

Constitutional Law – Fall 2017 Final Exam – A+ Paper

PART I

1. The Director's appointment does not violate the Appointment clause. Under Article 2, Section 2 of the constitution, the Executive has the power to appoint ambassadors, judges, and officers with the consent of the Senate. Under *Ex Parte Merryman*, the courts showed this to be true, albeit with a different issue (Habeas Corpus). Here the courts stated that if the executive had the power, it would be found in the second article of the constitution. Additionally, it can be inferred from the constitution that if the President has the power to appoint officials, then he also has the power to remove officials. Under Article 1 Section 1, the executive has an oath to “preserve, protect, and defend the constitution.” This oath is to uphold the constitution as he interprets it. Therefore, the President has a duty to remove the Director for inefficiency, neglect of duty, or malfeasance in office.
2. In *M’Culloh v. Maryland*, the courts established that the Necessary and Proper clause, when combined with other enumerated powers such as the Commerce Clause in *Gibbons v. Ogden*, could regulate commerce as long it was necessary and proper to do so. In *Hammer v. Dagenhart*, and particularly in *Schechter Poultry Corp v. U.S.*, the courts interpreted the Commerce Clause very narrowly. The courts did not want to infringe on state rights to regulate intrastate commerce. In *Hammer v. Dagenhart*, the Court stated that Congress could only regulate commerce if it directly affected interstate commerce. Because it is unclear if Filhorn intended to ship the raisins in interstate commerce, and he may never ship interstate, this is unconstitutional. Additionally, only Congress, under Article 1 section 8, has the ability to issue rules that are “necessary and proper.” The Director, an appointed executive agent, would not be able to use this clause of the constitution to accomplish his agenda.
3. The compensation provided by the director is constitutional because under *Barron v. City of Baltimore*, the Bill of Rights clearly applies to the federal government. The 5th amendment’s Taking Clause clearly states that no “private property shall be taken for public use, without just compensation.” However, only Congress has the power of the purse. Under Article 1 of the constitution, and Compensation under Section 6 and Revenue Bills under section 7, the CFPB Director would be infringing on the separation of powers. Further, the CFPB Director is an executive agent, and thus only has powers delegated to him under Article 2 of the constitution. The director's authority, assuming that his seizure is constitutional, therefore would lead to the compensation provided to Filhorn as constitutional as well under *Barron v. Baltimore* and the 5th amendment.
4. The Fifth Amendment’s Due Process clause states that the federal government cannot deprive anyone of life, liberty, or property without due process of law. Beginning in *Lochner v. New York*, the courts laid the framework for assessing the due process clause. Private property is protected against unwarranted government interference. The framework provided was that you may only deprive someone of life, liberty, or property if that the state or federal government was exercising a valid police power with their regulation, which related to the safety, health, morals and general welfare of the public. In *Adkins v. Children's Hospital of DC*, the courts invalidated the statute due to it being overly vague and the interest was not legitimate. In *Nebbia. v. New York*, the courts ruled that “price controls that are arbitrary, discriminatory, or demonstrably irrelevant to the policies of the legislature, are unconstitutional because they are unnecessary and unwarranted interference with individual liberty.” The courts started to move away from their “hands off approach” here, however,

and stated that milk is a paramount industry and it was important to regulate it. Therefore, the seizure of Filhorn's raisins will probably be unconstitutional in that it violates his Due Process rights under the 5th amendment unless the government shows that they are exercising a valid police power with their regulation and that it isn't arbitrary or irrelevant, and finally that regulating Raisins is a "paramount industry" which makes it important to regulate it.

5. First, Section 6 is unconstitutional. The Supremacy Clause under Article 6, Clause 2 of the Constitution makes the constitution the supreme law of the land. Under Article 3, Section 2, the courts have jurisdiction where "their judicial power shall extend," to controversies to which the US shall be a party to, and between citizens of different states. Additionally, under the Judiciary Act of 1789, the courts have original jurisdiction over such issues, and further under the Judiciary Act, congress cannot expand the constitution by statute, only through amendment. Making a statute that "bypasses" the courts is clearly contrary to the constitution, and in violation of the constitution and judiciary act, and therefore is unconstitutional. Section 5 is unconstitutional because such reasons follow. Here however, additional violations occur in that the Director's authority can only be adjudicated by administrative law judges appointed by the Director. Once again, this is going beyond the limits of the constitution and infringing on the separation of powers. The Director is an executive agent and act as his own congress. Under Article 2, section 2, the executive branch powers shall be vested in the President of the US. The Director therefore does not have the power to appoint judges or other officers, only the President has that power. Even so, the President may only appoint judges and such officers with the consent of the senate.

