CONSTITUTIONAL LAW

OUTLINE OF ISSUES: MID TERM EXAM

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Outline of Issues in Response to Question One

1. Unconstitutional Acts of Becky and Trump

a. The Treaty. The facts indicate that Becky, as President, negotiated an agreement with India. The agreement was submitted to the Senate for ratification as a treaty. However, the agreement was never ratified. The Constitution provides that treaties, along with the Constitution and the laws enacted by Congress, are legally enforceable. Since the agreement here was not ratified as a formal treaty, anything done pursuant to it would ostensibly be unlawful. Specifically, any action by the President or by an official of the executive branch done in accordance with terms of the agreement would be without legal sanction and would be unconstitutional. If the President authorized use of United States naval bases by India as provided for by the agreement, this would be an unconstitutional act. If the President, or her agent, Trump, called on the assistance of India to undertake warlike actions, this, too, would be unconstitutional.

This, of course, would all be true *if* the President and Trump had indeed been acting in accordance with the terms of an un-ratified treaty. The facts indicate that the President told the leader of India that their agreement was still good despite the Senate's refusal to consent to it. The President would be correct in her assessment if one were to view the agreement *not* as a treaty but as an *executive agreement*. The Courts have recognized a certain reservoir of implied executive authority lying within the President's express power over foreign affairs— particularly with respect to communicating with foreign nations. An executive agreement is an agreement between governments that is essentially outside the scope of the Court's power to review, for no one other than the President can compel what the President must communicate to or with a foreign nation. While such an agreement is not law for purposes of the Supremacy Clause, it is a valid exercise of executive authority. Tellingly, not a single executive agreement in the history of the nation has been held to be in violation of the Constitution.

It could be argued that Congress, through its Joint Resolution, has limited the President's ability to act. The facts indicate that the operative Resolution seemingly limits the President's power more narrowly than was the case before the Resolution passed. The President is now only permitted to take necessary measures, as opposed to taking all necessary measures *and using all necessary force*. On the other hand, the most current language remains broad, despite the narrowing to eliminate what very well could be construed to be mere redundancy of prose without any resultant dilution of the potency of what Congress actually conveyed. It is unlikely that the Court would accept any invitation to determine any substantive difference in the language of the former and current resolutions. It would likely consider such a determination to be a non-justiciable political question best resolved by the political branches of government themselves. Similarly, the omission of "force" from the resolution from the most recent

resolution likely would *not* be construed by the Court as a limitation on the President's discretion with respect to choice of "measures" that are "necessary." The Court will likely refrain from attempting to infer Congress' intent in an area of constitutional authority where the President has broad power that is to some extent independent of Congress.

Even if it was the intent of Congress to limit the President's ability to conduct foreign policy, it is uncertain if Congress actually could dictate to the President anything with respect to the contents of executive agreements the President enters into with foreign nations. Congress simply has no power to communicate with foreign nations, and thus (logically) can have no power to tell the President what she can or cannot communicate abroad.

b. Acts of War. The facts indicate that President Becky, through her "ambassador," arranged for the dispatch by India of an agent to kill or capture persons suspected of being in arms against the United States. Subsequent to those arrangements, an Indian agent did just that and then deposited the surviving target into Indian custody. It could be argued that these are acts of war. War, however, is a state of armed conflict between nations, hence the acts at issue are not necessarily warlike acts as understood within the context of International Law. Additionally, the acts of President Becky and her ambassador stopped short of what might be considered warlike: the actual warlike acts were committed by the agent of *another* country, not the United States. If these acts constitute war, the President's (and her administration's) actions are subject to the Constitutional limitation on the President's power in this area. If the President is to wage war, the President must receive authorization from Congress. Here, the Congress did pass a joint-resolution authorizing the President to resort to "necessary measures" to combat international terrorism. Joint resolutions have been viewed as the functional equivalent of formal declarations of war. The difference between this joint resolution and a previous one, however, does suggest that the Congress was narrowing the scope of the President's power to act. More likely than not, the difference in the wording would not be considered substantial enough to permit the Court to determine what kinds of actions Congress intended to authorize under the earlier resolution, and which actions were forbidden by the second. Such an inquiry would likely be considered an improper invasion of the non-justiciable domain of the political branches of government.

