

Constitutional Law Examination

May 9, 2014

6:00 p.m. - 9:00 p.m.

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Instructions:

You will have three hours to complete this exam. There are two essay questions. Each question is worth 50% of the final score. Each question has a 1,000-word limit. Anything you write past 1,000 words will not be read. Both answers combined should not total more than 2,000 words. Please use the word-count feature to check the length of each answer. If you hand-write the exam, please do a manual word count.

The exam is completely open-book. You can use anything you wish, so long as that it was printed *before* the distribution of this exam. Obtaining any new information from anyone or anything *after* the exam is prohibited.

Please don't turn the page until the proctor signals that the exam has begun.

Good luck!

Question 1 (50%)

***Instructions:** The year is 1942. Following the surprise attack by the Japanese on Pearl Harbor, Hawaii on December 7, 1941, a “day that will live in infamy,” the United States has formally declared war on Imperial Japan, and shortly thereafter on Nazi Germany. In response, President Franklin D. Roosevelt has issued three executive orders, and Congress has enacted two laws, that severely curtail the rights of Japanese-Americans. You are a law clerk for Justice Robert H. Jackson. He has asked you to prepare a memo of no more than 1,000 words addressing five issues present in this case.*

The United States Army learns that twelve Japanese-Americans, all natural-born United States citizens, have been taking flying lessons at flight schools in California, Oregon, and Washington. Their instructors have informed the Army that these students are only interested in piloting planes midair, and have not shown interest in learning about taking off or landing. These reports are consistent with coded transmissions intercepted in the Pacific Theater by a young intelligence analyst named John Paul Stevens (who enlisted on December 6, 1941). The information suggested that sleeper cells of Japanese-Americans within the United States were training to fly suicide Kamikaze (“Divine Wind”) missions, where they would hijack commercial airplanes in-flight, and pilot them into high-value targets such as the Golden Gate Bridge in San Francisco.

In response to this wartime threat, the United States government takes the following four actions.

1. President Roosevelt issues Executive Order #1 (“EO1”), ordering that these twelve citizens be detained immediately on Alcatraz Island, a prison off the coast of San Francisco, California. In the dark of night, the dozen are rounded up without any warning, and hauled to Alcatraz. One month after these individuals are detained, Congress passes, and the President signs into law the War Commissions Act (“WCA”), which names these twelve individuals, and denies them the ability to challenge their detention in any court.

2. Concerned about the looming threat of Japanese-Americans who may still be loyal to Japan, President Roosevelt issues Executive Order #2 (“EO2”), which provides that the military general of each state can charge, and prosecute, any American of Japanese ancestry before a military tribunal for disobedience. A week after it is enacted, both houses of Congress unanimously issue a proclamation in support of Executive Order #2.

3. President Roosevelt issues Executive Order #3 (“EO3”), ordering that the Secretary of War shall seize control of and manage all commercial airlines. Executive Order #3 specifies that a

member of the United States Army must pilot all commercial flights in the United States. President Roosevelt cites as authority for Executive Order #3 a treaty between the United States and Great Britain the Senate ratified earlier that year, concerning aviation security during time of war. Congress is silent concerning the implementation of Executive Order #3.

4. Congress enacts, and President Roosevelt signs into law the War Purity Act of 1942 (“WPA”). This Act mandates that all Americans of Japanese ancestry renounce all allegiances to Japan, and swear an oath of loyalty to the United States. Those that decline to take the oath are afforded a trial before a military jury. If a unanimous military jury, finds that the individual is not entirely loyal to the United States, the individual is to be sterilized (either through the removal of the Fallopian Tubes, or a Vasectomy).

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Four lawsuits are filed challenging these four governmental acts.

1. Fred Korematsu, an attorney in San Francisco, filed a writ of habeas corpus in the Northern District of California against the President of the United States, on behalf of the 12 detainees being held at Alcatraz. The writ seeks to challenge their ongoing detention. He also files a constitutional challenge to Executive Order #1 and the War Commissions Act on behalf of the detainees. Korematsu challenges that Executive Order #1 was an exercise of power beyond the President’s Article II powers. Korematsu further claims that the War Commissions Act fails to justify the suspension of the writ of habeas corpus, and was an unconstitutional removal of jurisdiction. Korematsu *does not* challenge Executive Order #1 as violating due process of law, or equal protection of the laws. Korematsu has not been able to talk to or see the twelve detainees, as the military has kept them on total lockdown.

