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===== Start of Answer #1 (2673 words) =====

Well Done.
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1.

a.) Is the Presidents refusal to close the border a legitamite exercise of Executive Power?

The Constitution vests its executive power within the President ("P"). The president is responsible to faithfully enforce the laws of this nation. He is not supposed to pass the laws, which is Congress's job, he is empowered merely to enforce them. Here, we have a situation where we are told that there is a Federal Statute on the books, which would ALLOW the president to close the border during a time of emergency. Though it certainly appears that the situation in Honduras would constitute an emergency, the law does not require the the P to do so. There is great lattitude given to the P to enforce the laws, and in this case, he has decided to not close the border. Since he is not required by the Statute to do so, it is a legitamite exercise of the Executive Power and within the statute for the P to keep the border open.

Though it appears that Congress would not have the ability, at this point, to override the president to enforce the law, Congress may be able to take a different tactic. Since Congress is in charge of regulations regarding immigration, they could pass an emergency law [given their voting patterns, and legitamite concerns in this case, it would likely overwhelmingly pass] which forced immigrants coming from Honduras [or other areas which might have infected individuals] to be placed in quarantine for a certain amount of time before being allowed accross the border. This would be seriously expensive, but the House could appropriate the funding.

Potentially, Congresses actions would lead to an interesting situation where Hondurans (or others similarly situated) were being held against their will. They would likely be afforded some sort of due process hearing to challege that they were not infected. They would have to also be afforded other fundamental protections, though the extent would

be unclear.

b.) Is the Agreement negotiated with the five foreign governments a legitimate exercise of Executive Power?

Though the president is given wide discretion in the area of foreign affairs (*Curtiss-Wright*), he is still limited by his inability to appropriate funds. This type of agreement non-self accuating treaty, where the president proposes it, but cannot fully implement it without congressional power. If it did not involve funding, it could be considered an Executive Agreement, and then, it would likely withstand scrutiny, as no Executive Agreement has ever been determined to be unconstitutional.

Only the House of Representatives, half of Congress, is allowed to appropriate such funding. Here, the P appears to have unilaterally promised the five central american governments that the US would match their deposits into that account. The P would be outside of his powers to do so. The House of Representatives could appropriate those funds, but given the facts of this question, the P's unilateral action regarding the treaty, and his actions subsequently, it is very likely that the House would not appropriate the funds.

Further, the P in the agreement appears to be directing where the funds would be going. This would violate the power of Congress to Tax and their Spending powers. The P does not get to dictate to Congress how the funds would be dispersed. Again, the House of Representatives could do all of these things, but is unlikely to do here.

c.) Is the decision to forego enforcement of the Immigration Act a legitimate exercise of Executive Power?

It is unclear from the question exactly which statute is the "Immigration Act". I assume

since question 1 related to the first statute which allowed the P to close the borders that the second Federal law, the one requiring immigrants and foreign visitors to possess proper documentation is the "Immigration Act." This answer will proceed off that assumption.

As previously discussed, the P is given a berth in relation to his power over foreign affairs. There is even the implication that his powers may be greater than the ones enumerated by the Constitution if there was a danger to US citizens. (Curtiss-Wright) However, allowing them into the border would make this a domestic issue. That would mean that the P's actions would be scrutinized based upon Justice Jackson's concurrence in *Youngstown Sheet*, where he detailed three circumstances and how they would be analyzed.

First, Jackson states that if the President is acting in concert with Congress, expressly or implicitly, that his power is greatest and that the actions would only be held to be unconstitutional if they clearly were outside the bounds of what the Federal Government as a whole would be allowed to do. This is not the situation here.

Secondly, Jackson states that when the President is acting in a domestic area that Congress is silent in, that he can only act within his own powers. This area will be looked at on a case by case basis, and it is unclear in a vacuum who would succeed.

Lastly, Jackson states that when the President acts in an area which Congress has specifically spoken in, the only way his actions would be held to be constitutional is if he was within his power, and Congress was outside of theirs. This is the situation we find ourselves in here. P has gone outside his powers, deciding not to enforce the law which requires documentation to enter the country, which Congress has specifically said is required. Congress is allowed to pass regulation in this area, has, and the P has refused to enforce it.

