#1.

The White House is consumed by scandal. Several prominent social media personalities have begun to reveal information about the President's reckless personal behavior prior to taking office. The revelations indicate that the President may be liable for civil damages. Requests to the management of these social networks to take down posts relating to the President's prior behavior have been politely refused, and counsel for the networks have cited New York Times v. United States as providing a basis for this refusal.

The Content Moderation Act, passed by Congress last year, sets out provisions for arbitration in cases where takedown requests have been refused. It grants the Department of Justice broad authority to develop standards for regulating speech broadcast by social networks, but the House of Representatives can reject these standards by majority vote. So far, Congressional leaders and the Attorney General find this system efficient and workable.

Daily revelations about the President's pre-election conduct dominate the national conversation, and are widely covered in the traditional media. Factions of the opposing party have taken to the streets to protest the President's behavior, and have begun to call for impeachment. Some extreme elements of the opposing party are calling for violent protests until the President is forced to resign. Everyone is waiting expectantly for additional revelations to emerge.

Last Friday, the President issued an executive order nationalizing [taking over] the operations of prominent social networks, including those owned by Meta. The executive order states that nationalization is required because the content of these networks is promoting an "environment of lawlessness," and hence poses a threat to national security. As evidence, the executive order cites recent riots in Chicago and Houston, in which several police officers were injured.

The owners of these social networks immediately filed suit, alleging that their property has been taken without due process of law, and that this was done in order to impose a "prior restraint" on publication of information unfavorable to the President personally. To make this case, the owners are demanding background memoranda showing the administration's deliberations regarding the executive order. A quick review of these (classified) documents makes plain that the nationalization was motivated by the President's desire to suppress additional revelations about her pre-election conduct. However, the President's team believes that these documents are protected by executive privilege.

You work for the Department of Justice. Your boss, the Attorney General, just heard from the White House. The President wants to know what will happen if she refuses to settle and the case is allowed to go to trial. She asks:

1) What standard of review is the Supreme Court likely to use?
2) How will the court rule on the merits of the nationalization?
3) What role will the Content Moderation Act play in the Court's analysis?
4) Must the White House turn over the background memoranda?
5) Are there any other factors that will be important?

Commented [MD1]: No immunity from civil litigation for unofficial conduct (Clinton v. Jones).

Commented [MD2]: Heavy presumption against prior restraints, no inherent power to halt publication (NYT v. US)

Commented [MD3]: Big picture: this act would indicate (like in Youngstown) the existence of Congressional intent to handle content disputes via some particular process, which the President's decision to nationalize ignores. However, unlike in Youngstown, this act may be unconstitutional on its face because it grants part of Congress's legislating power to the executive branch (Schechter) and grants a unicameral legislative veto (Chadha). If so, this (counterintuitively) would mean that the President isn't bound by the clearly-expressed intent in the CMA.

Commented [MD4]: Jackson's concurrence: three classifications of Presidential power (Youngstown v. Sawyer). The presence of a Congressional statute makes this look like category #3.

Commented [MD5]: No delegation of congressional legislative powers to executive agencies (Schechter).

Commented [MD6]: Legislative vetoes must be bicameral or they violate the presentment clause (INS v. Chadha).

Commented [MD7]: Efficiency is only one value, and the Constitution ranks other values higher (INS v. Chadha).

Commented [MD8]: This is not a threat to national security.

Commented [MD9]: These violent protests make the President's claim about national security plausible on its face. Much will depend on the standard of review the court elects to use. Strict scrutiny would obviously find this response overbroad, but it just might be sustained on a rational basis review (see Trump v. Hawaii).

Commented [MD10]: No authority to legislate in the absence of Congress (Youngstown v. Sawyer). [does this count as "legislating"?]

Commented [MD11]: No authority to take possession of private property (Youngstown v. Sawyer).

Commented [MD12]: No absolute and unfettered executive privilege (US v. Nixon).

Commented [MD13]: Presidential proclamations subject to "rational basis review" (Trump v. Hawaii) – is there a "relationship to legitimate state interests," or does the law "lack any purpose other than a bare desire to harm" some group?

#2.

In response to widespread distrust in the electoral process, Congress has just passed the Clean Up Our Elections Act, which provides for:

a) A cap on political donations to candidates, parties or campaign committees of $2,500 per individual, per year, in both Federal and state elections (necessary to "counteract the role of big money in our elections").
b) Matching (public) funds for candidates whose opponent spends more than $25,000 of their own resources (necessary to "level the playing field").
c) A ban on independent expenditures on behalf of candidates (necessary because "these allegedly-independent groups actually coordinate their activities with the campaign").
d) Disclosure requirements for the funding behind "issue advocacy" ads (same reason).
e) A ban on the use of corporate funds to promote "issue advocacy" ads (necessary because "corporate speech crowds out individual speech").
f) Automatic recounts in "districts with a high rate of fraud, or where perceptions of fraud are widespread" (necessary to "improve confidence in our elections").
g) The application of all the foregoing provisions to primary elections and political conventions.

Your client, Bob Billionaire, plans to run for President as the Reform Party candidate (a third party), and plans to also fund challenges to incumbent officeholders in state and Federal races across the country. Bob finds most of the restrictions in the Clean Up Our Elections Act irksome, and has hired your law firm to research their constitutionality. If any of these provisions will be found unconstitutional by the Supreme Court, Bob would like to know in advance to avoid having to comply with them during the campaign. Taking each provision in turn, discuss its constitutionality based on prior Supreme Court jurisprudence.

Commented [MD14]: Restrictions on individual contributions to political campaigns and candidates do not violate the First Amendment because they enhance the "integrity of our system of representative democracy" by guarding against corruption or the appearance of corruption (Buckley v. Valeo).

Commented [MD15]: Regulation of soft money does not affect core political speech and therefore is ok under the First Amendment (McConnell v. FEC).

Commented [MD16]: We didn't focus on this, but dicta in McConnell v. FEC suggest that the Court has a more limited role in regulating state-level elections.

Commented [MD17]: When the government "burdens the right to contribute," the court will apply heightened scrutiny (McConnell v. FEC). Is the interest "sufficiently important" and is the statue "closely drawn"? This looks like a legitimate public purpose.

Commented [MD18]: Matching funds provisions linking the funds participating candidates receive to the amounts raised or spent by or on behalf of their opponents violate the opponents' rights under the First Amendment (Arizona Free NEterprise Club v. Bennett).

Commented [MD19]: Restrictions on independent expenditures in campaigns, limitations on expenditures by candidates from their own personal or family resources, and limitations on total campaign expenditures all violate the First Amendment because they don't necessarily enhance the potential for corruption or the appearance of corruption (Buckley v. Valeo).

Commented [MD20]: Disclosure requirements and regulation of issue advocacy ads are compatible with the First Amendment (Citizens United v. FEC).

Commented [MD21]: Laws limiting the corporate funding of independent political broadcasts in candidate elections violate the First Amendment (Citizens United v. FEC).

Commented [MD22]: Ballots cannot be invalidated by "later arbitrary and disparate treatment" (Bush v. Gore).

Commented [MD23]: Primaries and political parties are integral to the operation of government and so are "agents of the state" subject to the proscriptions of the Fourteenth Amendment (Smith v. Alwright).

Commented [MD24]: Restrictions on third parties are unconstitutional (Williams v. Rhodes).