I.
(50%)

In early 1995, President Clinton and Congress concluded that substantial progress had been made in advancing a strong "affirmative action" agenda. However, both political branches recognized that regression from this agenda might occur if the Presidency should again fall into the hands of advocates of "color-blindness." Congress therefore passed, and the President signed, legislation containing the following provisions:

1. Title. This Act shall be titled "The Affirmative Action Preservation Act of 1995."

2. Findings. Congress hereby finds that, in light of the lengthy and disgraceful history of oppression of African-Americans throughout American history, legal strategies of racial neutrality or color-blindness will not provide appropriate integration of African-Americans into the American workplace; that affirmative action is necessary to provide African-Americans their fair share of the economic and self-esteem benefits of employment proportional to their representation in the American population.

3. Equal Employment Opportunity Commission (EEOC) Leadership. Section 705 of The Civil Rights Act of 1964 shall be amended by adding the following subsections:

(k) The Chair of the EEOC shall be appointed by a panel of three federal judges selected by the President from a roster of ten federal judges, all of whom are certified by the American Bar Association to favor affirmative action for African-Americans; and

(l) The Chair of the EEOC shall be removable by the President only for good cause; provided, however, that good cause shall not include the President's disagreement with the Chair of the EEOC about policies concerning vigorous use of affirmative action and rejection of color-blindness in EEOC's enforcement of the employment discrimination laws of the United States.

4. Judicial Review. No state or federal court, including the Supreme Court, may exercise original or appellate jurisdiction over any action in which the constitutionality of this Act is challenged.

In late 1995, following passage of this Act, Holmes Norton was selected, in accord with the procedures set forth in section 705(k), to serve a five-year term as Chair of the EEOC. Norton proved to be a vigorous champion of affirmative action. He refused to bring any suits complaining of discrimination against whites and instituted priority treatment for race discrimination claims over claims of age, gender, religion, and disability discrimination. Norton also instituted "numerical equivalency audits" for all Fortune 500 companies which were followed by EEOC suits whenever an audited company fell short on proportional representation of African-Americans among employees at any level of the company.

In November 1996, J. Danforth Quayle was elected President of the United States, in part on his platform of color-blind administration of the laws and opposition to affirmative action. Quayle did not, however, carry on his political coattails enough Republican Senate and House candidates to overturn the "Affirmative Action Preservation Act of 1995." Frustrated with the policies and actions of the Norton-led EEOC, Quayle asks you as his chief legal advisor evenhandedly to evaluate (1) whether the appointment and removal provisions of the Act are constitutional, (2) whether the jurisdictional restriction is constitutional, and (3) what the constitutional considerations would be (a) if he fired Norton and appointed a successor and (b) if he filed suit to invalidate these provisions of the Act. Write a memo on each of these issues in the spaces provided below.

1. Appointment and Removal.

Question I

(Weak Answer)

1. Appointment and Removal.

My evaluation of the Appointment Clause would lead me to advise Quayle that the appointment provisions of the Act is probably unconstitutional. Under Article 11, § 2, cl. 1 it states that "He (the president) shall have power . . . and . . . shall appoint . . . all other officers of the U.S., whose appointments are not herein otherwise provided for, and which shall be established by law." This clause gives no indication of the President vesting this authority to federal judges who in turn will appoint the chair of the EEOC. A strict reading of the constitution would probably lead an individual to conclude the appointment was unconstitutional because the actual appointment was from a panel selected by the President and not the President himself, who is given express authority to appoint under Article II.

On the other hand, the later part of Article II, § 2, cl. 2 may allow the president's appointment to hold up. "[B]ut Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, to the ct's of law, or in the heads of Departments." If one went so far to say that since Congress passed this act, they vested the opportunity to the President who in turn gave the authority to Dept. heads to execute the actual appointment. It is a weak argument, nevertheless it could be put forth.

