

Mid term total = 89 1/2

Very Well Written

1)

===== Start of Answer #1 (1890 words) =====

1. Agreement with Mexico

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Concurrent powers on Foreign Policy:

The executive and Legislative branches have overlapping authority when it comes to public policy. The legislature has the power to declare war, allocate resources for war, and ratify treaties negotiated by the president. The Executive has the power to negotiate treaties and wage war. In times of emergency, the President is given more leniency in the use of his power because it is important for the country to have a unified voice. This is only true to the extent that the President is carrying out his duties: to uphold the constitution and execute federal laws.

Was this a treaty?

The executive of the United States, the President, has the authority to negotiate treaties with foreign countries. There are two kinds of treaties: self-executing treaties [where nothing needs to be done for it to be implemented] and non-self executing treaties, where there must be some further act of congress [usually money apportioned] for the treaty to be implemented. However, to be valid, a treaty negotiated by the President must be accepted by the Senate with a 2/3 supermajority. Here, although both houses passed with a majority, this is not enough to properly ratify the treaty. This cannot be a valid treaty.

Was this an executive agreement?

The President also has the authority to make agreements with foreign nations so long as money is not needed to implement them, and so long as they do not abridge some other part of the constitution. Executive agreements have the same practical effect on foreign policy as do self-executing treaties. The courts will usually defer to the President in this area, as is evidenced by the fact that no

executive agreement has ever been found to be unconstitutional. However, in this case, the President acted against the joint resolution, and negotiated the agreement which did the exact opposite as the Congress' resolution directed. The City of San Diego had [unlawfully] mounted a standing militia and was basically saying it was going to succeed. The President was supporting that unlawful action by his agreement. This was not a constitutionally valid execution of his duties as President. In addition, the Congress has authority to make laws regarding treatment of aliens in the United States. It appears that the agreement is not valid.

2. Is the President entitled to:

(a) refrain from enforcing Federal environmental regulations?

The duties of the president include executing all federal laws. The Federal environmental regulations are included in that umbrella. The President must direct the principal officer in charge of enforcing the regulations to do so. The President cannot simply decide unilaterally that a specific law or regulation will not be enforced [unless it is in some way unconstitutional].

(b) refrain from spending money authorized by Congress for a particular purpose?

The legislatures' enumerated powers include declaring war and spending money for the welfare of the country. Appropriations bills must start in the House of Representatives. Then, as with all bills, when it passes the first house of Congress, it goes to the other house and if it passes there then it is presented to the President. The President can sign it [then it becomes a law], veto it [goes back to Congress, and must include a reason why it was vetoed], or do nothing. If the President does nothing, it becomes a law after ten days unless there are less than ten days left in the Congressional session, in which case it dies [pocket

veto]. There are no facts to support a contention that the money allocated by Congress did not follow the proper procedure for an appropriations bill. The President signed it into law, so the money is available for the President to use, but ONLY can go to what the Congress directed. Here, the President takes the money and puts it to his arbitrary use. This is a breach of his duties as President to execute the laws of the federal government. He is not authorized to refrain from using the money which was specifically to fund the military effort against the unlawful Mexican immigrants unless the directions from Congress are somehow unlawful or unconstitutional themselves. Congress has the authority to legislate immigration and nationalization, so this allocation is well within their powers and the President is beyond his.

(c) refrain from going to war?

The executive has the power to wage war. This probably does not, however, allow him to refuse to wage war when the Congress has expressly directed him to do so. The Congress has the power to declare war and provide for the security of the nation. Although there is no expressly clear declaration of war in the fact pattern, that is what it appears Congress intended, even if the war being declared was not against Mexico, but was instead to defend the country's borders from the mass immigration. Under the necessary and proper clause, Congress has the authority to make laws which are necessary and proper for the executing of any existing legislative power. However, the executive has the discretion to decide how the war will be waged. If there was any way for the President to argue that the "Kenny Car" program was a way to wage the war that Congress mandated, then the President could argue that, but it would most likely fail with the facts before us.

(d) spend money without Congressional authorization?