P can argue that he believes the law is unconstitutional. It is clear that a wide deference

is given to Congress in enacting laws regarding immigration and protection of our borders. This is not a gay marriage case, where the P decided to not enforce the law because he believes that in a post *Lawrence* world *DOMA* is unconstitutional. (*Windsor*). This appears to be a cut and dry case, where Congress has written a law which states documentation is required and applies to all immigrants and foreign visitors. It is not discriminatory and is likely to stand. P's not enforcing the law would be found to be unconstitutional.

d.) Is the deposit of funds into immigrant accounts a legitimate exercise of Executive Power?

The P does not have the power to spend money. Just like the power to tax, the power to spend is vested in Congress. Since Congress was not consulted, nor approved any legislation stating that the funds could be reapportioned from paying for the transfer of illegal aliens from state custody to federal custody. Again, Congress could write and pass that regulation, but P is not allowed to unilaterally decided to do it.

2. Is the invocation of Executive Privilege by the Chief of Staff Constitutionally proper?

The executive privilege, as invoked by the Chief of Staff is unlikely to be constitutionally proper. The executive privilege, if cited generally, which is how it appears to be here give the response of "too busy" to respond, can be defeated by a showing of need by Congress. If the P was to cite a specific privilege, such as states secrets, that would protect the documents more. However, given the facts presented, the assertion of the general executive privilege would be struck down by the Courts. This would not be a political question, mostly on the basis that the Courts would need to decide it if the P chose to stonewall that hard.

The 6 factors established in *Baker v. Carr* would be invoked by the P, however, the

Court is unlikely to not weigh in, especially if it was needed to force P to produce the documents. If P did not produce the documents, I guess Congress could wait for the hackers to do so though.

3. With respect to any acts or omissions of the President that are constitutionally improper, what remedy is available to combat them?

The President is acting unilaterally in violation of the Constitution. His actions will have caused complete chaos, and Congress would be passing regulations in an effort to fix the situation. However, those regulations would need to be signed by the P in order to become law. Obviously the P would not sign any such legislation, so in order to fix the issue and get back on congressionally sound footing, the P would need to be impeached.

Impeachment:

Impeachment is the process by which Executive Branch officials are removed by the legislative branch. The Constitution states that the President may be impeached for "High crimes or misdemeanors", and the exact meaning of both of those terms is somewhat in dispute. What is clear however, is that Congress has wide latitude to determine what those mean, and certainly there is a strong argument that the P's unilateral action to violate, repeatedly, the Constitution, could be interpreted as a high crime.

The House is vested with the power to vote to impeach the president., it must be approved by 2/3rds. After the House has voted to impeach him, the Senate is charged with "trying" him. However, this is not a traditional trial, and the senate gets to conduct it. Likely in this case it would be a short trial, although the P has some procedural due process rights. He would get notice of the hearing and would be allowed to show that what he did was not in violation of the constitution, and this issue would likely be

contensions and extensive. There would likely be lots of discussion about the 5 million dollar account in his name from Mr. Salvio as well, though the evidence presented in the fact pattern, though interesting, do not rise to the level of impeachment on their own.

Ultimately however, it would be clear that his unilateral actions to thwart the Constitution would lead to his impeachment.

This would lead to the vice-president becoming president, hopefully who would sign the legislation needed to fix the mess created, and also implement the legislation allowing him to close the border with Honduras during times of emergency.

Civil Suit:

The P is traditionally immune from civil litigation regarding his actions which P, unless those actions are found to be outside the scope of his employment. There is a possibility that the immigrants who came here and were promised funds by P would sue him. They could potentially sue on promissory estoppel grounds, though they would have other issues. Standing to sue in federal court has been found to exist when a foreign national sues the United States, and it is unclear if this would extend to the President. They would have actually had to get to America, had to have expended money in order to get here, based upon the P's promise of funding, and would have to be still injured as a result of his actions. Though this suit might ultimately not prevail, it might get picked up as a class action.

