Torts "Ace" Winning Game Plan

- Any Torts?
- Any defenses?
- Any special circumstances?
Torts "Ace" Winning Game Plan.mmap - 6/8/09 - Scott Johns
Constitutional Law

Sword
- Federal Government
- State or Local Government
- Federalism Limits

Shield
- Procedural Due Process
- P&I
- Substantive Due Process
- Equal Protection
- First Amendment
- Catch-All
Step 1: Does the government entity have the power of the sword?
FEDERAL EXECUTIVE POWER

Step 1: Does the government entity have the power of the sword?

1. Judicial Power
   - Appointment of ambassadors, public ministers, consuls, justices, officers with advice and consent of Senate
   - Inferior officers - appointment if Congress vests in President, courts, or heads of departments
   - Congress cannot appoint members to administrative or enforcement bodies
   - Superior Officers - at will without congressional interference
   - Inferior Officers - removal only for good cause if provided by statute
   - Congress can remove officers only through impeachment

2. Legislative Power
   - Pocket Veto - automatic veto if Congress not in session during 10 day veto review period
   - No line item vetoes

3. Executive Power
   - Maximum power - express or implied congressional authority
   - Little power - acts against express congressional will
   - Mid-range power - congressional silence
   - Military power in actual hostilities
   - Conduct foreign daily relations
   - Treaty power - enter into treaty with advice and consent of Senate
   - Executive Agreements
   - Treaties are supreme law of land - preempts conflicting state law
   - Last in time prevails between statute and treaty
   - Constitutional limits prevail over treaties
   - Preempts conflicting state law
   - Conflicting federal law prevails

4. Federalism
   - Executive Privilege - great deference unless demonstrated need in criminal proceedings
   - Executive Immunity - absolute immunity from civil damages based on action within official responsibilities

5. State or Local Government
   - Impeachment Limits - treason, high crimes, bribery, and misdemeanors with majority of House to impeach and two-thirds of Senate to convict and remove from office
STATE AND LOCAL GOVERNMENT AND FEDERALISM CONCERNS

Step 1: Does the government entity have the power of the sword?

Federalism Concerns

Sword

Federal Taxation or Regulation of States

Tenth Amendment Limits

State Taxation of IC

Non-discriminatory taxes permissible if:
- Substantial nexus to taxing state
- Fairly apportioned to activity
- Fair relationship to service or state benefits provided

State Taxation or Regulation of Federal Government

Indirect taxes if nondiscriminatory and no unreasonable burden
No state regulation of federal government or officers while performing federal functions

State Regulation of IC

No discriminatory taxes against out-of-state interests unless congressional authorization

Dormant Commerce Clause

No non-discriminatory undue burdens unless:
- Balance burden on interstate commerce with benefit to legitimate local interest

State Regulation of IC

Limits discrimination against out-of-state interests

State is acting as a market participant or Congressional permission

Limits discrimination against out-of-state interests

State is acting as a market participant or Congressional permission

Federalism Concerns

Judicial Power

Legislative Power

Executive Power

State or Local Government

Police Powers to protect health, safety, welfare and morals

Supremacy Clause – conflicting federal law, treaty, or executive agreement preempts state law

State law prevents achievement of federal objective

Preemption

Express or implied federal occupation of field

Presumption

Full Faith and Credit Clause – state court judgment entitled to full faith and credit if court had jurisdiction, judgment on merits, and judgment final

State Suit Against U.S. – must have U.S. consent

U.S. Suit Against State – no consent needed

State v. State – no consent and original jurisdiction in Supreme Court

Interstate Compact Clause – requires congressional approval if states increase power by agreement at expense of federal power

Congress can tax or regulate states if law applies to both public and private sectors

No commandeering state offices to enforce federal laws

Congress may indirectly regulate states by spending power conditions

Congress may restrict state activities that violate civil liberties

Furthers an important non-economic state interest with no reasonable non-discriminator alternatives or Substantial nexus to taxing state

State is acting as a market participant or Congressional permission

Fairly apportioned to activity

Fair relationship to service or state benefits provided

No direct taxes without congressional consent

Indirect taxes if nondiscriminatory and no unreasonable burden

No state regulation of federal government or officers while performing federal functions

Step 1: Does the government entity have the power of the sword?
Step 2: Does the challenger have the protection of a constitutional shield against federal, state, or local interference?