The President does not have authorization to arbitrarily spend money against the express wishes of Congress. Congress has the exclusive power to tax as well as to spend for the good of the country, and the President's duty is to uphold Federal Laws. Unless he could somehow creatively argue that the car program was a way to achieve Congress' war goals, this was an unconstitutional way to use the money.

3. Was removal of the Secretary of Homeland Security Constitutionally proper?

The Secretary of Homeland Security [SHS] would be considered a principal officer of the executive branch. The President has the power to appoint principal officers, but they must be approved by the Senate. The President also has power to remove principal executive officers, although sometimes there are restraints on that power, like a breach of their duties. Here, the Legislative branch has removed the SHS. Congress does have the power to remove principal executive officers, but only through impeachment. Impeachment can only be for treason, bribery, or high crimes and misdemeanors. Removal by impeachment is a two-step procedure: first, the House of Representatives must decide to impeach by a simple majority. This acts almost like a Grand Jury indictment, and subjects the officer to a trial by the Senate. The Senate will hear evidence and try the case [with the Chief Justice of the Supreme Court sitting as magistrate IF the impeachment is on the President]. The Senate must agree by a supermajority [2/3] to remove the principal officer. The ideas of 'high crimes and misdemeanors' has not been nailed down by the constitution or courts. Some crimes may not be applicable to impeach, while some actions which do not constitute crimes may be enough. Treason is defined in the Constitution as giving aid or comfort to enemies, or taking up arms against the United States. There must be two witnesses testifying to the treasonous actions. Although the SHS did not take up arms against the US, the actions of giving away cars against the mandate of congress, and not complying to federally mandated safety standards,

would probably be enough to impeach and remove the SHS. Perhaps even simply welcoming the immigrants against the specific wishes of Congress would be enough. The facts are silent as to whether the Congress instituted the proper procedure for impeachment and removal of the SHS. If they did, the removal was proper.

4. Actions to be taken against the President:

As stated above, it appears that the President did not fulfil his oath to defend the Constitution, and did not execute Federal laws. In addition, he acted beyond his powers. The Congress and court may have some options: they can decide to impeach and convict him, and they may be able to go to the court with a writ of mandamus. The writ of mandamus [mandate] is a tool to be used to force a public official to carry out his lawful duties. To bring a case to the Supreme Court [SCOTUS], there must be a case or controversy, and the plaintiff must have standing. In addition, if the claim is brought under a Constitutional basis, there must be some kind of 'state action'. A case or controversy is when there is an actual issue that the court can address, which is neither moot nor unripe. In this case, there would be a case or controversy found because there is an immediate issue that the court could theoretically address. There is 'state action' because the President is acting under the alleged authority of the Constitution and federal law. The Speaker of the House may have standing to bring a case against the president. For standing, one must have an injury in fact, caused by government action, and the case must be able to be resolved or addressed by the court [redressability]. Congressional standing can be sustained when a law of Congress is not carried out. Here, if the court decided to hear the case, and the writ of mandamus, they could order the President to carry out his duties as directed by the Congress. However, this may simply be an unjusicable issue. If the Court decides that this is a political question, or that no judicial standards could constitutionally apply because it is an area of separation of powers, then

they may abstain and refuse to hear the case. SCOTUS has great leeway in deciding which cases it wants to hear, and can, for the most part, abstain if it so chooses.

If the Court refuses to hear the case brought by the Congress against the President, then the Congress can begin impeachment proceedings against the President. As discussed above, the procedure of impeachment must be followed. It appears in this case, as with the case of the SHS, there is ample evidence to prove that either treason or high crimes and misdemeanors have occurred. If the President is removed, then the Vice President will take the seat.

5. Must the civil suits against President Kenny be dismissed?

Although not enumerated in the Constitution, the President has certain Privileges and Immunities which go along with the job. Kenny is absolutely immune from suits instituted for civil wrongs done by him in the scope of his actions as president. This extends to the 'outer circle' of his actions as Executive. Kenny will argue that all his actions were within this 'outer scope' of his executive actions as President. However, with the facts before us, it appears that the suits all came out of injuries for deaths and personal injuries caused by the "Kenny Cars" which not only were arguably given away unlawfully, but also did not comply with Federal Environmental and Safety regulations. Because the 'outer circle' of the President's duties are to uphold the Constitution and Execute federal laws, this action which constituted a breach of those duties would not be immune from prosecution. The civil suits do not have to be dismissed.