4. What Constitutional arguments, or Constitutional rights, can Mr. Salvio assert to combat the Amendment to the Immigration Act and its application against him?

First, Mr. Salvio would have to show that he has standing. Given that the facts state that Congress would revoke his legal residency, it appears he does have fundamental protections. In order to assert the most serious protections of the Constitution though, Mr. Salvio would need to be a citizen of the US.

Bill of Attainder:

Mr. Salvio would argue that Congress created a bill of attainder against him. Bills of attainder are specifically stated to be illegal in the US constitution A1S10, due to their high potential for abuse. A bill of attainder is where the legislature finds someone guilty of a crime without a judicial termination. Here, that appears to have occurred twice. Congress passes a resolution finding Mr. Salvio to be an enemy and to be expelled from the country. Secondly, Congress enacts an amendment immediately revoking his residency status and forcing him out within 10 days. Both are unilateral decisions by the legislature without judicial review and would be considered bills of attainder. There are additional constitutional violations which will be listed next.

"Enemy to be Expelled"

The question is silent whether the President's veto was overridden by Congress. The facts only state that a majority vote to override it. However, a bare majority cannot override a P veto, only a 2/3rds supermajority can. If there was not 2/3rds votes to override, then the veto is in place and the legislation is dead.

Procedural Due Process

It is unclear if Congress has the power to determine unilaterally that Mr. Salvio is an enemy of the state. Post 9/11, congress through a statute authorized the executive branch to detain certain enemy combatants which were related to the 9/11 attacks. It was subsequently determined that even those individuals would be allowed a hearing to determine their status as enemy combatants. Here, it is not stated in the facts that Mr. Salvio is being held by the US Government, but his status as an enemy would trigger his due process rights to a determination on this regards. He would need to be given notice of this hearing and a chance to be heard in front of a neutral party. If the same policy is applied as at a hearing to determine enemy-combatant status, then the government would need to show more than "some evidence" that he is an enemy. Namely, the fact that he gave the P 5 million dollars does not seem to be enough to

solidify this status. They'd need more evidence showing why the money was given, etc.

The immediate revoking of his legal residency and requiring him to leave the country within 10 days would also likely violate the due process clause. He would need to be given a hearing before that revocation, and an opportunity to be heard. The facts are silent about what evidence congress could produce, but again, the five million dollar deposit would be brought to the forefront. If he could not justify that deposit to the P, he would likely be removed from the country, though not through these bills of attainder.

Substantive Due Process

If Mr. Salvio is a US citizen or even had legal standing to be here, he would be allowed the fundamental rights to liberty, life, and property. Here, the main implications are liberty. It has been established that getting to choose to live together as a family is a fundamental right, which the US will be taking away if they choose to expel him. It is stated that his children are US citizens. They are lawfully allowed to be here. The analysis under Substantive Due Process for a fundamental liberty is strict (or heightened) review. Here, the Government would be forced to show that there was a compelling state interest [safety] and that the least restrictive way to deal with this issue would be to expel Mr. Salvio. This would be a determination to be made by a court, but if he was not found to be an enemy, then the government would lose. However, if he was found to be an enemy of the state, then this would be the rare situation where the Government would be able to defeat a strict scrutiny interest, and likely would allow his expulsion.

Though Congress would ultimately have to try again after these bills of attainder were rejected, after the hearing to determine his enemy status, pursuant to their war powers, if there was more than some evidence, they could brand Mr. Salvio an enemy of the US and detain him. The length of detention would be at issue, and he would have access to A III courts as he was on US soil when apprehended, possibly a US citizen, and would

likely be held in the US (or in Guantanamo, which the Court has held to be the US for purposes of Habeas Review.) This would allow them option to get him out of the country eventually.

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2) ===== End of Answer #1 =====

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1. What can Frito argue in order to invalidate the QNQ and any of the actions taken against him? =====

Procedural Aspects of the QNQ are Unclear:

The facts given state that both Houses of Congress passed the QNQ. There is no allowance in the sections listed for any funding, but obviously, due to the grandiose goals expounded within this section, there will need to be funding in order to make the QNQ happen. The House of Representatives is solely vested with the power to introduce any bill which requires the appropriation of funds. Here, we are not told which, the House or the Senate, first passed the bill, but that would cause an issue. It may just mean that the bills is passed, but there is no funding for it.

