intent to adopt a uniform system of federal regulation, conflicts with Congress's goal of establishing a regulatory "ceiling" for certain products or activities, or by impeding the vindication of a federal right.

Lee Burgess: Okay, we're almost done with our rules; we just need to cover our last topic: commandeering. Although Congress can enact laws that preempt state law, Congress may not commandeer the states to regulate on its behalf. For example, in *Printz v. United States*, the Supreme Court held that Congress could not enact a law that required local law enforcement officers to conduct background checks in accordance with a federal gun control law. Similarly, in *New York v. United States*, the Court struck down a federal law requiring states to either "take title" to radioactive waste or "regulate according to the instructions of Congress". In both cases, the federal law violated the anti-commandeering doctrine by directly compelling the states to perform regulatory functions for the federal government.

Lee Burgess: Now, while Congress may not directly compel the states to perform regulatory functions for the federal government, it can incentivize state regulation by conditioning federal grants to the states on conformity with federal standards. If the condition is too coercive, however, the incentive crosses the line into commandeering territory. Two cases that illustrate this point are *South Dakota v. Dole* and *NFIB v. Sebelius*. In *Dole*, the Court held that conditioning 5% of federal highway funds – or 1/2 a percent of South Dakota's budget – on a drinking age of 21 was constitutional. In contrast, in *NFIB*, the Court held that conditioning all Medicaid funding – or 10% of the average state's total budget – on compliance with the Affordable Care Act – was unconstitutionally coercive.

Lee Burgess: Okay, that's it for our rules. Let's move on to our hypo. This one is adapted from the July 2008 California bar exam. And you know what's kind of fun? That's my bar exam! I know, can you believe it?

Lee Burgess: "To protect the nation against terrorism, the President proposed the enactment of legislation that would authorize the Secretary of Homeland Security to issue National Security Requests, which would require businesses to produce the personal and financial records of their customers to the FBI. Congress rejected the proposal.

Lee Burgess: Thereafter, in response, the President issued Executive Order 999. 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. The Order further authorizes the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records.

Lee Burgess: Concerned about acts of terrorism that had recently occurred in State X, the State X Legislature passed the Terrorism Prevention Act, requiring businesses in State X served with National Security Requests pursuant to the Order to produce a copy of the records to 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."

Lee Burgess: Alright, well, I'll admit, when I saw this on my bar, I wasn't immediately sure how to answer it. But we're going to go walk through it together. The first question asks us about the President's authority to issue the Order. The first thing we should notice is that Congress initially rejected the President's proposal to enact nearly identical legislation. That means we're dealing with a power struggle between the President and Congress, which means we're in *Youngstown* territory. Under the *Youngstown* test, the first question we need to answer is whether Congress has expressly approved or disapproved of the President's actions. In this fact pattern, we're told that Congress rejected the President's proposal to enact similar legislation, so it's clear that the President is not acting pursuant to an express or implied congressional authorization. There is no indication, however, that Congress took some action expressly disallowing the President's issuance of the Order. A court could therefore find that Congress' rejection of the proposed legislation is mere silence. If so, the President acted in the "zone of twilight" of the second *Youngstown* category, and the Order is likely to be upheld unless the President usurped the power of another branch of the federal government.

Lee Burgess: If, however, a court finds that Congress expressly or impliedly disapproved of the Order, then the President's power is at its lowest level. Accordingly, the Order would only be upheld if it is an exercise of an exclusive presidential power. That does not appear to be the case here. The President's power as Commander in Chief likely does not allow him to regulate domestic businesses any more than he can regulate labor disputes, as was the case in *Youngstown*. Similarly, any argument that the Order is necessary to faithfully execute the law would likely fail as it did in *Youngstown*.

Lee Burgess: Congress, on the other hand, likely has the power to enact similar legislation pursuant to the Commerce Clause, because it regulates the personal and financial records maintained by businesses. In sum, the outcome likely depends on the court's view of Congress' rejection of the proposed legislation. If the court views it as congressional silence, the Order would likely be held to be a constitutional exercise of presidential authority. If the court views it as congressional disapproval, the Order would likely be held to be unconstitutional.

Lee Burgess: In either case, there's another issue here affecting the President's authority to issue the Order that we still need to discuss. The President's Order goes further than the proposed legislation by authorizing the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records. Whenever you see the federal government "requiring" state or local officials to do something, that's a pretty good sign that there's a commandeering problem. This is not a situation where the federal government is trying to incentivize state regulation by conditioning federal grants. If it were, we would need to compare the facts to cases like *Dole* and *NFIB* to determine whether the condition is unconstitutionally coercive. Here, the Order directly compels state and local officials to perform a regulatory function on the federal government's behalf. Note that it doesn't matter that we're dealing with an executive order instead of acts of Congress. Because a provision of Presidential Order commandeers the state and local officials, that provision is unconstitutional.

Lee Burgess: Okay, that covers the first question. Now we need to address the second question, which asks us whether the President's Order preempts the Act passed by State X. As is the case with commandeering, it doesn't matter that it's an executive order and not an act of Congress – both are federal laws that can preempt state law. Let's take the different kinds of preemption in turn, starting with express preemption. For there to be express preemption here, the Order would have to specifically state that it is preempting state law. There is no indication that the Order contains any such provision, so it does not expressly preempt the Act.

Lee Burgess: Moving on to implied preemption, we need to address each of the three types of implied preemption. The first – conflict preemption – requires a direct conflict between federal and state law. No such conflict exists here. The Act does not require the state businesses to do anything they are prohibited from doing under the Order, or vice versa. The Act merely requires businesses to provide a separate copy of their records to the state Department of Justice. That is not a direct conflict.

Lee Burgess: The next type of implied preemption is field preemption, which requires that the law itself or its legislative history indicate that the federal government intended to exclusively occupy the legislative field. There is no legislative history for this Order, other than the fact that it was intended to protect the nation from terrorism, and there is no language in the Order itself that a court could read as an intent to occupy the entire field. Accordingly, there is no field preemption.

Lee Burgess: The last type of implied preemption is obstacle preemption, which occurs when the state law substantially interferes with the objective of the federal law. Here, it does not seem like the Act interferes with the objectives of the Order in any way. The Order provides that personal and financial records go to the FBI, and the Act requires that a copy of those same records go to state law enforcement. Therefore, the Order does not preempt the Act.

Lee Burgess: Well, that's all we have for you today, as we took a trip down memory lane to my bar exam question. We hope you found this hypo to be a helpful example of how to work through these Constitutional Law issues. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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