2. Mitsuye Endo, a natural born United States citizen of Japanese ancestry, is arrested in Seattle by the military commander for violating the curfew of 8:00 p.m. The curfew was only imposed on those of Japanese ancestry, as determined by the United States Army. Endo responds that she was arrested for sitting on her own porch at 7:45 p.m., and was not in violation of the curfew. Endo is charged and convicted by a military tribunal for violating her curfew, and is sentenced to one year in military prison. Endo files a writ of habeas corpus in federal court against the commander of the prison. She asserts that Executive Order #2 denies her the equal protection of the law. She does not raise any other claims.

3. Howard Hughes, the President of Trans World Airlines, files suit against the Secretary of War challenging Executive Order #3. He claims that the President does not have the authority to order the seizing and commandeering of his airline.

4. Carrie Buck, whose great-grandfather lived in Japan, was charged by the military commander, General Josef Mengele, as a person of Japanese ancestry who was not loyal to the United States. Citing the War Purity Act as authority, the commander ordered Buck to read a statement concerning American patriotism, and sign an oath professing loyalty to the United States. Buck, who could not read, was not able to complete the exercise. Buck was hauled in front of a military trial, and was not offered a lawyer. The only piece of evidence admitted into the record was the blank oath form that was not signed. Buck was allowed to testify on her behalf. She testified that while she was proud to be an American, the way the government had been treating Japanese-Americans since the War began was shameful. Based on the evidence at trial, the military jury unanimously found that Buck violated the War Purity Act, and sentenced her to be sterilized. Buck filed a writ of habeas corpus in federal court, asserting that the sentence of sterilization imposed under the War Purity Act violated her 5th Amendment rights in two ways: her liberty interests protected by the due process clause, and the procedures required by the due process clause. She does not raise any other claims

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All four of these suits are unsuccessful in the lower courts, and are consolidated on appeal to the United States Supreme Court.

Justice Jackson has asked you to prepare a memo of no more than 1,000 words addressing the following five issues.

1. Does the President have the Article II powers to enact Executive Order #1, and detain the twelve American citizens under his authority? What is the impact of the subsequent enactment of the War Commissions Act on the President's authority to detain the twelve American citizens? Does the WCA suspend the writ of habeas corpus? Does WCA validly remove jurisdiction from the courts to review these detentions?
2. Was the enforcement of Executive Order #2, with respect to the conviction of Endo, constitutional? Focus on whether subjecting Endo to the military tribunal during this time violated her right of equal protection under the law. Please explain what is the importance, if any, of Congress's unanimous declaration supporting Executive Order #2.
3. Does the President, pursuant to his Article II powers and Executive Order #3, have the authority to order the Secretary of War to seize the airlines? Please address the importance, if any, of (1) Congress's silence on this seizure, and (2) the treaty signed with Great Britain, on the President's Article II powers.

4. Does Carrie Buck's sentence of sterilization violate her 5th Amendment rights of both liberty and process? Please focus on the state's countervailing interests.

5. In talking over the difficulties of this case, Justice Jackson muses, "In times of war, the laws fall silent." Consider this maxim in the context of actions taken in the heat of World War II. Address both sides of this issue—whether the Court should, *and* should not invalidate these laws.

Question 2 (50%)

Instructions: *The year is 2014. You are a law clerk for Justice Anthony M. Kennedy. Three consolidated cases concerning the constitutionality of the Protection of Marriage Act (POMA) were recently argued before the Supreme Court. You have been assigned the task of writing a memorandum of no more than 1,000 words addressing five issues presented in these cases.*

In the wake of *United States v. Windsor* (2013), which found that part of the federal Defense of Marriage Act was unconstitutional, Congress was concerned that a number of states continue to deny same-sex couples the right to marry. To address this problem, Congress enacts, and the President signs into law, the *Protection of Marriage Act of 2013* (“POMA”).

