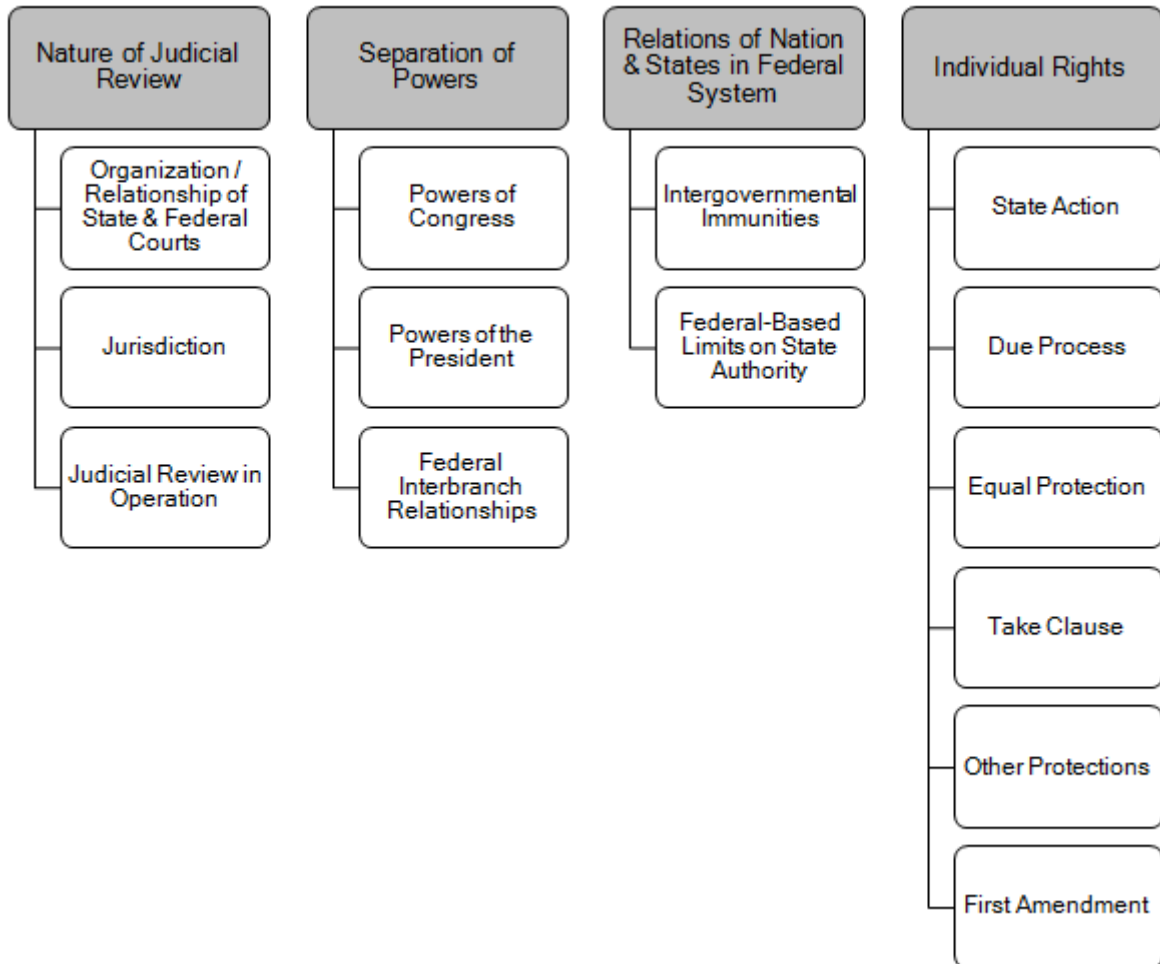


MBE Constitutional Law **Sample**

Approximately 50% of the Constitutional Law questions for each MBE will be based on "Individual Rights" such as due process, equal protections, and state action. "State Action" is when State is trying to have some rules that may interfere with the US Constitution.

Constitutional Law Check List



I. The Nature of Judicial Review (10% of the Constitutional Questions)

A. Organization and relationship of state and Federal courts in a Federal system:

1. Federal:

- a) Congress has the power to create lower federal courts.
- b) Federal courts have jurisdiction only if the Constitution clearly grants such.
- c) Federal court has the final judge of its own powers.

