

MID-TERM EXAM
ESSAY QUESTION ANSWER OUTLINE
April 12, 2019

As a refresher, here's the essay question from our mid-term exam:

On April 30, 2019, the State of Texazona passed a new statute to address the growing tide of abuse of home-fabricated drugs. In particular, the Legislature enacted the following statute:

Section 1001: Short Title. This statute will be called the "Stop Abuse of Home Manufactured Drugs Act."

Section 1002: Purpose. The Legislature finds that:

- (a) Increasing numbers of individuals within the state manufacture illegal drugs in their own homes or premises after purchasing the precursors or ingredients for those illegal drugs from other sources;*
- (b) These precursors or ingredients are otherwise sold frequently by legitimate vendors for legal purposes; and*
- (c) The growing practice of illegal personal drug manufacturing has directly contributed to rising illegal drug use, increased crime, and damage and destruction to private property and state resources.*

Section 1003: Liability. The following actions shall constitute a Class 1 felony:

- (a) the purchase, exchange, collection, possession, acquisition, or any other action to obtain drugs or precursors listed in Annex 1 with the intent to use them to formulate drugs or chemicals that constitute controlled substances under federal or state law.*
- (b) Liability for violations of subsection (a) shall attach without regard to the legality of the underlying purchase, exchange, collection, acquisition, or any other action to obtain the Annex 1 drugs or chemicals.*

Annex 1 of the Act then lists hundreds of over-the-counter medications that could be used to manufacture illegal methamphetamines, hallucinogens, and tranquilizers which either require prescriptions for use or are illegal outright under federal and state law. The Act does not provide an explicit effective date.

You are Texazona's Attorney General. A legislator has asked you for an opinion on whether one of her constituents, Melinda Bontemps, might now be liable under the Act. Bontemps has

routinely travelled into Mexico to purchase cheap precursors in bulk that now appear on Annex 1, and she brings them back to Texazona to create home remedies and homemade drugs for alternative therapies and traditional folk medicines. She has consolidated a stockpile of these precursors in a commercial storage unit to support her altruistic health outreach program, and that program serves numerous poor and politically disadvantaged communities along the Texazona and Mexico border. Some of her home remedies arguably qualify as controlled substances under federal law, although the federal government has never prosecuted her.

Does the Act apply to Bontemps?

This question asks you to offer an impartial legal analysis of the reach of the Stop Abuse of Home Manufactured Drugs Act (a legislator has asked you, as the Attorney General, to assess whether the statute would apply to Bontemps). As a result, you should offer an opinion – don’t just list the factors for and against applying the statute to Bontemps. You should also identify all relevant statutory interpretative legal issues that might affect your answer – the question essentially calls for issue spotting, so don’t exclude issues that merit discussion even if they don’t change your ultimate answer.

Within that framework, your conclusion is not as critical as your reasoning to support it. I gave equal weight to answers that favored Bontemps as well as to responses that would send her to prison. The methods that you use to justify your answer are far more germane to your grade. I also did not expect any particular approach or format for your answer – you can begin with a discussion of substantive canons and then move to linguistic analysis, or vice versa. Generally, though, it usually helps to begin your analysis with the more specific linguistic analysis and then move outward to structural, whole act and whole code, and substantive doctrines. Arguments appealing to the primacy (or not) of underlying Congressional intent are also almost always relevant to your answer.

That said, your analysis should have touched on the following key issues. I also gave credit for creative and insightful additional arguments brought up in answers, so this list is not exhaustive or exclusive.

Plain Language. The starting point for almost any statutory analysis is the language of the particular provision at issue. Here, the language of the Stop Abuse of Home Manufactured Drugs uses broad and inclusive language to describe the scope of the Act’s coverage. For example, the liability provisions of Section 1003(a) apply to sweeping laundry list of actions (“purchase, exchange, collection, possession, acquisition”) and a broad catch-all category (“or any other action”). The Act limits the applicability to actions with “the intent to use them” to formulate “drugs or chemicals that constitute controlled substances.” While we can debate whether Bontemps acted with “intent” – a term undefined by the statute – her home remedies also “arguably qualify” as controlled substances under federal law.

The statute’s plain language in Section 1003(a) and (b) could also trigger use of the last antecedent rule. In particular, the phrase “drugs or chemicals that constitute controlled substances” could support an interpretation that includes *any* drugs as well as chemicals “that constitute controlled substances” because this last limiting phrase would apply solely to the word “chemicals” preceding it.

Note that these analytical approaches rely on the common dictionary definitions of these terms. Bontemps might argue that this strategy unfairly overlooks the specialized meaning given to the term “intent” through centuries of common law civil and criminal decisions. The incorporation of a common law term might reflect the legislature’s intent to allow a more flexible and dynamic understanding of the

word “intent” as future circumstances and caselaw develop (*Bob Jones University v. United States*). This argument, however, would incorporate a possibly unconstitutionally vague definition in the statute, and it also ignores the judicial preference to assume widely understood and non-technical meanings of statutory terms that impose possible criminal consequences.

While the question does not give any background on Texazona’s statutes, a plain meaning approach to the Act’s language would gain additional strength if Texazona had adopted a statutory construction statute similar to the Texas Code Construction Act or the federal Dictionary Act.

