Shanor Folder 4
Shanor
Constitutional Law I
Final Exam Spring 1995

EMORY UNIVERSITY

Exam N 200000031200

FINAL EXAMINATION
in
CONSTITUTIONAL LAW I

April 20, 1995

Professor Shanor

This 3⅓ hour exam contains three questions. Credit will be weighted approximately in accordance with the percentage allotted to each question.

The exam is closed book (except that you may refer to the copies of the Constitution handed out with the exam); it may be taken only in this room. If you believe you need additional information to analyze any question, state what you think is needed and why it makes a difference!

Read, think, and organize before you write!

Write all your answers in the space provided on the exam.

Write your exam number on each of the exam pages and in the space provided below for the Honor Code pledge.

GOOD LUCK!

I acknowledge that in this, as in all other Law School activities, I am bound by the Honor Code.

Exam Number: _____

I.
(35%)

Nearly sixty years ago, the United States Supreme Court held, in NLRB v. Mackay Radio, that the National Labor Relations Act (NLRA) allows employers to hire permanent replacements for economic strikers to continue business operations. This decision has remained the law despite strenuous efforts by unions to overturn it. The most recent attempt to overturn Mackay Radio was in 1993, when legislation supported by President Clinton passed the House but foundered in the Senate, where only 58 of the needed 60 Senators voted to end a Republican filibuster against the bill.

Following the Republican takeover of Congress in the November 1994 elections, President Clinton issued this Executive Order:

> 1. It is the policy of the executive branch not to contract with employers that permanently replace economic strikers. All discretion under this Executive Order shall be exercised consistent with this policy.
>
> 2. The Secretary of Labor shall conduct investigations concerning whether a contractor with an executive branch department or agency has permanently replaced economic strikers. Upon finding that permanent replacements have been hired, the Secretary of Labor shall transmit that finding to the head of the department or agency which contracts with the contractor.
>
> 3. Upon receipt of such notice, the contracting department or agency shall terminate all pending contracts with the contractor until such time as the Secretary of Labor shall certify that all replaced economic strikers have been returned to their jobs. Provided, however, that the contracting department or agency may appeal to the Secretary of Labor for an exception permitting it to continue contracting with the contractor for compelling reasons.
>
> 4. The provisions of this Order shall apply to situations after the date of this order in which contractors permanently replace economic strikers or fail to return economic strikers formerly replaced to their jobs.

You are a law clerk for the federal judge responsible for resolving a lawsuit filed against the President and the Secretary of Labor by the U.S. Chamber of Commerce (many of whose members are government contractors) seeking a declaratory judgment that the Executive Order is unconstitutional. She requests that you write brief memos to her responding to these questions:

1. Is this suit justiciable?

2. Does the Executive Order violate the separation of powers doctrine?

II.
(30%)

In early 1994, there occurred a national outbreak of Wing's Disease, a viral livestock infection that is especially deadly for cattle. The outbreak affected at least some livestock in every state, and every state has taken some action to prevent the epidemic from destroying livestock production.

Two feed additives have been discovered that are equally effective in combating Wing's disease, Virukill and No-Wing. Meat from animals fed with Virukill, unfortunately, can produce a temporary, but uncomfortable allergic respiratory reaction in about 3 percent of the population. Children are especially sensitive. No-Wing, it has been discovered, also has a negative side-effect. Roughly 2 percent of all women over 40 who also suffer from high blood pressure are vulnerable to long-term muscular paralysis if they ingest No-Wing. As it happens, however, the effect of No-Wing is completely counteracted if the meat is thoroughly cooked (that, is, if cooked to a "well done" state). Cooking does not mitigate the allergenic effect of Virukill.

Congress responds to the Wing's Disease epidemic by enacting the National Wing's Disease Eradication Act of 1994. Section 2 of the Act requires states to permit persons raising livestock to feed their livestock Virukill, No-Wing, or both. Section 3 requires all raisers of livestock, as defined in the Act, to feed their livestock either Virukill or No-Wing, as state law may permit. Section 4 requires wholesale and retail meat distributors to label all meat with a statement of: (A) which virucide was fed to the animal from which the meat came; (B) the health risk presented by the virucide; and (C) whether cooking can eliminate the health risk.

In the summer of 1994, East Dakota enacts a Wing's Disease Virucide Act. Section A requires all raisers of livestock in East Dakota to feed their livestock with No-Wing. Section B prohibits the use of Virukill by any raiser of livestock in East Dakota. Section C prohibits the sale, in East Dakota, of any meat from Virukill-fed animals. As it happens, Ace Chemical Corporation, the country's largest manufacturer of No-Wing, is located in East Dakota. No one in East Dakota manufactures Virukill.