2. State:

- a) The Constitution and laws of each state establish the State Courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts.
- b) There is a very large group of powers belonging to the states, and the Federal courts are limited to only those powers explicitly listed in the Constitution.
- c) Only certain cases are eligible for review by the U.S. Supreme Court.

B. Jurisdiction

1. Constitutional basis: The U.S. Constitution gives the Federal courts jurisdiction over all cases arising under the Constitution.
2. Congressional power to define and limit: Congress has power to define and limit jurisdiction of all courts, including the Supreme Court. Congress cannot take away a state's 11th amendment immunity from Federal Lawsuits.
3. The 11th amendment and state sovereign immunity: The 11th amendment prohibits the Federal courts from hearing damage claims against a state without their consent.

C. Judicial review in operation

1. The case or controversy requirement: There must be an actual dispute between parties before a court can hear the case.
 - a) Prohibition on advisory opinions: The case or controversy requirement in Constitution prohibits Federal courts from issuing advisory opinions.
 - b) Standing
 - (1) Plaintiff must show he has been injured or will be injured (economic, aesthetic, environmental) and can only assert injuries that he has personally suffered.
 - (a) If seeking injunctive or declaratory relief, must show likelihood of future harm.
 - (b) Causation/redressibility: Relief sought must eliminate the harm alleged.



Hint: The plaintiff who has personally suffered an injury has best standing. If there is more than one plaintiff suffering from personal injury, the one who has suffered an economic or monetary injury has best standing.

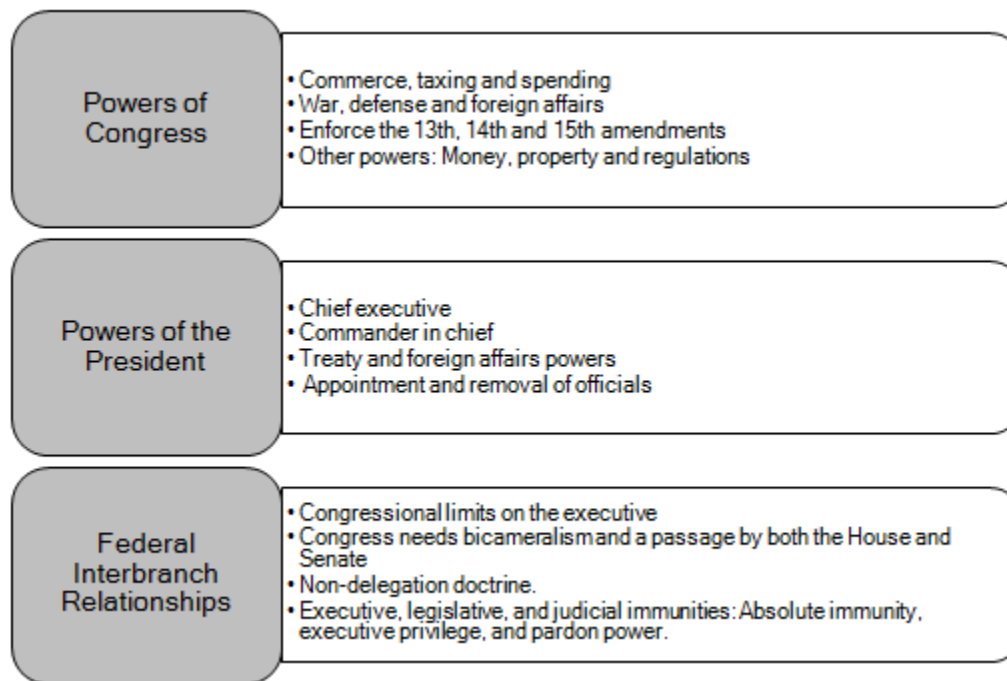
- (2) 3rd Party Standing: Plaintiff cannot assert claims of others who are not before the court unless
 - (a) Close relationship between Plaintiff and Third Party,
 - (b) Third Party not likely to assert own right (criminal Defendant has standing to raise rights of jury to be free from discrimination),
 - (c) Organization suing for its members.
- (3) No Generalized Complaints:
 - (a) Plaintiff cannot sue solely as a citizen or taxpayer.
 - (i) Example: Taxpayer lacks standing to challenge grants of property by the government to religious institutions.
 - (b) Except that taxpayer has standing to challenge Government expenditures as violating Establishment Clause.
- c) Ripeness
 - (1) There must be a genuine immediate threat of harm.
 - (2) Consider the harshness that will be suffered without pre-enforcement review and the fitness of the issues and records for judicial review.