===== Start of Answer #2 (2703 words) =====

1) Does the Dormant Commerce Clause invalidate the State of California's Law?

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The Dormant Commerce Clause is a prohibition on state law which negatively affects or burdens interstate commerce. In determining whether a law might negatively affect interstate commerce, a Court would look seek to place the law in one of three categories as to how it might be classified in affecting interstate commerce. Generally, laws are determined to be protective, facially discriminatory, or facially neutral. Protective legislation is automatically doomed at the outset as a violation of the Dormant Commerce Clause, while Courts apply strict scrutiny as to facially discriminatory legislation and apply a rational basis test, with an additional balancing test, as to facially neutral legislation. Here, the law includes two aspects, both of which would be looked at separately.

With respect to the portion of the law which bans use of petroleum in certain products, this portion appears to be facially neutral. In particular, the law does not, on its face, treat in-state products any differently from out-of-state products. Simply put, the law sets forth a ban on petroleum in certain products (period). Thus, Courts would apply a rational basis standard, with an additional balancing test. The burden to show that the law does not rationally serve a legitimate government objective would, therefore, be on the challengers of the law, and to also show that the burdens placed on interstate commerce is greater than the benefits derived.

Generally speaking, showing that a law is not rationally based in a legitimate government purpose is very difficult to show in Court. Challengers would set forth that the law is not rationally based in that it looks needlessly at certain products which contain petroleum over other products that contain petroleum. In response, the State of California would set forth that, in the Legislature's findings, petroleum is adverse to climate change and is therefore negative to the environment. The challengers would then argue that while this might seem to be a legitimate government goal (to prevent climate issues), the argument that eliminating all products which merely contain petroleum. Perhaps the actual petroleum which affects climate is that which comes from vehicles, not that which is in products. Similarly, most products contain petroleum (including soap, shampoo, plastic items, etc.). Thus, there is simply no rational relation, despite a legitimate governmental objective.

Further, Courts would look to balance the alleged benefits against the burdens placed interstate commerce. The State would argue that the benefits stem from eliminating petroleum which negatively affects the environment, which outweighs the burden of limiting the certain products availability. Challengers would argue that the law does not derive the benefits alleged because the environmental problems asserted are as to such things as vehicles and petrol, not the mere present of petrol in certain products. Thus, the benefit "lose its teeth" and the burden would outweigh it. The Government might then argue that the throwing away of such products which contain high levels of petroleum is the cause of such climate change. This argument is not supported by the facts and appears rather tangential on its face. Thus, the balancing test seems to be in favor of any challenger of the law.

It is difficult to determine where a Court would rest its hat regarding these issue. My inclination is that, given the difficulty in overcoming the standards employed, this portion of the law would be upheld—despite problems with the laws rational relation to the State's objective and issues with the balancing test. The opposite, however, could very well be true.

In regards to the other section of the law, which requires out-of-state manufacturers who ship their products overland to submit them for inspection and testing, this is a law which seems either facially

discriminatory or even protective. In particular, the law, on its face, forces all other states to adhere to testing and inspection that in-state products are not forced to adhere to. Challengers would argue that this is presumed protective legislation which should be automatically deemed unconstitutional. California would argue that the law isn't protectionist, but, perhaps, merely seeks to ensure that products from other states meet standards that are already in place in the state of California. While no such facts are present, this is the best argument to prove non-protective legislation.

If such an argument succeeds, the Court would likely deem this portion of the law facially discriminatory. Then, given a strict scrutiny standard, the burden would be on the state to show that the law is necessary to achieve a compelling government interest. While it is extremely difficult to meet this standard, the State would argue that, as shown in the Legislative findings, 65% of all products received in California from out of state are shipped overland. This fact seems inconsequential, and acts as a red herring with respect to the facial discrimination that the law creates in burdening out-of-state sellers and shippers. Further, such a fact does not provide any basis for finding a compelling purpose which necessarily relates to problems the State has. Simply put, the facts make no indication that such a burden could be met by the State. Unless, perhaps, they could show that there are standards in place within the state which are distinct from this legislation, that they wish out-of-state products to adhere to, there is no possible way to meet this burden. Additionally, the fact that products shipped over air are not given this scrutiny would rebut any such potential argument by the State.