c. Appointment of Trump. The facts indicate that the Senate failed to confirm Trump as the President's nominee for an ambassadorship, but that the President sent him to India anyways to act as the nation's ambassador. On its face, this is a violation of the Constitution. However, the President's choice of Trump might be Constitutionally valid if Trump was a recess appointment— that is, if he was appointed Ambassador to India while Congress was in recess. The Constitution permits recess appointments in order that the government might not come to a standstill while Congress is between sessions or in recess. Once Congress returns to session, the Senate would have an opportunity to confirm or reject the president's choice. Here, the facts are silent on whether Congress was in recess when Trump was appointed. Consequently, it is not entirely clear whether Trump was properly appointed to his position or not. Probably he was not.

d. Trump's Exercise of Authority Under Agreement. Clearly, Trump was not confirmed as Ambassador to India. If he was not a recess appointee to the position, he had no authority to act for the United States. He had no authority to execute any provision of the agreement between the United States and India, whether the agreement was a formal treaty or an executive agreement. In other words, Trump would have been outside the scope of his authority (which was non-existent) to request India's assistance in the apprehension or killing of the two suspected terrorists.

e. Civil Rights Violations of American Citizens. Musa and Farad are American citizens. They are protected by the Constitution, including the Bill of Rights. They have been declared to be enemies of the nation and subject to death and imprisonment without trial. If they had been on American soil, or within America's jurisdiction, it could be argued that their civil liberties had been violated by action of the Executive Branch. However, the two men were abroad, on foreign soil. Consequently, they were, as a practical matter, subject to the law of nations as opposed to the law of the Constitution. This is a murky area, involving privileges, immunities, wide executive discretion and a complex of jurisdictional issues. Too many permutations exist to provide an adequate outline. Some discussion of these issues is provided in response to Sub-parts 3 and 4 below.

2. Congress' Remedy for the Executive's *Ultra Vires* Acts.

Assuming that everything the President and Trump did was violative of the Constitution, the Constitution nevertheless provides the Congress with a limited range of remedies.

With respect to the President's negotiation of the agreement with India, there is nothing the Congress can do to impair its execution, accept perhaps withhold any appropriations in the future that might be necessary in order for the United States to honor its side of the agreement. Indian ships using United States facilities, for instance, would likely incur some expense on the United States' part. Congress could also refuse to cooperate with the President on anything else in order to gain concessions from the President. These, of course, are purely political remedies. The Congress could also attempt to remove the President from office, but this requires a finding by a majority in the House that the President has committed High Crimes and Misdemeanors, bribery or treason, and then a super majority vote in the Senate. In American history, this has never happened— at least with respect to a President. Senator Dave's vague threat of a lawsuit is meritless. If Dave attempted to invalidate the agreement via a lawsuit, he would likely be informed by the Court that he had no standing to bring such an action due to lack of a personal injury, not to mention the political nature of the issue. This would be true with respect to any lawsuit brought be a member of Congress to enjoin the President's conduct or conduct of an executive official.

With respect to the appointment of Trump, the Senate can, if it was a recess appointment, fail to confirm the appointment at the appropriate time after it returns to session. It can also attempt to remove Trump from office via impeachment. Of course, if Trump was never appointed, the Senate cannot remove him at all. Logically, there would nothing to remove him from.

With respect to Trump's exercise of authority under the agreement, impeachment and removal again are options, but only if Trump was properly appointed to the office.

With respect to each of the alleged offenses, Congress could also investigate. Congress has the power to hold hearings and compel attendance at such hearings by witnesses. Its investigation would have the affect of shedding public light on the doings of the Executive and might well uncover evidence of actual wrongdoing. Whether this would lead to public approbation or federal prosecution is unknown, but it would at least provide a public airing of important public business.