Ejusdem. The catch-all phrase “or any other action” invites the use of *ejusdem generis* to clarify its scope. In general, *ejusdem* would require the court to determine the scope of “any other action” through examining the categories of actions covered by the terms preceding it. Here, the terms “purchase, exchange, collection, possession, acquisition” suggest that “any other action” applies to other acts focused on obtaining and holding listed drugs or other controlled substances.

Noscitur a sociis. The list of actions covered by Section 1003(a) also permits the use of *noscitur a sociis* to clarify the meaning of terms within, or adjacent to, the list. For example, the phrases “purchase, exchange, collection...” could help limit the potentially broad reach of the term “possession.” In addition, Bontemps may attempt to invoke *noscitur* to limit the scope of the terms “drugs or precursors listed in Annex I”), but generally *noscitur* only applies to lists of three or more terms.

Exclusio unius. Bontemps might invoke *exclusio unius* to give meaning to the Legislature’s failure to include the term “possession” in its list of actions under Section 1003(b), even though the Legislature specifically included that term in Section 1003(a). This omission could reflect the Legislature’s conscious choice not to apply the strict liability provision of Section 1003(b) to the simple act of possessing drugs or precursors listed in Annex I – which is exactly the situation that Bontemps faces (in part, at least) for her storage of drug precursors in a commercial storage unit in Texazona.

Whole Act Canons (including title). In addition to the specific text of Section 1003, you can look to the overall provisions of the Act and its structure. For example, the title of the Act indicates that the Legislature meant to focus on drug abuse and crimes arising from addictive substances. Viewed in this light, Bontemps’ actions do not fall within the sphere of actions that the Legislature meant to prohibit. Despite this insight, though, the courts tend not to give the titles of statutes much weight (and certainly not controlling weight) during statutory interpretation.

Retroactivity. The Act does not specify an effective date, but the Legislature did not enact the statute until April 30, 2019. Bontemps apparently has already traveled to Mexico frequently to buy precursors, returned them to the United States, and currently now stores them in a commercial storage unit. This arrangement raises the risk that a prosecutor may seek to hold Bontemps criminally liable for purchases and actions that were entirely legal when they occurred prior to passage of the Act. The presumption against imposition of retroactive liability for wholly past actions would squarely apply to these circumstances. Bontemps may nonetheless face liability if she continues to store her precursors in the commercial storage unit because that action arguably constitutes a *continuing* pattern of conduct that can trigger liability after the Act takes effect.

Rule of Lenity. When a criminal statute’s language contains material ambiguities, a court will typically choose the interpretation that favors the defendant. Given the Act’s ambiguities in its facial language and its statutory intent (as described in Section 1002), the rule of lenity would weigh in favor of a judicial

construction of the statute that favors Bontemps. To a lesser extent, a similar argument for the use of the canon of constitutional avoidance would urge the court to interpret the statute to avoid imposing criminal liability on Bontemps because her purchase of chemical precursors predating the Act in another nation did not violate any laws in effect at the time. The imposition of strict criminal liability in such circumstances might arguably raise serious constitutional concerns about deprivation of due process rights.

Extraterritoriality. The canon that a court should not construe a statute to give it effect outside the state's territorial jurisdiction (unless the Legislature clearly expresses its intent to do so) would directly apply to Bontemps' purchase and conveyance of chemical precursors in Mexico. This presumption, however, would not shield her storage of the precursors in Texazona, her processing of them into home remedies that might constitute drugs listed on Annex I, or her conveyance of those drugs to consumers within Texazona.

Federalism concerns. The Act states that it will incorporate the federal schedule of drugs listed as controlled substances, and it also requires the state to directly impose criminal penalties based on these federal listings. While this intermingling of state and federal legislative authorities might appear to raise concerns about federal impingement on state sovereign functions, the federal clear statement rule does not apply here. This rule, as explained in *Gregory v. Ashcroft*, only applies when the federal government attempts to impose its will on state operations central to the exercise of the state's sovereign functions. Here, the state is voluntarily incorporating federal limits and is acting to impose additional state penalties on its own accord. As a result, the court will not need to rely on the federalism clear statement rule to interpret the state statute.

Constitutional avoidance. The state's incorporation by reference of federal statutory or regulatory requirements may pose separate future Due Process concerns if changes to the federal statute automatically become enforceable as state law without any intervening state legislative or regulatory action. The vagueness caused by the broad scope of the statute's criminal sanctions on the legal purchase of precursors, without regard to intent, may also evoke this canon.

Absurd results doctrine and accord with legislative intent. Last, even if the plain language of the Act and its interpretation under these substantive canons would favor criminal sanctions for Bontemps, she will likely argue that the clear statutory purpose of the Act seeks to address an entirely different ill (crimes arising from addictive drug use). As a result, application of the Act to Bontemps' home remedies would create an absurd result at odds with the Legislature's purpose, and the court should instead interpret the statute more liberally to achieve those legislative goals. While *Holy Trinity Church* would favor this broader interpretation, this approach would conflict with judicial precedents that emphasize the cardinal priority of the statute's text over any arguably conflicting legislative purpose or history.