With respect to the removal provision of the Act, I found no constitutional provision which dealt directly with the removal of officers of the U.S. other than the elected executive members and those of Congress. I would advise Quayle to challenge the ambiguity in the language of the provision. What exactly is good cause? How can good cause not include the President's disagreement with the chair of the EEOC about policies of legitimate interest to his constituents and the entire nation rather than a certain class of people who have been disgracefully oppressed for years. Can this Act be considered a right to that terrible wrong. Under the 14th Amendment § 4 it states that the U.S. nor the Senate shall assume or pay a debt or obligation incurred in aid of insurrection or for loss of emancipation. Any and all such debts under Amend 14 are held to be illegal and void. The findings of the Congress appears to be an attempt to right that wrong and if in fact that is their objective the act would be void.

2. Jurisdiction Restriction.

The jurisdictional restriction is unconstitutional. It

allows no court in the country to hear any case filed questioning the constitutionality of this Act. The Judicial Power extends to all laws made under the Authority of the U.S. (Art. 3 § 2) and to controversies to which the U.S. shall be a party (Art. 3 § 2) Congress obviously anticipated actions being brought against the U.s. challenging the constitutionality of the Act. In anticipation of these suits Congress inserted the clause stating that no state or federal ct. including the Supreme Ct., may exercise original jurisdiction or appellate jurisdiction over an action challenging the statute.

Supreme Ct. will have the authority over this case simply because this act became law under the authority of the federal gov't. On the other hand, one might argue that under Art. 3 § 2 cl. 2 that the clause is constitutional because " . . . the Supreme Court shall have appellate jurisdiction, . . . with such exceptions, and under such Regulations as the Congress shall make. One might certainly classify the provision as an exception.

3. (a) Firing/Appointing.

The provision states that the Chair shall be removable only for good cause which does not include the President's disagreement with the chair about policies concerning use of affirm. action and rejection of colorblindness, which clearly appears to be the Presidents qualms. Absent a good cause for removal I find no constitutional provision for the firing of Norton.

If appointment of a successor became necessary I would advise Qualye to appoint a new chair that is clearly within his executive power to appoint. Seems however the provision on removal stated in the act, if it is deemed constitutional he must follow the guidelines in the act. If the provision is deemed unconstitutional he may appoint w/in executive power granted in Art. II §2.

3. (b) Filing Suit.

If he filed suit to challenge the constitutionality of the provisions of the act, his suit would be barred under § 4 of the Act. He could attempt to bring suit under the 14th amendment to strike the entire act. He could put forth the proposition that the U.s. is attempting to assume a debt for the African-Americans for their loss of emancipation. "Neither the United States . . . shall assume or pay any debt incurred . . . for the loss of emancipation . . . all such debts shall be held illegal and void. If a Ct. finds or accepts this proposition Congress can enforce the provision of the 14th Amendment that is applicable and void the entire act.

20w

(Mediocre Answer)

1. Appointment and Removal.

The Appointment Provision 3(k) will, most likely, not pass muster under a stringent constitutional analysis. Art. II, Section 2(2) provides that the Congress may by Law vest the Appointment of such inferior Officers in the president, the Judiciary or the Cabinet. That is, although Congress itself cannot appoint these inferior officers, it has the authority to delegate that right of appointment. I believe that this Constitutional provision was intended not to empower the Legislative Branch but to remove all power of appointment from the Executive.

By 3(k), however, I believe that Congress is usurping the power it was supposed to delegate. By providing for the specific procedures and certification necessary, Congress is, effectively, performing the executive function themselves. By retaining such inherent control over the appointments, Congress is violating the separation-of-power doctrine and the specific Constit. provision by not "vesting" (totally) the power of appointment in either the President, the Courts, or the Cabinet.

Congress, in provision 3(l), has also over-stepped its bounds. It is entitled to provide by statute that the Chair of the EEOC may be removed only for "good cause." However the Congress is not the arbitrator of what constitutes "good" cause. By stipulating how the law shall be interpreted rather than simply creating it, the Congress is usurping the Judiciary's function. If, for example, the President attempted to remove the Chair, it would be up to the Court to decide (had there been ensuing litigation) if "good" cause was present. The legislature's attempt to retain control over the Appointment can almost be construed as a "built-in" legislative-veto-it provides a mechanism by which an incoming Pres. can't remove the appointment b/c of ideological reasons, but this mechanism may also interfere w/ the President's ability to "faithfully execute the laws."