State Action Requirements

- Traditional Exclusive Government Functions or Significant State Involvement
- Procedural Due Process
- P&I
- Substantive Due Process
- Equal Protection
- First Amendment
- Catch-All Limits

State Government - Incorporation of Major Bill of Rights via 14th Amendment Due Process Clause

Federal Government - Reverse Incorporation of Equal Protection Component via 5th Amendment Due Process Clause
Step 2: Does the challenger have the protection of a constitutional shield against federal or state interference?
Step 2: Does the challenger have the protection of a constitutional shield against federal or state interference?
Criminal Law "Ace" Analysis Chart

- Any crimes?
- Any defenses?
- Any special considerations?
Criminal Law "Ace" Analysis Chart

- Any crimes?
  - Any general prima facie concerns? +
  - Person Crimes? +
  - Property Crimes? +
  - Preparatory Crimes? +
  - Judicial Crimes? +

- Any defenses? +

- Any special considerations? +
Criminal MS

Mental State Classification of Major Crimes

Specific Intent
- Incite
  - Solicitation
  - Conspiracy
  - Attempt
- Simple Crimes
  - Larceny
  - Robbery
  - Burglary
- Clever Crimes
  - Forgery
  - False Pretenses
  - Embezzlement
- Major Crimes
  - First Degree Statutory Murder
  - Assault (only the type of assault defined as an attempted battery)

General Intent
- Battery
- Rape
- Kidnapping
- False Imprisonment
  - Assault (only the type of assault defined as intentional creation of imminent bodily harm)

Malice
- Common Law Murder
- Arson
- Statutory Rape
- Statutory Rape
- Statutory Rape
- Statutory Rape

Strict Liability
- Selling Liquor to Minors
- Bigamy
Criminal Law "Ace" Analysis Chart.mmap – 6/19/09 – Scott Johns
Criminal Law "Ace" Analysis Chart

Any crimes?

- Any general prima facie concerns? (+)
- Person Crimes? (+)
- Property Crimes? (+)
- Preparatory Crimes? (+)

Any crimes?

Judicial Crimes?

- Perjury
  - Intentional false oath of material fact
- Subornation
  - Procuring or inducing another to commit perjury
- Bribery
  - Corrupt payment or receipt of value for official action
- Compounding
  - Agreeing for valuable consideration not to prosecute felony or conceal commission of felony or location of felon
- Mispresentation
  - Failure to disclose knowledge of a felony or prevent commission of felony

Any defenses? (+)

Any special considerations? (+)
Criminal Procedure Analysis Chart

- What are all possible triggers for each government encounter?
- Did the government comply with each constitutional claim or is compliance excused?
- What are the remedies for each constitutional violation?
Criminal Procedure Analysis Chart

What are all possible triggers for each government encounter?

Did the government comply with each constitutional claim or is compliance excused? +

What are the remedies for each constitutional violation? +
Criminal Procedure Analysis Chart

What are all possible triggers for each government encounter?

Did the government comply with each constitutional claim or is compliance excused?

What are the remedies for each constitutional violation?

4th Amendment

Fifth Amendment

Sixth Amendment

Eight Amendment

Fourteenth–Fifth Amendment
Criminal Procedure Analysis Chart

What are all possible triggers for each government encounter?

4th Amendment

The Fourth Amendment protects against unreasonable searches and seizures by government actors and is applicable to the states via incorporation under the Fourteenth Amendment.

- State Action?
- Standing?
- Definitional Issues?
- Warrant?
- Any No Warrant Exceptions?

Fifth Amendment

Sixth Amendment

Eight Amendment

Fourteenth–Fifth Amendment

Did the government comply with each constitutional claim or is compliance excused?

What are the remedies for each constitutional violation?
What are all possible triggers for each government encounter?

Criminal Procedure Analysis Chart

Did the government comply with each constitutional claim or is compliance excused?

4th Amendment

The Fourth Amendment protects against unreasonable searches and seizures by government actors and is applicable to the states via incorporation under the Fourteenth Amendment.

State Action?

Standing?

Subject Expectation of Privacy?

Reasonable Expectation of Privacy?

Definitional Issues?

Detention?

Search?

Arrest?

Seizure?

Warrant?

Any No Warrant Exceptions?

Fifth Amendment

Sixth Amendment

Eight Amendment

Fourteenth-Fifth Amendment

What are the remedies for each constitutional violation?
Criminal Procedure Analysis Chart

What are all possible triggers for each government encounter?

4th Amendment
The Fourth Amendment protects against unreasonable searches and seizures by government actors and is applicable to the states via incorporation under the Fourteenth Amendment.

- State Action?
- Standing?
- Definitional Issues?
- Warrant?
  - Valid and Properly Executed?
    - Neutral and Detached Magistrate?
    - Probable Cause? trustworthy facts for reasonable person to believe suspect committed crime
    - Particularity?

  - Good Faith Re-Reliance on a Defective Search Warrant?
    - Can go behind warrant if false statement by affiant with intent or recklessness and material to finding of probable cause

- Any No Warrant Exceptions?