Thus, in all likelihood, this portion of the law would be deemed to violate the Dormant Commerce Clause and would be invalidated, while the former provision would be more likely to be upheld.

2) Assuming that each law is not inherently defective, what effect, if any, does the Federal Zombie Protection Act have on California's Law?

The initial issue is whether the Federal law (FZPA) has any effect regarding the state law. Preemption is a Constitutional doctrine which sets forth that all federal laws on point preempt state law. The doctrine of preemption, as to state laws, may be retroactive in their effects. Thus, even though the state law came first, the federal law may still preempt the state law.

There is still the issue as to whether the FZPA may affect the substantive rights of others. Generally speaking, such laws, known as ex post facto laws, are unconstitutional; however, exceptions do exist. Laws which seek to retroactively alter rights of others are simply unconstitutional. As to arguing an exception, Rick would argue that the FZPA does not seek to adversely affect his rights, but merely alters the standard under which he could be punished to the benefit of the accused. Because it is a lessening of

a standard set forth by the state, substantive rights of those charged or potentially charged are not being affected; thus, Rick would argue that an exception applies when rights are not unduly prejudiced or affected, but that he merely gains additional rights. And, the "ban" on ex post facto laws was created to protect individuals, which is also what the FZPA seems to do; thus, they are not in conflict. Here, in fact, his rights are merely be expanded (the right to ship products with a slightly greater level of petroleum), and as such, the law should retroactively go into affect and likely not be deemed an ex post facto law.

As an aside issue, the facts are unclear whether under the FZPA's mandated levels regarding petroleum are greater or lesser than the State's. For all we know from the facts, the State law is merely preempted, while he could still be open to prosecution by the Feds. If the amount of petroleum permissible is greater under the FZPA than the amount Rick had in his products, there would be no actual issues other than those set forth above. However, if the standard still left Rick open to federal prosecution, but safe from State prosecution (given preemption), then he could rely on his ex post facto defense to show that retroactively applying the law to him would be in violation of his Constitutional rights to not be prosecuted for acts which occurred prior to implementation of the FZPA.

3) What could the State of California argue in order to invalidate the Federal Zombie Protection Act?

In addition to bringing up the issue of ex post facto laws as a defense, as set forth above (albeit an odd defense for the state to implicate), the State would also argue that the law is in violation of the Federal Commerce Clause. Generally speaking, the Commerce Clause grants the federal government very broad powers to regulate commerce. In particular, Congress has the power to create laws which regulate the channels of interstate commerce, the instrumentalities, persons, and things in interstate commerce, and to regulate anything that substantially affects or relates to interstate commerce. In determining whether the scope of the law extends beyond this, Courts employ the rational basis standard. Therefore, the burden would be on the state to show that the law does not rationally relate to a legitimate government purpose. This standard is very difficult to overcome and the State is not likely to meet it.

The State would argue, however, that there is no legitimate purpose to prescribe a minimum amount of petroleum in products. This argument, however, is duplicitous. Particularly in light of the fact that the State's own arguments in defense of its law which does the same thing (and to a greater degree in its limitations on levels of petroleum) sets forth there is a legitimate purpose in prescribing limits on the levels of petroleum in products. Further, the federal government would make such arguments with respect to potential health and environmental issues as they relate to petroleum in products. Such matters/objectives easily relate rationally to the FZPA. Thus, the law would not be invalidated under as a violation of the

Commerce Clause.

The State would also argue that the law is in violation of the 10th Amendment. The 10th Amendment vests in states all powers which are not expressly given to the Federal government. Such arguments are generally not given much credence, particular as to issues regarding interstate commerce which is so strongly rooted contemporarily in the federal government. Thus, this challenge would likely be insufficient.