Understandably, the Congress may pursuant to a statute provide for an appointment to be fired only for cause. But the Congress, with this act, has extended past the scope of their powers.

As a public policy matter, the Congress' over-extension would be detrimental to the functioning of a unified, federal govt. if the president were not able to remove appointed officials (except for such a qualified "cause"), his/her ability to perform his functions would be severely curtailed. Additionally, if the Congress were allowed to set its own standards, it would usurp this power from the Courts. Thus, for

removal both the appointment and removal provisions are constitutionally questionable.

2. Jurisdiction Restriction.

The "Judicial Review" provision of the "Act" provides that no action challenging the constitutionality of the Act may be brought in <u>any</u> state <u>or</u> federal court, including the USSC. Art. III, Section 2 of the Constitution provides that Congress may make exceptions to the appellate jurisdiction of the USSC & the inferior federal courts, however it appears that it was intended by the Framers that there be some federal forum in which to seek redress. Since this proscribed action concerns the constitutionality of a <u>federal</u> Act, as a matter of judicial construction, it must be void (since there is no federal forum allowed).

<u>However</u>, the state judiciary are, in some respects independent entities and Congress has no Constitutionality enumerated power to remove/restrict their subject-matter jurisdiction. As long as the federal gov't has not preempted the entire field of Civil Rights legislation, the state's highest court will simply be the highest arbiter of the Act's constitutionality. However, this process might lead to the unfortunate scenario of having 50 separate state courts interpreting the Constitutionality of the Actin varying ways. Plus it would only be binding upon each respective state!

As for whether Congress can "modify" the USSC's original jurisdiction: it <u>cannot</u>, Act III, § 2(2)explicitly states that in "all other [not Original] cases, the USSC shall have appellate juris . . . w/ such exceptions & regulations as Congress shall make."

If it is determined that the judicial Review provision usurps the judiciary's vote, then a separation of powers question arises. The need for checks and balances cannot be circumvented by denying all causes of action in all forums allowable. If this were the case each branch would unilaterally usurp the others' control unchecked. Therefore, the judicial review provision must be invalid.

3. (a) Firing/Appointing.

If Quayle fired Norton, then appointed a successor, the most obvious question would be whether the Court could adjudicate the issue of "good cause." If the Court (assuming it <u>could</u> adjudicate this issue) determined that, b/c of the clear language of the statute, Congress had set the limits for removal, then this could be considered a non-justiciable political question. Thus, based on the "commitment to the other Branch of Gov't" principle the Court could not adjudicate the issue and the

Legislature's standard would prevail (w/ quayle perhaps in violation). If Quayle's firing of Norton was not for "good cause" it is possible that a procedural due process issue is relevant -- Norton clearly has a property interest in his job and he cannot be removed from his post w/out procedural safeguards -- at least an adversarial hearing of counsel here. He at the very least has a "legitimate claim of entitlement." Goldberg/Perry

3. (b) Filing Suit.

Again, if Quayle filed suit to invalidate provisions of the Act, it is not clear that the Court would be willing to adjudicate over the action since it can be deemed a "political question." Nor is it clear that Quayle has any standing in the matter -- that is (1) can he show an injury-in-fact or (2) a concrete and individuated one (diff. from all the others that wanted to invalidate the Act) or (3) that there was a cause-in-fact ("But for" the Act . . .). Additionally in this scenario, since there has been no violation of the Act (by firing w/ cause for those proscribed reasons), the matter may be too ripe to adjudicate as well -- There has not been enough concrete evidence/harm/etc to constitute a justiciable controversy. It would essentially be, at this pt. only an advisory opinion and this is not allowed due to Art. III's "case or controversy" requirement.