3. Farad' Writ of Habeas Corpus.

The Court has long held that American Citizens who are held outside of the zone of active hostilities, where civil court houses are still operational, are entitled to the entire panoply of constitutional rights, including the protections afforded by the Great Writ. Here, Farad is not in the zone of hostilities. Nor is there any fact suggesting that civil court houses are not operational where Farad happens to be held. However, these facts or apparent facts are irrelevant due to Farad being held on *Indian soil* outside of American control. Consequently, the power of a Federal Court to compel action by authorities holding custody and control over Farad is non-existent. Farad is where the Writ will not run.

4. Civil Liability of Becky and Trump.

The President and the principal officials of the government, including intimate advisors of the President, have broad immunity to prosecution. The Court has determined that the immunity exists to the outer perimeter of the President's official authority. Farad, however, could well allege that the President and Trump acted outside of their official authority and that those actions proximately caused Farad's injuries. If that were true, the President and Trump might well be outside the protective curtain of Presidential immunity. The executive agreement itself likely would not provide a basis of liability. The same could not necessarily be said of the appointment of Trump. If Trump's appointment was invalid, then the President might be civilly liable for injuries caused by the appointment, especially if it could be shown that the President instructed Trump to act as he did. Certainly Trump would be more vulnerable than the President in that it was he who called on India to kill or capture Farad. If Trump had no official authority, he was

without power to authorize Farad's apprehension. The injuries suffered by Farad— his loss of liberty in particular— would not be barred by Executive Immunity.

While Farad's action might not be barred against either Becky or Trump (or both) by Executive Immunity, Executive Privilege may well represent a more formidable obstacle. There is, of course, no absolute privilege to information held by or communications within the Executive Branch. However, there is a high degree of deference paid by the Court to the assertion of privilege related to national security matters. Here, the President might be able to successfully raise national security as a reason to bar access to evidence useful or even necessary to the making of Farad's case. Rebuttal of the presumption of privilege might be possible, but it would require a sufficiently compelling purpose. Civil litigation (as opposed to criminal prosecution) might not be sufficiently compelling. There is also the matter of whether there would be a bar on any civil discovery or trial of the matter so long as the President remains in office. The Court has held that litigation could continue for civil offenses by a President allegedly committed prior to taking office. The Court might well be somewhat more reticent to permit litigation against a President while the President is in office for offenses allegedly committed during the President's tenure and which had some relation to the prosecution of foreign affairs. If the Court permits him to press his suit, Farad might well have to wait until President Becky leaves office to effectively prosecute it.

Outline of Issues in Response to Question Two

1. Frito's Constitutional Objections to the Fast Food Law.

a. Takings. The Fifth Amendment prohibits the Federal Government from appropriating for public purposes the property of individuals without just compensation. The Fifth Amendment's Takings Clause has been incorporated into the Due Process clause of the Fourteenth Amendment, thereby imposing the same limitation on state and local governments. Frito could argue that the provision of the Fast Food Act requiring him to install a display is a taking. He could argue that the State has deprived him of use of a portion of his property in order to achieve a public end— that is public education regarding nutrition. There is little retort to this contention, other than to argue that the dispossession by the government is so insignificant as to require only nominal compensation, if any.

b. Pre-emption. Article VI of the Constitution states that the laws enacted by Congress are the supreme law of the land. This so-called Supremacy Clause has been interpreted by the Court to provide that any law enacted by a State that conflicts with a valid federal law is pre-empted by the federal law. Here, Frito could argue that the provision of the Fast Food Act requiring him to use food processed in compliance with the higher State standards actually conflicts with the food standards enacted by the Federal Government. The State, he could argue, cannot impose a higher standard than that imposed by federal law. The State, however, could argue that Congress did not intend to prevent States from providing higher food quality standards. Congress was only setting a minimum standard, which the State's could build on. Unless the Federal law clearly manifests an intent by Congress to establish a maximum quality standard, the State will likely win this argument.

c. Impairment of Contracts. Article I, Section 9 of the Constitution prohibits States from passing laws impairing obligations on contracts. Here the State has enacted and is now enforcing a law requiring employers pay their employees at a certain rate. Frito could argue that he has existing one year employment contracts with his employees and that any regulation of wages must await termination of those existing contracts. Any enforcement of the wage and hour provisions would have the affect of altering his obligation to his employees pursuant to existing contracts. In response, the State could argue it has inherent power to provide protection for workers. The State's police powers do include authority to issue wage and hour laws, but the State's argument likely would not succeed here, where actual contracts for set terms are in place. If the employees of Frito were at will employees, it is more likely that the law would immediately apply.

