CONSTITUTIONAL LAW

First Assignment

For our first class, January 9, we will work through the 14 questions on the following pages, which you should try to answer based simply on a careful reading of the Constitution.

Four our second class please read pages 8-29 (historical and political background) and 29-42 (Marbury v. Madison) in Stone, et al., Constitutional Law (5th edition, 2005). We will start but not finish Marbury on Wednesday.

A full syllabus will be available on or before the first day of class.

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Before we turn to the materials in the casebook and consider what others -- primarily the Supreme Court -- have said about the Constitution, let’s begin with the document itself. For the first class, read the Constitution (including the Amendments) carefully and answer the questions below. Some are entirely straightforward, others more difficult. Do no research beyond simply reading the Constitution. (You do not need to turn in your answers; this is just for class discussion purposes.)

1. It's 2008, an election year. George W. Bush has had a happy and successful seven plus years in office. Can he run again? Could he run for Vice-President?


   (a) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

   (b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

   (d)(1) If, by reason of death [etc.], there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs.

Four questions about the foregoing:

(i) Where does Congress get the constitutional authority to make these arrangements?
(ii) Are any of these provisions constitutionally required?
(iii) Are any of these provisions constitutionally invalid?
(iv) Elaine Chao, the Secretary of Labor, was born in Taiwan. Suppose it’s her turn under subsection (d)(1). What happens?
3. In response to Supreme Court decisions holding that flag-burning is protected by the First Amendment, Congress considered a constitutional amendment to ban flag-burning. A majority of both houses voted for the amendment, which went down to defeat. How can this be? And can Congress amend the Constitution in the first place?

4. On the subject of Amendments: the most recent amendment, the 27th, went into effect in 1992. It had been proposed a mere two centuries earlier. Is there, and/or should there be, a time limit for the ratification of amendments?

5. Members of the Senate are elected “at large”; that is, each of a states’ two Senators is elected in a state-wide election. In contrast, a state’s Representatives in the House are elected from districts, with the districts all being identical in population. Which, if any, elements of this arrangement are constitutionally required?

6. Under the rules of the House of Representatives, it takes a simple majority to pass a bill except in the case of legislation that would raise taxes, for which 60% is required for passage. Is this supermajority requirement constitutional?

7. Determined to cement his reputation as a tax-and-spend-liberal, Senator Ted Kennedy introduces a bill that would raise income tax rates by 5% across the board. The Senate passes the bill and sends it over to the House, which also passes it (with more than 60% support, of course) and sends it to the President, who signs it. A group of federal judges, who view themselves as grossly underpaid and unable to take the tax hit, file a lawsuit challenging the constitutionality of the new law. Will they win?

8. In March 2005, President Bush nominated John Bolton to be Ambassador to the United Nations. The Senate took no action on the nomination, so on August 1, 2005, the President went ahead and made him ambassador without Senate approval. Can he do that? (Also, when will Bolton’s term expire?)

9. President Bush has used this same mechanism to appoint two federal judges without Senate approval. Develop an argument that such appointments of judges (as opposed to ambassadors, or cabinet secretaries, or other officials) are constitutionally impermissible.

10. Suppose the United States Congress enacts a law requiring everyone in the United States to drive on the right-hand side of the road. Virginia, obsessed, as usual, with its English heritage, enacts a law requiring everyone in Virginia to drive on the left-hand side of the road. You have a Virginia client who feels nothing is more important than obeying the law. He is freaking out because the only way he can avoid violating one law or the other is not to drive at all, which would involve a deprivation of what is perhaps the most important unenumerated American constitutional right, the right to drive. What advice do you give him?

11. The State of West Virginia did not exist prior to the Civil War; it was carved out of the State of Virginia when citizens of that state were divided over secession. West Virginia was granted statehood by an Act of Congress passed in July 1862 and it joined the union in June.
1863. What constitutional difficulties do you imagine may have accompanied this process? How do you suppose they were overcome?

12. Congress, tired of wrangling over military spending and hoping to facilitate long-range planning by the Department of Defense, enacts a five-year military appropriations bill. Constitutional?

13. The words “slave” and “slavery” do not appear in the original Constitution. What, if anything, did the Constitution as enacted do about slavery?

14. For many years, there was a de facto “Jewish seat” on the Supreme Court. It began with the appointment of Justice Brandeis in 1915 and came to an end in 1970 when Harry Blackmun replaced Abe Fortas. (In 1993, the Court regained a Jewish justice with the appointment of Justice Ginsburg; Justice Breyer, who is also Jewish, was appointed the following year.) Suppose that Congress, concerned about the Court’s representativeness and subtle prejudices, passes a law expressly requiring that there be at least one Jewish justice on the Court at all times. Constitutional? Would your argument be any different about a law requiring at least one female justice at all times? One African-American justice?