As of September, 1994, 17 states have passed laws similar to Sections A and B of the East Dakota statute. Eighteen other states require their raisers of livestock to use Virukill or No-Wing, but permit the use of either drug. The 15 remaining states require the use of Virukill and prohibit the use of No-Wing. No state other than East Dakota forbids the sale of meat in the state because of

the drug fed to the animal to combat Wing's Disease.

For the last five years, on the average, 30 percent of beef consumed in East Dakota has come from animals raised in East Dakota. The remaining 70 percent has come from 8 states, each of which now either requires or permits the use of Virukill.

You are a law clerk for Judge Phil A. DeBoeuf of the U.S. District Court for the District of East Dakota. The Cattle Ranchers Association of West Dakota (CRAWD), a state that previously sold large quantities of beef to East Dakota, but whose laws now require cattle ranchers to use Virukill, sues to overturn Section C of the East Dakota act. Prepare for Judge DeBoeuf a memorandum analyzing and evaluating the arguments that CRAWD is likely to make that: (1) Section C violates limitations on the state's regulation of commerce under the U.S. Constitution; and (2) Section C is preempted by federal law.

III.
(35%)

Congress, increasingly concerned about the consequences of substance abuse upon children, passed a statute which reads as follows:

Sec. 1. The title of this Act shall be "The Substance Abuse and Children's Protection Act."

Sec. 2. The purposes of this Act are to deter drug abuse and to protect children, including unborn fetuses.

Sec. 3. Congress finds that, each year:

a. Over five million women of child-bearing age abuse illicit substances in the United States;

b. Illicit substances enter over 900,000 fetuses; and

c. Most of these fetuses will be born blind, deaf, or mentally handicapped from prenatal contact with illicit substances.

Sec. 4. Any woman convicted of consuming illicit substances after learning she is pregnant shall be punished by surgical implantation of Norplant [a capsulate birth control system recently approved by the Federal Drug Administration that can temporarily sterilize a woman for up to five years after implantation underneath the skin of her upper arm].

Sec. 5. Illicit substances, for purposes of this Act, include cocaine, marijuana, and opiates.

Sec. 6. No state or federal court shall have jurisdiction over any action challenging the constitutionality of any part of this Act.

Nora Davidian, whose son, Branch, was born mentally retarded, was convicted of consuming cocaine after learning she was pregnant. You are a law clerk for one of three judges on the appeals court assigned to hear Davidian's appeal of her sentence under this statute. Please draft a memo analyzing all constitutional issues posed by this statute.

Exam Number _____

CONSTITUTIONAL LAW
WEAK ANSWER TO Q1 (1995)

1. Is this suit justiciable?

Probably not. There is no *Baker v. Carr* political question problem. The issue seems to be sufficiently concrete to justify a declaratory judgment. The main justiciability problem is standing. The U.S. Chamber of Commerce cannot stand in privity of its members—some who are government contractors, some who are not. There is no injury-in-fact (*Allen v. Wright*) to this group as a whole, and potentially, not to a single of its members. With no injury established, the causal link need not be addressed. The Court could, however, provide redress by finding the act unconstitutional.*

Presidential immunity prevents a sitting President from being sued absent very serious, specialized charges.

* Normally, the problem of ripeness would prevent a Plaintiff from asserting a claim before an injury-in-fact had occurred. If the case is allowed as a declaratory judgment, ripeness would not be a problem.

2. Does the Executive Order violate the separation of powers doctrine?

Yes. Article II §3 states that the President shall "take care" to see that the laws be faithfully executed. The President can only execute laws and law-making power is vested solely in the Congress. In *Youngstown*, the President, in attempting to commandeer steel mills, was found to violate separation of powers because Congress had exclusively reserved to itself the power of condemnation. Here, the broad sweep of the Congress' commerce power would certainly cover striking workers. Using Jackson's three levels of power, Clinton is at his weakest because he is going against the Congress. Clinton cannot point to a foreign policy objective to ease the scrutiny with which the Court will view his act of making laws as in *Dames and Moore v. Regan*. (The need for steel during the Korean War didn't past muster as a pressing national need.)