Secondly, we are told that the President signed the bill into law after the close of the legislative session. This however does not tell us about the timeline involved. Congress is to present the president with the bill. The president then has 10 days to sign the bill, or to veto it. We are not told about this ten day window. There are two possible outcomes. If the 10 day window expired, previous to congress closing the legislative session, then the bill would become law. That is what happens should the president just not sign it in the 10 days, but not veto it. On the other hand, if the legislative session closed, then the 10 day period expired, and then after that the President signed the bill, the bill is not law. This would be due

to the fact that the 10 day period expired, and Congress was not in session. This situation is known as the pocket veto. If this is the situation, the bill would be kicked back to Congress for them to try again.

Based on the facts given, this answer will proceed on the assumption that the 10 day period did not expire before the president signed the bill. That means, no matter if congress was in session or not, it is the law.

Does the QNQ violates the Commerce Clause:

Congress is granted the power to regulate interstate commerce. Congress is not granted the power to pass regulations to provide for the General Welfare. That is a designation strictly given to the states. Congress is given the power to spend and provide for the general welfare in that sense, however, it is not a general police powers. Due to that fact, the QNQ would have to be a legitamite exercise of the commerce clause or the taxation power in order to be a legitamite exercise of Congresses power.

There are four general areas which Congress may regulate pursuant to their commerce clause powers. First, they may regulate the channels of interstate commerce. This includes rivers, highways, or other avenues by which interstate commerce flows. Secondly, they may regulate the instrumentalities of interstate commerce. This is anything which carries or affects interstate commences movements, such as trains, trucks, or other comparable items. Third, they may regulate anything that moves within interstate commerce. This is broadly construed and has been determined to allow Congress to regulate every automobile in the country. Lastely, Congress is allowed to regulate anything which substantially contributes to interstate commerce. The term "substantially" is very very lose in this situation, and it has been held that wheat grown for person use may be regulated (*Wickard v. Fillmore*) as well as marijuana for personal

consumption, in a state which allows it medically, even though federally it is illegal. (*Gonzalez v. Raich*)

There are however some instances where Congress has stretched their commerce clause authority too far. In *Lopez*, Congress attempted to make illegal firearms on school grounds. Though noble, as written it did not rationally relate to interstate commerce. That is the test to allege a violation of the commerce clause, rationally related. The burden is on the plaintiff to show that the government has a legitimate state interest, but the regulation which they attempt to regulate it is arbitrary or capricious. This is a very high burden on the plaintiff, and the government typically wins these cases. In *Lopez*, the court did find for the plaintiff, saying that the nexus between guns being on school property was too removed from interstate commerce to allow Congress to regulate it. However, it is curious to note that if Congress had written the law differently, and only made it illegal for guns which moved in interstate commerce to be on school property, it likely would have been upheld. This would have drastically changed the law however, and in order to establish a violation, the government would have to show that the guns did move in interstate commerce.

A second example of a situation where the commerce clause power was stretched too far was in *Morrison*, where Congress attempted to create a federal cause of action for women who were victims of violent crime. The court held that this was too stretched under the commerce clause as well.

Lastly, in 2012, in *Sellebus*, the Supreme Court [SCOTUS], held that the commerce clause could not be used to force individuals to buy health care. This was based upon the analysis that Congress could not force individuals to buy or sell in a market they had never previously been in. Justice Roberts did save the individual mandate however through a tenuous, and contrary to Executive and Congressional intent, analysis that it was allowable pursuant to the Congressional Tax Power.

Here, the facts show that the QNQ is attempting to be implemented using

the Commerce Clause. The first clause stated the goal for population control and redistribution would be controlled by not allowing individuals from populated areas to go to lesser populated areas. The converse obviously being possible. Section two requires expansion of population centers to discourage childbirth in high population areas. Section 3 permitted the federal government to take all actions necessary and proper to facilitate the goals of the legislation. Lastly, Section 4 provided appointment of an individual to administer the law.