Frito could also argue that the bar on impairing obligations on contracts applies to the law requiring Frito to use food ingredients that meet California standards. Frito could argue that the

requirement that he use only food meeting California's higher standards effectively prevents him from satisfying his obligation to Spungo's, Inc to purchase food from Spungo's, or which prevents Spungo's from satisfying its obligations to him. The State could argue in response that the law itself is neutral on its face and in its intent. The law was not aimed at liberating any given contracting party from their contractual obligations, but instead seeks to ensure food quality at a certain class of restaurants. The law doesn't actually prohibit Frito from obtaining food products from Spungo's, Inc., nor does it prevent Spungo's, Inc. from selling and distributing food products to Frito. The effect on Frito is merely incidental. Frito may loose his franchise with Spungo's, Inc, or be subject to civil action initiated by Spungo's, Inc., if he chooses to abide by the new law, but the law itself is likely outside the scope of the Constitutional prohibition relating to existing contracts.

d. Ex post Facto Law. It is not clear whether the fines imposed on Frito were for violations before or after the time when the law was enacted. If the fines were for pre-enactment conduct, Frito could argue that they are barred by the ex post facto clause of the Constitution, which prevents States from imposing criminal penalties on individuals for conduct that was lawful at the time the conduct occurred. If the fines, or some portion of them, were retroactive, the State could argue that the ex post facto clause does not apply because the penalties are civil in nature, not criminal. Penalties, however, are penal in nature, thus the State's argument likely would not gain much headway. If the argument prevailed, Frito could still argue that the due process clause of the Fourteenth Amendment limited the State's power to impose retroactive laws of a civil nature. The presumption would be that the State's retroactive law was permissible, and would only be found to be impermissible if Frito could demonstrate that the law was unreasonable, was not rationally related to a legitimate governmental purpose and/or was capricious or arbitrary. There are not sufficient facts to determine whether Frito could meet his burden.

e. Procedural Due Process. Frito apparently has been informed that he owes money to the government for alleged violations. Frito could argue that the violations havn't been proven and that before he can be punished pursuant to what is in effect a criminal statute, he is entitled to due process— that is, that he is entitled to notice of the allegation and an opportunity to be heard in his own defense. Because he has not been afforded either of these things, he could allege that the State has violated the Due Process Clause of the Fourteenth Amendment. The State would not really be able to answer this argument.

f. Excessive Fines. The Eighth Amendment prohibits the Federal Government's imposition of excessive fines. Though the Excessive Fines Clause of the Amendment has not yet been formally incorporated into the Due Process Clause of the Fourteenth Amendments by the Supreme Court, it is more likely than not that incorporation would occur if the issue came before the Court. Here, Frito could argue that the fines imposed are excessive. The facts indicate that Frito's contention is likely correct, though proof of such is subject to a factual inquiry which likely would include a weighing of the nature of the offense against the size of the fine.

g. Dormant Commerce Clause. In seeking an injunction, Frito can argue that some of the provisions of the State's law violate the Constitution's implied limitation on the power of the States to regulate interstate commerce. He could argue, for instance, that section (a) of the law impairs interstate commerce in food stuffs. Facially, the law does not seem to be discriminatory, though the State's higher standards may well have the affect of impairing interstate commerce. Certainly with respect to foodstuffs shipped from Spungo's Inc.'s national processing center there is an impairment. Frito would have the burden of demonstrating that the law is not reasonably related to a legitimate state interest, or, in the alternative, that the benefits obtained by the law in furtherance of an actual legitimate state interest are substantially outweighed by the burdens on interstate commerce. Here, the State's purpose is not clear, but it could be argued that its likely purpose is to ensure that food consumed by people of the State is safe. This is a legitimate state interest. Whether the health benefits are substantially outweighed by the burdens on interstate commerce in foodstuffs in uncertain. In order to show that they are, Frito would have to demonstrate that the higher State standards have no significant impact on the health of consumers.