POMA has three key sections.

Section 1: Pursuant to Congress’s powers under Section 5 of the 14th Amendment, and in order to ensure that no state shall “deny any person of life, liberty, or property without due process of law,” or “deny any person within its jurisdictions the equal protection of the laws,” all states shall guarantee to same-sex couples “marriage equality.” Marriage equality is defined as all states guaranteeing same-sex couples the ability to marry, and be treated under state law in the same manner in all respects, as opposite-sex couples.

Section 2: Same-sex couples that are denied the ability to marry can file suit in federal district court against the state in which they reside to challenge the state’s denial of “marriage equality” under POMA.

Section 3: Discrimination on the basis of marital status shall result in liability of \$1,000 per discriminatory incident. Individuals shall have standing to bring claims under Section 3 in federal district court. The Religious Freedom Restoration Act (“RFRA”) shall not constitute a defense to this section.

After POMA is signed into law, three lawsuits are filed.

1. Aggie and Barge, two women who live in Houston, apply for a marriage license and are denied. Texas has a state constitutional amendment prohibiting same-sex marriage. The couple promptly filed suit against the state of Texas in federal district court, under the jurisdiction of Section 2 of POMA. The couple alleges that Texas’s refusal to allow them to marry violates Section 1 of POMA. Texas replies that Congress lacks the power under Section 5 of the 14th Amendments to enact Section 1 of POMA, as it abrogates its state sovereignty protected by the 10th Amendment, intrudes on Texas’s police power, and violates the principles of federalism. Further, Texas asserts that Congress lacks the power under Section 5 of the 14th Amendment to permit the couple to sue the state in federal court under Section 2 of POMA.

2. Carl and Domer, two men who live in Dallas, ask a Roman Catholic Priest to officiate at their wedding. The priest refuses. Carl and Domer file suit against the Priest under Section 3 of

POMA. The Priest concedes that he has discriminated against the couple on the basis of marital status. However, he replies that being forced to perform a same-sex wedding imposes a burden on his religious beliefs, in violation of his rights protected by the Free Exercise Clause of the First Amendment. The priest *does not* raise any claim under the Free Speech Clause of the First Amendment, or the Religious Freedom Restoration Act.

3. Edna and Fapu, two women who live in Austin, ask Grandpa, a world-famous chef, to bake a cake for their wedding. Grandpa, an atheist who rejects all religion, declines to make them a cake for their wedding. He views his baking as a form of art, and refuses to be forced to design a cake for an event that does not inspire him to create beautiful torts (the tasty kind). Edna and Fapu file suit against Grandpa under Section 3 of POMA. Grandpa concedes that he discriminated against the couple on the basis of marital status. However, he replies that being forced to design a cake for their wedding would violate his rights protected by the Free Speech Clause of the First Amendment. Grandpa does not assert any claim under the Free Exercise Clause of the First Amendment, or the Religious Freedom Restoration Act.

All three of these suits are unsuccessful in the lower courts, and are consolidated on appeal to the United States Supreme Court.

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In a memorandum of no more than 1,000 words for Justice Kennedy, address the following five issues.

1. Does Congress have the authority under Section 5 of the 14th Amendment to enact Section 1 of POMA? Please also address whether Section 1 violates the 10th Amendment, Texas's sovereignty under the principles of federalism, and Texas's traditional police powers.
2. Does Congress have the authority under Section 5 of the 14th Amendment to enact Section 2 of POMA? Please also address whether Section 2 violates the 10th Amendment, Texas's sovereign immunity under the 11th Amendment, and principles of federalism.
3. Would the application of Section 3, and the imposition of civil liability to the Priest violate his right of Free Exercise under the First Amendment?
4. Would the application of Section 3, and the imposition of civil liability to Grandpa violate his right of Free Speech under the First Amendment?
5. Justice Kennedy is laboring over a question raised, but not fully answered in *United States v. Windsor*. Must opposition to same-sex marriage only be grounded in animus or hatred towards gays and lesbians. Please address *both sides* of this issue in the context of the constitutionality of the Protection of Marriage Act.