Hint: If someone is requesting a declaratory judgment, it is probably a ripeness question.

- d) Mootness: If file and then events happen that cause Plaintiff's injury to end, case is moot and must be dismissed except
 - (1) Where the injury is capable of repetition yet evading review: Pregnancy is over yet can still continue case dealing with abortion, *Roe v. Wade*.
 - (2) Voluntary cessation: Defendant stops offensive practice but is free to resume it at any time.
 - (3) Class action suits: Named Plaintiff's case is moot, but at least 1 member of the class still has an injury.
- 2. The adequate and independent state ground: A doctrine governing the power of the U.S. Supreme Court to review judgments entered by State Courts.
 - a) General rule: If the law is Federal, then the U.S. Supreme Court has jurisdiction to review the State Court judgment. If it is State Law, then it does not.
 - b) If it is a mix of Federal and State Law, then if the state ground is adequate to support the judgment and independent of Federal Law, then the Federal court does not have the jurisdiction.
 - (1) Adequate to support the judgment: State procedural rule is presumed to be adequate unless it is arbitrary, unforeseen, or unreasonable.
 - (2) Independent of Federal Law: If it is not "apparent from the four corners" of the opinion that the judgment rests on an independent State Law rule, then, unless it is "necessary or desirable" to obtain clarification from the State Court itself, the Supreme Court will presume that the decision rested in part on Federal Law, thus rendering it reviewable.
 - c) Other rules:
 - (1) All cases from State Courts go to US Supreme Court by writ of certiorari.
 - (2) Federal courts can only hear cases from State Courts after there has been a final judgment from the highest State Court.
- 3. Political questions: A statement used by Federal courts to decline ruling.
 - a) Constitutional violations which Federal court will not hear:
 - (1) Republican form of Government clause: A Government in which decisions are made wholly by the people's representatives, not by the people themselves.
 - (2) Challenges to the President's conduct of foreign policy/affairs, includes rescinding a treaty.
 - (3) Challenges to the impeachment and removal process.
 - b) If U.S. waives its sovereign immunity (e.g. Federal Torts Claims Act) then political question does not apply.

II. The Separation of Powers (20% of the Constitutional Questions)



A. The powers of congress:

1. Commerce, taxing and spending:

a) Commerce power:

- (1) Can regulate channels of interstate commerce.
- (2) Instrumentalities of interstate commerce such as trucks and planes.
- (3) Can regulate economic activities that have a substantial economic effect on interstate commerce: applies to both domestic and foreign commerce.
- (4) Cannot regulate a non-economic activity.
 - (a) Possession of a firearm in a school zone does not affect interstate commerce.
 - (b) Keeping a wild animal does not have a substantial economic effect.
- (5) 10th amendment puts a limit on Congress' power to compel state regulatory or legislative action, but Congress can induce state Government to act by putting strings on funds and prohibit harmful commercial activity by state.

b) Taxing and spending power:

- (1) Exclusive (plenary) power of Congress but still subject to judicial review.



Hint: On the exam, if you see the word “appropriation”, look for taxing and spending power.

- (2) Congress can spend in any way it believes will serve the general welfare.

- (a) General Welfare Clause is not an independent source of power, if it is standing by itself it is a wrong answer.

- (b) Will only be correct when dealing with taxing and spending or the Federal police power.

2. War, defense, and foreign affairs:

- a) War power: Power to declare war and authority to remedy an economic problem that directly/substantially flows from the war.

- b) Defense power: Power to declare war, to raise and maintain the armed forces, and to make rules for the military.

- c) Foreign affairs: The President has the power to negotiate treaties, but the Senate must ratify them.

3. Power to enforce the 13th, 14th, and 15th amendments:

- a) 13th amendment: Prohibits involuntary servitude.
 - b) 14th amendment: Guarantees equal protection and due process for all citizens.
 - c) 15th amendment: Bans race-based voting.
4. Other powers:
- a) Power to coin money and regulate its value.
 - b) Power to establish post offices and railroads.
 - c) Property Power
 - (1) Power to issue patent and copyright.
 - (2) Power to dispose of the territory or other property belonging to the U.S.
 - (a) District of Columbia
 - (b) Wild animals on Federal property
 - (c) Military ships and airplanes
 - (d) Federal buildings/enclaves
 - (e) Indian reservations
 - d) Necessary and Proper Clause:
 - (1) Allows Congress to use any means not prohibited by the Constitution to carry out its powers.