It is unclear, under even the most expansion reading of the Commerce Clause that the QNQ would not violate it. To challenge the law, a plaintiff would have to show that they have standing. Standing requires three elements: injury, causation, and redressability.

Any plaintiff who wants to move to a high population area, like California, would be injured by this law, as they would be blocked by its enforcement according to Fife. They would have to try to move to California, though, to establish this injury. Secondly, the plaintiff would have to show causation, again, easily shown, as the causation for their injury would be the QNQ, as enforced by Fife.

Lastly, the plaintiff would have to show that there was redressability. Here, the court could fix the problem by stating either the QNQ was an unauthorized use of the commerce clause, or that Fife's enforcement of the QNQ violated substantive due process, privileges and immunities, etc. That will be discussed separately.

The commerce clause, when challenged, is analyzed using rational basis review. Rational basis review is most favorable to the Government, and requires that the Plaintiff show that though there was a legitimate state interest, the regulation was arbitrary and did not rationally relate to that interest. Here, the interest attempting to be protected is population control. This is not a legitimate state interest. It has been continually shown by the Courts over the years that the state cannot infringe upon people's right to control their personal lives. The government in this case would want a narrower question presented to the court in order to possibly survive. This is akin to *Bowers v. Hardwick* and *Lawrence v.*

Texas. In *Bowers* the question, as decided, was whether homosexuals had the right to sodomy. In *Lawrence*, though concerning the same behavior, the question was whether there was a fundamental liberty interest in relationship and what occurs in your bedroom. Here, the government will argue for a narrow question, which might allow the court to go astray, as it did in *Bowers*. If the government can show that it is a legitimate state interest to control population, it will be through this tactic. However, as more likely to occur, if the question is broader and more personal, for example, can the state limit your ability to reproduce, or where to live, it will be held to be an illegitimate state purpose. Due to that, it will violate the commerce clause, even if somehow population control was argued to be interstate commerce related enough to allow Congress to have that power.

Substantive Due Process

As enforced by Fife, the QNQ would violate Fritos rights guaranteed by the 5th Amendment.

Frito has economic rights at stake here. His economic rights are to distribute his books and make money. Here, Fife has issued a ban on the transport of books across the border, in regards to a very specific subject. Here, the test to determine if this would violate Fritos economic substantive due process rights would be a rational basis review. Was there a rational basis between the goal of the government [population control] and the regulations? [banning books encouraging population increase] Yes there was. Was it a legitimate state goal? No, as detailed above. The courts would be hard pressed to uphold this under rational basis review, however, rational basis review is very agreeable to the governments position and Fritos would likely succeed on his other causes of action.

Frito's fundamental rights are being impaired by Fifes application of the law. Fife

has a fundamental right to free speech, which is being infringed on by Fife, through California. Though that is illegal under NY v. US, it still happened, and it still violated Fritos rights. Unless the state could show a compelling state interest, and no other way of getting to that goal other than banning the transport of literature for the purposes of selling it, then the regulation would be unconstitutional. Here, it is absurd to think that this is the only way to control this. First, how would a guard at the border know that the intent was to sell the books in California? By the volume of books alone? Would the Guard search all of your possession to count the books? That would violate the fundamental rights established in the 4th Amendment. Further, any information which is in Frito's book would be available, probably for free online.

Substantive due process overarchingly includes the right to liberty. By infringing on where people can live and have children, you are infringing on this area. This is a fundamental right. Again, strict scrutiny would apply. Here, the government would attempt to argue that they have a compelling state interest [the worlds gonna fall apart if the population goes up, in certain areas] and that they least restrictive alternative would be to not allow people to move their or have children in those high population areas. Though related, the compelling state interest would be seriously challenged. It would be unclear if Congress had the power to do this, and this regulation would end up in a multitude of court cases challenging its legitimacy on multiple levels. In short, it would basically be the health care overhaul, multiplied drastically, as it would seriously infringe on many peoples lives, dreams, and hopes.

