

Constitutional Law Midterm – Spring 2016

Top Exam

1. The Ambassador Removal Act of 2017 or TARA is an assault on the separation of powers and the president's inherent executive authority. Under art. II § 3 the president has the power to receive ambassadors. (I would like to point out the linguistic difference between "receive" and "recognize"). This was argued by Hamilton a matter of dignity rather than substance, but times have changed. The power to receive dignitaries and recognize countries is within the president's power and was recognized in *Zivotofsky*, which modified the Curtiss-Wright doctrine wherein the president was recognized as the sole organ of international affairs (a point of contention). TARA violates the notion that in the international arena we should speak with one voice. Both here and in *Zivotofsky* the president is within Jackson's zone 3, the two branches are diametrically opposed, but like in *Zivotofsky* the president with the vesting clause's support comes out ahead (art II, § 3). The TARA is similar in substance and style to the Tenure of office act 150 years prior, which was also largely regarded as unconstitutional. Essentially, the president can reject an ambassador and necessitate his removal (Citizen Genet for example).

2. The Ambassador is 100% correct his case could and arguably should have been heard by SCOTUS. Article III, § 2, SCOTUS will have original jurisdiction over cases involving ambassadors. The Judiciary Act of 2017, hereinafter, the act, is wholly unconstitutional for a number of reasons. As we know from *Marbury*, the congress cannot change the jurisdiction of the supreme court with a statute or really anything short of an amendment to the constitution. Under article III § 2 this case should have gone straight to SCOTUS or been filed there. The rulings by the trial and appellate courts cannot be upheld. By shoehorning terrorism jurisdiction to one court arguable will fill the docket and irreparably change the sitting judiciary system and from a pragmatic view cannot stand. Under art III § 2, the ambassador's case should have started and stopped with SCOTUS. Overturning his conviction could be used to declare the act unconstitutional and help bring balance back to the judiciary after the damaging incursion by the legislature. Allowing the act to stand would damage the separation of powers between article I and III branches of government.

3. *Youngstown Reprised*: we know from the Truman administration the president cannot seize private lands in the name of national security. Here the president was acting with the consent of congress under the "N&P" clause in the BSA of 2017. The ranchers like the mill owners have standing seeing as they are arguably being denied their 5th amendment rights (due process). The ranchers may be justly compensated but the seizure of the land is a due process violation. Following Jackson's logic we are in zone 1 and the president and congress are acting in concert. (this is reminiscent of the president/congressional relationship in *Curtiss-Wright*). This is a hard question and go one of two ways. If we follow the non delegation doctrine as proposed by Justice White in *INS* the congress is incapable of delegating certain powers to the president and the power to seize and compensate is one of them. Giving Trump N&P powers is also non-delegable under Kennedy's holding in *Clinton*. Insomuch that Trump could be modifying and improperly enforcing laws. That track, the BSA or at least the severable seizure provision is unconstitutional. Under art II § 1 Trump has the power to faithfully execute the laws and he is acting on congressional mandate

and well within Jackson's zone 1, so its constitutional.

4. The DATE policy, strongly reminiscent of DAPA & the Dreamers is arguably constitutional because under article II § 1 the president is making sure the laws will be faithfully executed to the best of the judicial branch's ability. Taking a pragmatic, Breyer-like approach, the president reserves a lot of discretion granted to him in the vesting clause of art. II. If congress had a problem with how he was enforcing the laws they have the power of the purse (art I § 8) and could budget to have the funds available to further prosecute tax offenders. We are in Jackson's twilight zone (2). Congress is silent and the president is acting on his own accord to accomplish his policy goals. Even though Hillary was granted assurance under date and the president does have discretion, her conviction will be upheld, the executive officers who charged and helped convict her were upholding the law they had to faithfully execute, they were ignoring a policy choice which does not carry the same weight in judicial proceedings. Lastly, even though cert was granted a number of justices may feel this was a political question and should be beyond on the bounds of the judiciary.

5. Part 1: There was arguably a threat to national security during the tenure of office act but most scholars found it unconstitutional at the time. TARA would complicate relations with friends and foes alike and further infringe on the president's abilities as commander in chief lowering the standard making it easier to declare the provision unconstitutional.

Part 2: National security implications would further distort this already convoluted issue of terrorism and the courts. As a foreigner committing and planning acts of terror against the US the constitution is no longer in play. (Hamdan) The Hague, and other conventions would classify him as an enemy combatant not a terrorist this is not a SCOTUS but a gitmo issue the courts should defer (Korematsu & Hirahayashi). (Under Hamdan, this question could be a book!)

Part 3: This is already a close question, using Curtiss-Wright and the dissent in Youngstown paired with the zone 1 classification from Jackson's concurrence, the national security ramifications place the provisions closer to constitutional. Korematsu and Hirahayashi are also citable, dark spots they may be. The gravity of the threat matters, the constitution is a guide, not a suicide pact.