Hint: However, it is not an independent source of power and standing alone is a wrong answer. Necessary and Proper Clause will only be the correct answer if it carries into effect other enumerated powers.

- e) Power over courts:
 - (1) There can only be one U.S. Supreme Court and Congress cannot divide the court.
 - (2) Lower Federal Courts: Congress has plenary/exclusive power over the lower Federal courts (district courts and courts of appeal) and can:
 - (a) Confer jurisdiction,
 - (b) Remove jurisdiction, and
 - (c) Limit jurisdiction.
 - f) Section 5 of 14th amendment:
 - (1) Congress cannot create new rights or expand the scope of existing rights.
 - (2) Can only prevent or remedy violations of existing rights.
- B. The powers of the President:
1. As chief executive: The take care clause states that the President shall take care that the laws be faithfully executed.
 - a) It has also been asserted that the President's responsibility in the "faithful" execution of the laws entitles him to suspend the privilege of the writ of habeas corpus if deemed necessary upon Congress authorization.
 - b) The judiciary may not restrain the President in the execution of laws.
 2. As commander in chief: The President is the highest-ranking officer in the military.
 3. Treaty and foreign affairs powers: President may negotiate treaties, but 2/3 of the Senates have to approve it.
 - a) Executive Agreements:
 - (1) Agreements between U.S. and foreign Government; no Senate approval required.
 - (2) Can be used for any purpose.
 - (3) Prevail over conflicting State Laws.
 - (4) If in conflict with Federal Law or Constitution, then it is invalid.
 - b) Troops
 - (1) President has broad power to use American troops in foreign countries.



Hint: If question deals with whether President has power to send troops to foreign country, President always wins either because it is a political question or due to the

broad powers afforded by the office.

c) Emergency Powers: The President has broad emergency powers but they are not absolute.

4. Appointment and removal of officials:

a) Appointment Power:

(1) With Senate consent, President appoints

(a) Ambassadors, Consuls,

(b) Federal judges, Supreme Court Justices and

(c) Officers of the U.S. (member of an agency or commission having administrative or enforcement powers).

(2) With regard to the power to appoint inferior officers, Congress can give this power to the President, heads of departments or lower Federal courts.

(3) Congress cannot give itself, or its officers the power of appointment.

b) Removal Power:

(1) President may fire any executive branch official unless limited by statute.

(2) Statute can limit removal only for good cause if office is one where independence from the President is desirable (e.g. independent counsel).

C. The Federal interbranch relationships:

1. Congressional limits on the executive:

a) Impeachment and Removal

(1) Impeachment:

(a) The first of two stages in a specific process for a legislative body to remove a Government official without that official's agreement. The second stage is conviction.

(b) President, Vice-President and Federal judges and officers can be impeached and removed for treason, bribery or high crimes and misdemeanors.

(2) Removal or Conviction:

(a) Can only be removed if Senate convicts.

(b) Impeachment by House of Reps requires majority vote.

(c) Conviction in Senate requires 2/3 vote.

b) Executive agreements: While a treaty supersedes prior inconsistent Federal statutes, an executive agreement does not. Congress may, by statute, limit the President's power to make executive agreements.

c) Congress, not the President, has the power to declare war.

d) Executive appointees can be removed at President's will even if Senate's consent is required for appointment. However, when the officers are appointed pursuant to an act that specifies the length of their term of office, then they can be removed by the President only for cause.

2. The presentment requirement and the President's power to veto or to withhold action:

a) In order to act, Congress needs bicameralism and a passage by both the House and Senate.

b) Presentment of bill to President to sign or veto.

c) Unconstitutional:

(1) Legislative vetoes: When seek to overturn an executive action without bicameralism and presentment.

(2) Line-item vetoes: When President wants to veto part of a bill.

3. Non-delegation doctrine:

a) Congress cannot delegate executive power to itself or its officers.

b) Congress can give away its powers but cannot take away powers from other branches of Government.

c) There is no limit on ability to delegate to executive and judiciary branches.

== END OF SAMPLE ==