Frito has the freedom to contract

This statute and its implementation would infringe on Fritos right to contract. This is a fundamental right found in the contract clause. Now, the state can interfere with your contracts minimally, but if they drastically impair them, this may be held

to violate the contracts clause. Here, Frito's contracts are completely destroyed due to Fife's unilateral action. He had already received 80 percent payment for them, and was scheduled to deliver the books. Frito was even given a license from the state of California to sell his books there. A court will have to determine if the reason here, population growth stunting, was necessary to destroy Frito's livelihood.

Frito should delay his creditors while the unconstitutional actions of Fife are evaluated and overturned. Even in the event he gets a judgement against him for breach, he may be able to stay the judgment pending resolution of the issues presented here and still deliver the books. Either way though, the Federal Government, and the state have seriously impacted Frito's ability to contract.

Frito could argue that this is a the State of California violated the Takings Clause

The state of California did not allow him to sell his books or move his family. Further, they confiscated his books. Under the 5th amendment, the government is allowed to take your property, though you are to be given just compensation for it. The facts are silent about any compensation. There are exceptions to the just compensation rule, one being for public safety. It is doubtful that this would allow them to take books which are specifically only not allowed to be transported into California to be sold. They could still be sold elsewhere legally, and that would not allegedly constitute a safety issue (or Fife just hasn't gotten around to implementing it yet...)

Frito should be given his books back, or just compensation.

Frito would argue this is a bill of attainder

A bill of attainder is when legislation is imposed which singles out an individual as a law breaker without judicial process. Here, Frito would likely contend that the law obviously singled him out because he sells books on the subject of getting the population to increase and was going to drive to California. This however, is not within a bill of attainder, since the actions which constitute this were unilaterally imposed by Fife. Fife might have it out for Frito individually, but that would not equate to the ability to argue that this law was a bill of attainder against Frito.

Fife Ordering the Governor to not allow anyone to move to CA:

Fife ordering the Governor of California to prevent anyone from moving into the state would be considered the Federal Government forcing the states to enforce a federal regulation scheme. This is not allowed under *New York v. U.S.* That action would be unconstitutional, however, would not be resolved in time for the purposes of Frito's suit.

What Frito can do is sue the Governor for liability under 1983 for violating his rights under the color of law. Clearly, the Governor is a state actor, who has violated Frito's rights, because he believed, though incorrectly, that he could. It is likely that the cause would get dismissed if the Governor did not have a reasonable belief that Fife's mandate was unlawful. Given the circumstances however, Frito has a strong chance to succeed.

Fife stating that if his order was not complied with, that they would cut health and welfare funding to the state of California was an unlawful exercise of his power. Under *Sellebus*, the ACA was allowed to survive with its individual mandate as a tax, but there was also an issue related to its threatening to pull previous Medicare coverage if new laws were not complied with. SCOTUS stated that you could not give the states additional funding, but you could not take back funding previously given. California did enforce the order, but under threat, but it's clear

that this threat would have been unconstitutional if carried out.

2. Assuming the first three sections of QNQ are valid, is Fife properly authorized (pursuant to the Constitution) to enforce the QNQ?

The QNQ violates the Separations of Powers Clause:

Section 4 of the QNQ provides for the appointment of a cabinet level official by the Speaker of the House of Representatives.

This is in violation of the Separations of Powers doctrine. In order to protect our more perfect union, the founding fathers wrote into the Constitution, the separations of Powers doctrine which states that the branches of Government are to be distinct entities, though they would have checks and balances to keep them in line.

The president has the power to appoint his cabinet level members, by and through the consent of the senate. This just means that the President gets to put a name up, and the Senate gets to vote on that name. If the majority of the senate agree, then the appointment is approved. Here, we have the House of Representatives unilaterally appointing an Executive Branch Cabinet member. As such, the appointment of Mr. Fife would be unconstitutional.

What actually happens now is unclear. In a case last term, SCOTUS was asked in *NLRB v. Canning* to decide if appointments made unilaterally by the President, during a short recess, were constitutional or not. SCOTUS ultimately decided that they were. However, what those appointments did while appointed was still allowed to stand. Due to that fact, what Fife has done might be unconstitutional, but it is not entirely voided. Those acts which he put in place will still need to be challenged judicially.