Not only does this Executive Order go against law set down by Congress, it interferes with the Congress' power to regulate commerce among the states. Industry strikes can pose serious burdens to interstate commerce. Article I §2 says the President shall appoint "principal" officers of the executive with the advice and consent of the Senate. A cabinet member is not an inferior officer (*Morrison*). Post-*Myer*, the President has removal power over executive officers who perform purely executive functions. Thus, the President retains removal power over a principal executive officer, who, in this case, is executing the laws. The situation is somewhat analogous to *Bowsher* in which the Supreme Court said separation of powers violated because Congress retained removal control over an officer performing an executive function. However, this

Executive Order gives the Secretary of Labor some quasi-judicial powers which might lead the Court (via *Humphreys Exec*) to conclude that the Secretary is not purely an executive officer in which case the Congress might place restrictions on his tenure.
The Congress always has the option of impeachment when a President goes against Congress but political realities make this option not entirely realistic.

MEDIOCRE ANSWER TO QI (1995)

1. Is this suit justiciable?

To determine whether this suit is justiciable, we must consider any questions of standing, political question, mootness or ripeness. Standing is a potential problem. Unlikely that the court would find that the U. S. Chamber of Commerce has standing because the injury may not be "fairly traceable" to them. U.S. Chamber will argue that it brings this suit on behalf of its members who are, in fact, government contractors. However, from the facts, we do not know that any members have yet been injured by the executive order. In that case, we probably have a ripeness problem. Ripeness requires that the time is appropriate to bring a cause of action because an injury has occurred. If no injury yet, then not yet ripe. Standing and ripeness would be easily overcome if the suit was brought by a government contractor who had lost a government contract b/c it had hired permanent replacements for economic strikes. In that case, standing would be ok b/c the injury - loss of contract - would be fairly traceable to the party. Ripeness would work b/c the party would have been injured already. Mootness not problem because it is not too late to fix the problem. Is Political Question a problem? A court does not issue advisory opinions. Article 3 Section 2 of constitution gives the court the authority to hear "cases or controversies". The courts jurisdiction extends only to "cases or controversies" involving Federal Question because this suit involves the question of Executive authority and involves the president and Secretary of Labor, the federal question requirement is met. However, the "cases and controversies" requirement more difficult b/c. Who's to say what is a "case or controversy" Baker v. Carr gives a test to determine if political question problem. No international component here to present a problem. Plenty of standards for court to base decision on. Unlikely their is a political question problem. Court probably say non-justiciable b/c standing and ripeness problem. No big deal - just have some injured government contractor sue after it loses a contract.

2. Does the Executive Order violate the separation of powers doctrine?

It is very likely that the Executive Order violates the separation of Powers Doctrine.
Q: Is this an Executive or a Legislative Action?
Congress has power to make law and Executive Office has power to execute the law. The Executive Order looks an awful lot like legislation. President has no authority to legislate. Executive order is unconstitutional . Violation of Separation of Powers if court finds it to be legislation.

If Executive order is deemed execution of law, then it is still a possible violation of separation of powers because it contravenes legislation and juridical interpretation. The NLRA was legis. passed & courts interpreted that it meant comp's could replace, permanently, economic strikers. For the Executive branch to force a policy enforcement that punishes government contractors for doing what congress and judicial branches said ok is definitely an abuse of separation of powers.

In the 1940s, the court refused to allow President Truman to interfere in labor disputes in steel

mills. That case was very similar to this case and it is very unlikely that Executive can constitutionally enforce its new policy.

Q. Would allowing the executive order be giving President power to overrule Congress & Judicial Department, or would it simply be allowing the Executive Office to lay out its own policy decisions?

If that (2d choice) be the case, then could say that we must allow Executive order to stand because to deny it would be to step on the toes of the Executive branch. There is a bigger issue here. I think it's very unlikely that the courts would allow the President to enforce such a policy. It is better left to the democratic legislative process to decide. That process has already said that it's ok for employers to permanently replace striking economic workers. That decision lasted for 60 years and survived labor unions efforts to change. (Despite Hugh lobbying power of labor union). For the president to come in and punish employers is an absolute violation of the separation of powers. He could not win on the theory that he was just laying out policy to award government contracts.

Q: Do we have a procedural due process problem with Executive Order?

In the past, the right to contract was considered a fundamental right which could not be deprived because it was granted under 5th Amendment right to "life, liberty, or property." However, post-Lochner courts have declined to view such economic regulation as fundamental rights. In that case, probably not a substantive due process problem to overcome.