Part II

1. Because this is an act before Trump's presidency, Trump does not have immunity. The first issue is whether the President is "above the law." In *US v. Nixon*, the Court found that while the President is afforded some levels of immunity, although not absolute, the President is not above the law. Nixon was required to hand over tapes because the importance of a fair criminal justice system outweighed the Presidents need for confidentiality. This laid the ground work for *Nixon v. Fitzgerald* and *Clinton v. Jones*. In *Fitzgerald*, the courts ruled that so long as the President is acting in his official capacity, they have temporary immunity. However, per *Clinton v. Jones*, a president does not have immunity for acts prior to the president. Since this is an act in 2013 (and within statute of limitations), Trump has no immunity for these allegations arising from before office. However, whether the President can be indicted, or, whether the President once indicted, can pardon himself, nobody knows the answer (never tested before). Additionally, Trump may be able to preemptively pardon himself before a crime is ever charged, and he can pardon himself for future crimes as well.
2. Under the 10th amendment, any powers not delegated to the federal government are reserved to the states. New York's legislature therefore can criminalize certain behavior that the federal government does not criminalize. The President, having the power of the executive vested in him, may not be subject to a state courts jurisdiction however because of the 10th and 11th amendments. Under *Hans*, a citizen may not sue a state in federal court. This would be similar to Trump being sued in federal court by a state, which is not allowed. The United States has jurisdiction over federal court cases. Additionally, the New York's state legislative may be infringing on congress's authority. Under the 14th amendment, *Carolene Products* laid out a framework of constitutionality. If a law affects the political process, the courts must apply a strict scrutiny standard. In order to survive strict scrutiny, a law or regulation must further a compelling state interest and be narrowly tailored to meet that interest. This law will unlikely be able to meet that scrutiny, because it seems to be vague and have no particular purpose.
3. Tricky question. Under *Nixon v. Fitzgerald*, the issue that was discussed was only if there existed absolute privilege of immunity from civil damages so long as the acts are official (yes). Criminal acts, however, is left unanswered. Under *Nixon* it is clear that in the fairness of the criminal justice system, you weigh the importance of general privilege of presidential communications against the fair administrations of criminal justice. The answer is most likely that the President can be tried, but highly unlikely to be indicted. Additionally, even if indicted, the President may have temporary immunity until after his term has ended. Under Article 4, section 2 of the constitution, it is unclear if the executive may be subject to the state's executive powers. Also ask is whether the act made in official capacity or not. If official capacity, temporary immunity. If not, no temporary immunity even if done as president.
4. This would be a violation of Trump's First Amendment rights. The courts have generally ruled that speech that falls outside of a category that makes you liable, you must apply strict scrutiny. However, In *Synder v. Phelps*, the government is not allowed to restrict speech that involves protesting about a public issue or commenting on a public issue. The court ruled 8-1 on this, and even Alito would "swap" here because Trump was not targeting anybody in his tweet. This law would also most likely violate the 14th amendment. This issue most likely here is whether New York (the majority) is using their power of the state to enforce their views on the whole of society through criminal law per *Lawrence*. Even Justice Kennedy

would agree that merely speaking would not create a "legitimate state interest which can justify its intrusion into the personal and private life of the individual." However, New York might argue that they are attempting protect a discrete and insular minority, and to protect morality and the interest of the throuple. *Lawrence v. Texas* overrules *Bowers v. Hardwick's* morality rational basis test and replaces it with a "desire to harm" test. Here, the courts would reason that Trump is free as an adult to engage in his right to liberties under the Due Process Clause. Additionally, this law also violates the Privileges or Immunities Clause because it criminalizes the aforementioned privileges and immunities of the us constitution, such as the first amendment.

5. This is a Federalist 78 issue. Hamilton states that the courts are the "least dangerous branch," with neither the power of the sword nor of the purse. Going back to *Marbury v. Madison*, the courts understood the danger that a noncomplying President would have. In *Obergefell v. Hodges*, Justice Scalia dissent also noted that the court should not be taking the ability for us the "freedom to govern ourselves." Under *Planned Parenthood v. Casey*, the Majority clearly held the view as well that it would erroneous to make a decision to turn "public opinion" against the courts making it political, which goes back to *Marbury v. Madison* where the courts realized that they need to, at least appear, above the law. If the courts seem to be "unstoppable," it would lead many to discredit their decisions, and it would give legitimacy to many people in discrediting them and not following through with them. Even if indicted, the courts should agree to put Trumps prosecution on hold until after his presidency. This is because Congress, through Article 2 of the constitution section 4, has the ability to also remove the President from office through impeachment. This is a losing fight for the Courts, and they should move appropriately.