Fifth Amendment

Sixth Amendment

Eight Amendment

Fourteenth-Fifth Amendment

Did the government comply with each constitutional claim or is compliance excused?

What are the remedies for each constitutional violation?
What are all possible triggers for each government encounter?

4th Amendment

The Fourth Amendment protects against unreasonable searches and seizures by government actors and is applicable to the states via incorporation under the Fourteenth Amendment.

State Action?

Standing?

Definitional issues?

Warrant?

Any Warrant Exceptions?

Terry Stop?

Terry Frisk?

SILA?

Automobile Exception?

Plain View?

Exigent Circumstances?

Consent?

Catching?

Exclusion Rule/Remedy

Fifth Amendment

Sixth Amendment

Eight Amendment

Fourteenth-Fifth Amendment

Criminal Procedure Analysis Chart

Did the government comply with each constitutional claim or is compliance excused?

What are the remedies for each constitutional violation?
Criminal Procedure Analysis Chart

What are all possible triggers for each government encounter?

4th Amendment
- The Fourth Amendment protects against unreasonable searches and seizures by government actors and is applicable to the states via incorporation under the Fourteenth Amendment.
  - State Action?
  - Standing?
  - Definitional Issues?
  - Warrant?
  - Any No Warrant Exceptions?
  - Exclusion Rule/Remedy
    - Fruit of the Poisonous Tree
    - Exceptions to Exclusion
      - Dissipation of Taint
      - Inevitable Discovery
      - Independent Source

Fifth Amendment

Sixth Amendment

Eight Amendment

Fourteenth–Fifth Amendment

Did the government comply with each constitutional claim or is compliance excused?

What are the remedies for each constitutional violation?
Crim Pro "Ace" Analysis Chart.mmap - 4/8/09 - Scott Johns
Criminal Procedure Analysis Chart

What are all possible triggers for each government encounter?

4th Amendment

Fifth Amendment

Sixth Amendment

Eight Amendment

Fourteenth–Fifth Amendment

Did the government comply with each constitutional claim or is compliance excused?

DP

Confessions

Pretrial ID

Incompetency

Seizure? Method shocks conscience?

Duty to disclose exculpatory evidence

Excessive pretrial publicity/
Right to fair trial

Burdens of production and proof

EP

Preemptory challenges

Inference?

Rebuttal with race-neutral explanation

Judge determines if sincere

What are the remedies for each constitutional violation?
Criminal Procedure Analysis Chart

What are all possible triggers for each government encounter?

Did the government comply with each constitutional claim or is compliance excused?

What are the remedies for each constitutional violation?

- Exclusionary Rule
- Exceptions to Exclusionary Rule
Evidence "ACE" Winning Game Plan

Evidence Big Picture "6-STEP RECIPE!"

- Relevance/Competence?
- Extrinsic Policy Concerns?
- Character Evidence?
- Impeachment Evidence?
- Privileges?
- "Ear-say" Hearsay
Evidence "ACE" Winning Game Plan

Evidence Big Picture "RECIPE!"

Relevance and Competence?

Extrinsic Policies

- Settlement Offers/Withdrawn Guilty Pleas
- Medical Offers = accompanying facts admissions are admissible
- Subsequent Remedial Measures unless to show control/ownership or rebut claim of in-feasibility
- Liability Insurance not admissible to show negligence or ability to pay

Character Evidence?

Impeachment Methods?

Privileges?

Hearsay?
Evidence "ACE"
Winning Game Plan

Step 3: CHARACTER?

Evidence Big Picture "RECIPE"

Relevance and Competence?

Extrinsic Policies

Character Evidence?

- Admissible if ultimate issue, e.g., defamation
- Admissible if habit evidence (regular response to certain circumstances) to prove conduct in conformity with habit
- Circumstantial Propensity Evidence?
  - Civil = not admissible unless ultimate issue, e.g., defamation
  - Criminal - defendant must initiate to introduce good character

Specific Acts?

- MIMIC acts (not to prove propensity or disposition) admissible if sufficient evidence to support jury finding that defendant committed prior act and probative value not substantially outweighed by danger of unfair prejudice
  - MIMIC = Motive, Incentive, Mistake, Absence, Identification, Common Plan or Scheme
  - Not admissible to show defendant's character to commit crime unless sexual assault

Reputation or Opinion?