STRONG ANSWER TO QI (1995)

1. Is this suit justiciable?

This is probably a justiciable suit. Though advisory opinions are typically considered unconstitutional under the "cases and controversies" section of article 3, section 2, there was an exception made for declaratory judgments under the declaratory judgments act. So in this case, an advisory opinion is acceptable.

The issue of mootness is not applicable here since the Plaintiff still has a valid stake in the claim; members of chamber still have contracts and it is not too late. Further, the ripeness requirement of justiciability is satisfied. There is a reasonable possibility that the U.S. Chamber of Commerce will suffer a reasonably specified harm; namely, many members will withdraw and no longer pay fees if they go out of business because their contracts with the government are canceled. The fact that the act hasn't been enforced against them yet is irrelevant.

Also, the plaintiffs arguably have standing. The actual claim is not abstract or hypothetical. There is no actual injury-in-fact, but since the Ps are only seeking an advisory opinion, this is probably ok. The alleged potential harm is fairly traceable to the executive order, and a favorable result for the plaintiffs would likely redress their harm. Since individual members of the Chamber of Commerce would probably have standing, the org. does too. Finally, this is probably not a non-justiciable political question: Review of the order has not been committed to another branch, there is no absence of manageable standards for the ct. To rely on and there is no compelling reason to stand by existing political doctrine.

2. Does the Executive Order violate the separation of powers doctrine?

There is a very close case here. The controversy revolves around two contrary notions of Presidential authority. The first of these notions is that the President, as the chief executive, is supposed to ensure that the laws are executed properly. Here there is no such law to execute. The other notion of presidential power is that the President is in control of the Executive branch and the functions of that branch. The court should most likely find that this is a violation of the separation of powers.

Under the first notion of the President's authority, Article II §3 states that the President "shall take care that the laws be faithfully executed." In the present situation, there is no law for him to execute. Congress attempted to pass legislation, but could not get the requisite amount of votes to do so. In the present situation, the President is clearly acting without any express authority from Congress. A question arises if there is any implied power. Since the only thing that is stopping the Executive Order from becoming a statute is two votes to override a veto, the President may make a claim that he has the implied consent of Congress. This may be valid, except a strict reading of the Constitution requires that the President be presented a bill after it receives a majority vote by both houses of Congress. Even though he may have had a majority of

members on his side, the Senate never actually voted on the issue of the statute, only on the issue of ending the filibuster.

This case closely resembles the Supreme Court case in which the Court held the seizure of steel mills unconstitutional because the President had no real authority to do this. In a concurrence, it was stated that the president has no true power when Congress has yet to speak on an issue. Here, the President had no power placed on him by the Congress.

Another important Separation of Powers issue is if the President, by his executive order, is violating the power of the judicial branch established in Article III of the constitution. In the case of *Marbury v. Madison*, the Supreme Court established the fact that it had judicial review power over acts of government. There is a clear decision in prior case law, *NLRB v. MacKay Radio* that states that contractors do have the right to hire permanent replacements if they desire to do this. The Congress never changed the law upon which this decision was made so this decision should still be valid and carry the same weight it did when originally decided. For the President to simply ignore this decision would be to deny the authority of the judicial branch to make binding decisions.

Another problem is that this executive order seems to create judicial power in the executive branch. The Secretary of Labor is the sole judge of cases and has the power to review his own decisions. This could violate the due process rights of the contracting parties because the only substantial review is done by one person with the only appeals going through him. Procedural due process would require more from the government because the contractors have much to lose if they do not hire replacement workers. One wonders, if they did not hire replacements and could not complete their contractual duties, if the government would bring suit for breach of contract.

The other side of the argument is that this is not a violation of separation of powers. This stems from the fact that the President is in control of the executive branch and can make decisions for the branch as he sees fit (with some notable exceptions—such as Senate approval of appointments). The President could justify his order under Article II Section 2, which allows him to get opinions from the heads of the executive departments. He could attempt to justify the Secretary of Labor's action as an opinion requested by the President to better govern the country. This is similar to the *Dames and Moore* case where President Carter was able to suspend contractual claims pending in United States Courts against Iran. This is a similar action by the President except he is acting in domestic affairs and in contravention of the Supreme Court. The President's justification for his action seems to be very weak on this fact. He can claim that the power created in him allows him to decide with whom the executive branch will contract.

His other major claim of not violating the separation of powers would be that he was acting under the implied consent of Congress. This argument holds little weight because only one branch had given its consent to the act and the Constitution requires a majority of both houses.