Lastly, and if all else fails, the facts are unclear whether the Senate voted and approved the FZPA. It merely states that it was brought by Congresswoman Andrea, thereafter approved by the House, and the signed by the President. Assuming that the Senate did not vote and approve the FZPA, it could not possibly become law. The Constitution sets forth that all laws must be voted and approved by both houses of Congress. Therefore, assuming that it wasn't approved by both houses, the State would argue that the law is improper and seek relief setting forth that the law is not in effect given the nature in which it was alleged to have been enacted.

Thus, while the law passes muster under the Commerce Clause, and likely under the 10th amendment and ex post facto challenge, the facts would then dictate whether it was a valid law given the nature in which it was alleged to have been enacted.

4) What defense does Rick have to payment of the testing fee and the forfeiture of his California Business License?

With respect to forfeiture of his California Business License, Rick would argue that this is unconstitutional as an ex post facto law (see above). However, laws which merely tack on mere burdens/minor punishments are often treated as an exception to the rule. For example, a law which requires a sex offender to register with the state after having already been convicted has been upheld. Thus, the State would argue that because it merely tacks on an additional burden, the law should be valid. Rick would, in turn, argue that it takes away a substantive right to sell, which is far greater than a mere burden and, as such, it should be treated as an unconstitutional ex post facto law. It is unclear how the Court would rule, but given the manner in which his rights are affected (particularly the severity of the punishment in taking away all of his rights to properly sell in the State), I would venture that a Court would consider the law ex post facto and deem its application to him unconstitutional.

Should a Court, however, not deem the law ex post facto, Rick could argue that it's a violation of his procedural and substantive due process rights. The 14th Amendment grants individuals a right to life, liberty, and property, and should such a right be attempted to be taken, individuals are entitled to the

necessary procedures (i.e. right to challenge; right to notice; etc.) the potential loss.

Here, the facts set forth that Rick is being given 120 days to challenge the decision to take away his CBL; thus, unless there is some other procedure that is lacking (like an actual review of the appeal), the Court is likely to determine there are no procedural issues with due process.

Rick would then argue that his substantive right to due process is being taken away. When determine whether a substantive right to due process is involved, Courts first look at what right is being abridged, to place such a right in a category among either fundamental rights, incorporated rights, and all other interests/rights. The right to a CBL, which permits Rick to sell products in California, is a purely economic right, in which case it is neither fundamental or incorporated. Generally speaking, economic rights have not been considered with respect to due process for decades. Rick would, nevertheless, make the argument. The Court would require that Rick show there is not rational basis between taking away his CBL with respect to the laws/punishments' relation to a legitimate government purpose. The rational basis standard is extremely difficult to overcome, and Rick is likely to lose from the outset. The argument is simple: that punishment to stop selling goods for acts which violate laws which relate to the selling of goods is perfectly reasonable, and the State has a legitimate interest in ensuring that sellers who violate laws do not sell within the state. Thus, claims as to violations of due process are likely insufficient; even though Rick is likely to succeed regarding his defense of it being an ex post facto law (see above).

With respect to payment of the testing fee, Rick would argue that the fee is in violation of the 8th Amendment. The 8th Amendment protects individuals against cruel and unusual punishment and excessive fines. This Amendment is incorporated through the 14th Amendment; thus, it protects individuals from states as to excessive fines and cruel and unusual punishment as well. The fee in question here is based on 10% of the expected net profit from sale of the tested item. A court would use a strict scrutiny standard to determine whether the fine is excessive in light of the facts. The State would need to argue that the fee is necessary and not excessive. In particular, the State could show a correlation between a products value and the cost of the test employed; thus, suggesting that the greater the value, the more expensive the test and the greater the need to charge more. However, this argument seems unsupported from the facts. In fact, and on its face, 10% of the sale of the products seems grossly excessive and in no way rationally related to the basis for the charge (a small mere testing of products generally). There being no compelling interest to charge 10%, the State would likely fail to meet its burden to show that the fee is not excessive in light of the facts. Thus, the fee would likely be deemed excessive and overturned.

If that argument failed, there are various other argument that Rick could employ, such as that relating to

an unconstitutional taking incorporated from the 5th Amendment by the 14th Amendment, etc.; although, such arguments are much more likely to fail and more tangential from the 8th Amendment argument above.

===== End of Answer #2 =====

END OF EXAM