- Defendant can put good character at issue by offering reputation or opinion witness (not just taking the stand which is a credibility not character issue)
- Prosecutor can rebut: (1) cross-examine defendant’s character witness about specific instances (no extrinsic evidence allowed); or (2) counter with government reputation/opinion witness of defendant’s bad character
- Defendant can provide R/O evidence of victim’s bad character if relevant except in sexual assault cases
- Prosecution can counter using R/O evidence of victim’s good character or defendant’s bad character for same trial

Sexual Assault Victim’s

- Criminal Cases: victim’s sexual behavior admissible to prove some other than defendant’s source of physical evidence or consent
- Civil Cases: Victim’s reputation must have been placed in controversy by victim; victim’s sexual behavior admissible only if probative value substantially outweighs harm to victim and danger of unfair prejudice to any party

Impeachment Methods?

Privileges?

Hearsay?
Evidence 'ACE'
Winning Game Plan

Evidence Big Picture "RECIEF"

Relevance and Competence?

Extrinsic Policies

Character Evidence?

Impeachment Methods?

- Definition: casting adverse reflection on veracity of witness

- Prior Inconsistent Statement

  - Method: cross-examination or extrinsic evidence if foundation

  - To prove prior statements inconsistent with present testimony

  - Must have opportunity to explain or deny either before or after introduction of prior statement

  - Inadmissible hearsay for purposes of substantive evidence (use limited to impeachment only) unless prior inconsistent statement under oath

- Bias or Interest: motive to lie shown through cross-examination or extrinsic evidence but must first be asked about facts before introducing extrinsic evidence

- Criminal Convictions?

  - CIMT Conviction = any crime of dishonesty (no judicial discretion)

  - Felony Conviction if less than 10 years old from date of conviction/release and probative value not outweighed by prejudicial effect to defendant (substantially outweighed if witness)

- Bad Acts: only if probative for untruthfulness - judicial discretion; no extrinsic evidence permitted (Note: an arrest is not considered a bad act)

- Opinion/Reputation: poor reputation or opinion for untruthfulness

- Sensory Deficiencies

- Prior Consistent Statement to rebut charge of recent fabrication or motive

- No extrinsic evidence for collateral matters

- Rehabilitation: by character witnesses or if motive to lie only by prior consistent statement

Privileges?

Hearsay?
Evidence "ACE"
Winning Game Plan

Step 5: PRIVILEGES?

Evidence Big Picture "RECIPE!"

Relevance and Competence?

Extrinsic Policies

Character Evidence?

Impeachment Methods?

Privileges?

Attorney/Client

A/C communication, professional relationship, in confidence (no privilege if crime/fraud or dispute with attorney)

Husband/Wife Privileges?

Marital Privilege = criminal or civil proceedings, available to either spouse, only for confidential statements made during marriage, claim outlasts marriage

Spousal Immunity = criminal proceedings, witness spouse only, for confidential statements before or during marriage, can claim only during marriage

Doctor/Patient = not recognized under federal law

Social Worker/Psychotherapist

Waiver?

Voluntary disclosure or failure to assert or contract waiver

No waiver if overheard by eavesdropper if not negligent

Hearsay?
Evidence "ACE"
Winning Game Plan

Evidence Big Picture "RECIPE!"

Relevance and Competence?

Extrinsic Policies

Character Evidence?

Impeachment Methods?

Privileges?

Hearsay?

- Definition = out of court statement offered for the truth of the matter asserted
- Not legally operative facts/acts or statements to show effect on listener or what declarant believed to be true
- Statement = oral or written assertions or nonverbal conduct intended as assertion

Federal Definition Exclusions

- Prior Inconsistent Statement Under Oaths
- Prior Consistent Statement if offered to rebut charge of lying motive an statement arose before motive to lie arose
- Prior statement of identification of a person after perceiving person
- Admission by Party Opponent
  - Adoptive Admissions by Stance
  - Vicarious Admissions

Major Hearsay Exceptions

- Declarant Unavailable
  - Statement Against Interest When Made
    - Former Testimony with former party with opportunity to develop, same subject matter, under oath
    - Dying Declaration = imminent belief of death and concerns circumstances/cause
    - Family or Personal History Statements
    - Statements offered against party procuring unavailability of declarant

- Declarant Availability Immaterial
  - Present State of Mind; Present Sense Impressions; Present Physical Condition or Past Physical Conditions if made to doctor
  - Excited Utterance - startling event + statement made under stress of excitement
  - Past Recollection Recorded
    - Business Records: in regular course of business, customary to make entry, with personal knowledge or duty to transmit, entry made at or near time of transaction, with authentication
  - Official Records
  - Felony Convictions
  - Statute of Limitations
  - Ancient Documents (20 years old or more)
  - Catch-All = notice + strict necessity + guarantees of truthfulness
Property Ace Winning Game

- Ownership Interests
- Landlord Tenant Issues
- User Interests
- Catch-All Rights/Interests
- The Big Land Deal!