Frito could also argue that section (c) violates the Dormant Commerce limitation on the State's police powers. Specifically, he could argue first that the law has the effect of preventing laborers in one state from contracting for employment in another state, which is an impairment of interstate commerce. He would, of course, have to demonstrate (at the very least) that persons excluded from work by the law on the basis of residence in a non-urban environment, are predominantly from out of state. He would have standing to make the argument due to the fact that he is the one prevented from hiring the person of his choice—in some cases, persons from another state. Upon showing that discrimination against out-of-state labor has occurred, he could then argue that the provision is irrational. Specifically, he could point out that the geographic origin of the labor force at fast food restaurants has no rational relationship to healthy eating practices. Reserving a super majority of jobs at fast food restaurants for persons from urban environments simply has no bearing on the goal of instilling healthy food habits. In fact, since fast food restaurants are notoriously not conducive to good nutrition, it could be argued that the law is actually promoting poor health habits among the very population the law presumably aims to make healthier.

h. Non-Constitutional Point. As a threshold matter, Frito could argue that his franchises are not "fast food restaurants." If he is correct, the law does not apply.

2. Jillian's Liberties.

a. Right to Work/Contract. The Due Process Clause of the Fourteenth Amendment includes by implication a protection for economic liberties, including the right to work and contract. While the scope of protection has narrowed significantly in the past eighty years, some protection is still afforded. However, the presumption favors a State's impairment of the

individual's liberty interest— that is, the law at issue will be valid unless the challenger can demonstrate that the law is not reasonably related to a legitimate state interest. The State does have a legitimate interest in health, but, as indicated above, the law as it impacts Jillian's right to work does not clearly relate to the promotion of health. Certainly the law does not actually further the health interests of the people of the State, especially those directly benefited by the law. The State could point out that its interest is not merely in health, but in the employment of people living in the State's cities as well. This alone is not a sufficient basis for the impairment of Jillian's rights. Perhaps the State could argue that the urban population suffers from significant unemployment and that this law aims to ensure that the urban population finds gainful work. This might make the case stronger, but likely it would fail since the employment provision seems to be expressly rooted in the policy of promoting health, which the section of the law at issue simply does not actually promote and to which it is not rationally related.

b. Privileges & Immunities. Article IV, Section 2 of the Constitution prohibits a State from treating the citizens of another state worse than it own citizens. Here, Jillian could argue that that California's law provides preference to citizens of California. The State could challenge the premise that there is any discrimination by arguing that the law favors persons from urban environments over non-urban environments without any distinction as to what State a person comes from. Jillian could attempt to present evidence, if it exists, that the purpose of the law is to discriminate against non-Californians. Discovery of some correlation between native state citizenship and urbanity, as well as some correlation between out-of-state citizenship and non-urbanity, would help her to make the case, but it would not necessarily be decisive.

If Jillian were to prevail on the issue of whether there is discrimination, she would then be faced with carrying a further burden in the form of demonstrating that she is a citizen of another state and that the privilege at issue is a "fundamental" one. She likely can meet this burden since the facts indicate she is a resident (and probably a citizen) of Nevada, and because the right to work *does* qualify as a "fundamental" privilege. Consequently, the burden then would shift to the State, which would have to prove that there is a *substantial* reason for the discrimination against non-Californians. The State may do this by demonstrating that non-Californians are the source of the problem to be alleviated. Here, the purpose of the law is to promote health. There is no indication in the facts that employment of non-Californians in fast food restaurants is creating the health and nutrition problems that concern the Legislature. Consequently, it does not seem likely that the State could carry its burden. If it could carry it (perhaps by focusing on employment issues which might be an additional policy support for the law), the State would then have to show that the degree of discrimination resulting from the law is related to the degree of the problem to be alleviated. On the face of it, a seventy-five percent to twenty-five percent preference favoring urbanites, a substantial number of whom are Californians, would be difficult to defend. If this final prong represented the ropes on which the State's fortunes hung, it is likely that the canvas would be next stop.