(Good Answer)

1. Appointment and Removal.

Both are likely to be held unconstitutional given Post Myer (1926) S.Ct. Developments of the Appointment & Removal Doctrines. Possible C/A: (1) Non Delegation Doctrine -- Not likely to prevail on this theory alone in spite of 1930's decisions (Panama Refining, Schechter). which limited Congress from delegating "too much" authority to independent agencies like the EEOC. Modern doctrine allow "any intelligible standard" for administrative guidelines to be upheld and section (3)(k) "to favor affirmative action" is more than sufficient, as well as the clear findings guidelines in section #2. This C/A is worth pursuing, however, as the act does not seem to give the appointed official specific guidelines nor limit or characterize his power.

(2) Section (3)(k) and Appointment Process -- Likely to be held unconstitutional. A. Is office created inferior or public minister? Art II sec. 2 governs the procedure for appointments of public officials AND describes a shared responsibility between the Exec. and the Legislature. However, the legislature is fee in the case of "inferior officers" to vest the Appointment solely in the pres. or cts of law or heads of departments. A strong argument can be made according to the factors presented in

Morrison v. Olson that a inferior office is not created 1) only the president can remove 2) scope of EEOC chair appears unlimited -- all activities in public, economics, and private potentially covered 3) discretion great -- chair can act as sole decider of aff. action issues and political judgments protected by removal cl. 4) potentially unlimited duration of office and tenure. If not inferior then Art II sec 2 violated directly because nominee not appointed with "advice and consent" of congress. B. C/A Separation of powers violated by (3)(k). 1) procedure violative of II.2 - (3)(k) vests appointment power in 3 judge panel selected by the President from a list of 10 judges created externally. On its face this violates the "or" requirement of Art II Sec 2 as the intermediate strep has effect of vesting appointment and both jud. and exec. Further, the list of 10 may well be held too narrow of a restriction on President's discretion. [a la Humphrey's Executor but w/ appointments] 2) Essentially the restriction of candidates to the 10 ABA politically correct persons is a disguised legislative veto simply delegated to the ABA. Such delegation/retention will not pass muster Post Ins. v. CHAHDA (1983) C. Separation of Powers violated by nature of appointment. It is arguable that the EEOC chair is a legislative position -- creating guidelines for public or executive -- decides who to punish, administers title VII. In either case, the President is charged with making sure ['taking care'] that the law is executed. Having 3 judges appoint the chair will violate the sep of powers doctrine in either case [Bowsher]. If primarily legislative then president's appointment violates doctrine. 3) Removal -- (3)(l) likely to be held constitutional thought arguable. Art II sec 2 does not mention removal and the constitutional provision in Art III (1) that Judges will hold office during "good behavior" will not apply to the appointed judge as he will be acting as a executive [arguably]. Nonetheless, the S.Ct. held in Myers that the President could remove the Postmaster w/o consent of Congress. The power to appoint includes the power to fire, it is an executive function under Art II sec (1). However, the ct. has also allowed "good cause" guidelines to be included in statutes [Humphey's Executor]. The balance test seems to be that common law notions of misfeasance and nonfeasance the president can always remove for political issues are less inviolate. Congress here is narrowing the definition of good cause but still allows removal for common law/traditional reasons. 4) Removal violates 'take care' cl -- Art II sec. 3. The President is charged with ensuring that the laws Congress passes are faithfully executed. His/her interpretation of the mission entrusted to him by Congress is binding on all Executive officials as Act II(1) vests executive power in President alone. If the president and the current chair holder disagree on what 'take care' to see that this law is executed then the Presidents discretion/power is fettered by 3(l). The President can argue ?? that this is textually impermissible, a violation of separation of powers doctrine and a hidden legislative veto of his decision to fire

w/o bicameralism or presentment. A stronger argument than all 'good cause' clauses are impermissible.

2. Jurisdiction Restriction.

Tough call but likely unconstitutional. Art III sec allows congress to make "exceptions" and "regulations" of Fed ct/S.Ct Jurisdiction. It is not clear textually however, that the clause applies to original jurisdiction as it is in the following sentence. Original J/D has only been varied by Amendment so the ct. will have to consider the original J/D Restriction [Note: Marbury only held that Congress could not exceed the original J/D Art. III grant not the converse]. More importantly, Appellate J/D involving the great majority of S.Ct. cases is Restricted/Eliminated. Clearly, congress can restrict appellate J/D - Act III sec 2 and Ex parte McCardle, in dicta, noted that Congress might not be free to totally or unreasonably restrict S.Ct. Review [Appellate]. Three lines of argumentation can be pursued to argue that this goes too far: 1) S.Ct. has supreme power to say what law is [Marbury v. Madison, Cooper v. Aaron]. The Congress cannot create/delegate in excess of Art I sec 8 enumerated implied powers and the clauses ?? do so will be struck by J/D review as they were invalid at the time of creation [i.e. 3(k), 3(l)]. congress is not free to trample its constitutional bounds and then sanitize the cts review. It may prevent citizen grievances (private rights) from fed ct review but not S.Ct. structural review of legislation. 2) Separation of powers argument. The constitution creates these co-equal branches of gov. A legislative provision which unbalances fundamentally the power of one branch will be struck as against the framework of the document. 3) Inherent power -- In some instances, McCardle, Youngstown, Schecter, Dames & Moore, the Justices have alluded to inherent power of a branch of gov. The ct may well hold that review of congressional legislation is such an inherent power that even if the restructure is valid as to constitutional power, the ct possesses residual inherent powers beyond these to hear the case. 4) Class of cases -- In Klien the S.Ct. declined to allow Congress to set the rules of decision inside a class. If the class is described as equal protection or due process this statute would insulate some of the actions inside the class from review, potentially leading to conflicting judgments.

Note: Restriction on state ct review impermissible for similar reasons, s.ct allowed state ct. judges to interp. constitution and fed statutes subject to S.Ct. appeal in McCullough v. Maryland and Martin v. Hunters Leasee. As to lower Fed Cts: likely binding as Congress did not have to create and judiciary act controls.

3. (a) Firing/Appointing.

1. President has removal power - above, Myers. If fired, Norton will likely seek court writ of mandamus from lower federal court (D.C.). President is immune from civil suits so personal liability not an issue. Appointment/status does not specify a harm, so it likely to hold "chair is "at will" employee if fired. [Assuming good cause, court struck as in #1]. Norton will have standing as suffered person injury, defendant's actions traceable to injury and court can redress - damages for breach of contract or mandamus. [Marbury v. Madison]. At worst, expose is likely to be damages as specific period of employment contract's unlikely. Impeachment - ? High crime and misdemeanors never defined and as president recently elected public likely against congressional action. Appointment: contract unconstitutional, president likely to have to nominate and congress approve, contract is lead to deadlock which may be exactly what president desires. Procedural D.P.: President should give notice to Norton and allow a hearing as his employment as public official may be seen as property interest, public employment treated differently than private.

3. (b) Filing Suit.

President likely to find issue not ripe under the Goldwater standard the Supreme Court should decline to hear a case involving a conflict between the executive and the legislative until (1) both sides have made a claim to constitutional power (2) actual conflict because of actions taken which conflict (Powell). In this case, the president would have to remove Norton/fail to execute law (impoundment) before executive had taken action. The congress has purged statute so legislative action satisfied (Dellums v. Bush). Ripeness is court prudential doctrine for declining to hear cases prior to actual or threatened injury - before the time is right for action. It fits well with the prohibition on advisory opinions. The court will also consider if a political question is involved. (1)A textual constitutional commitment to a co-equal branch of government or (2) a lack of judicially manageable standards. Unlikely, as court would be playing referee, between two conflicting co-equal branches (Baker v. Carr). Standing - President will have as loss of executive power is "legally cognizable" injury and action traceable to court action and J/D can give relief if court will strike (Allen v. Wright)

Exam Number _____

Exam Number _____

2. Jurisdiction Restriction.

Exam Number _____

3. (a) Firing/Appointing.

Exam Number _____

3. (b) Filing Suit.