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Exam/Paper No. _____

501 INTRODUCTION TO CONSTITUTIONAL LAW

Semester II, 2007-2008

Examination
UNM School of Law
Three Credits

Professors Kovnat & Bay
May 9, 2008
1:30 pm – 5:00 pm

INSTRUCTIONS

Examination Format Essay Answers

1. **Laptops:** Start the Secureexam program entering your examination number, course name, professor's name, and date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam. Use 12-point or larger type face and double space (but not triple space) your answer. DO NOT WRITE YOUR NAME ON YOUR EXAM ANSWER.
2. **Bluebooks:** Write in ink, on only one side of the page, and skip lines. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Be sure to number your bluebooks in consecutive order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen and close the bluebook immediately. If using a laptop, save and exit the program.

Go to the examination check-in table at the conclusion of the examination and fill out a receipt.

Professor's Instructions

1. This is a three-and-a-half-hour long examination; however, during the first half hour you may only read the examination and prepare an outline of your answer. You may not start writing (either in blue books or on your computer) until 2:00. The examination consists of three questions, two of which have two subparts. We suggest 45 minutes for Question I, 60 minutes for Question II, and 75 minutes for Question III. In general, the points will be allocated in proportion to the time suggested.
2. This is an open book examination, except that you may not use any commercial materials, including commercial outlines, hornbooks, or treatises. You may bring your casebook, class notes, the Constitution, and any outline you helped prepare.

QUESTION I (45 minutes)

In June 2007, Congress failed to enact the Comprehensive Immigration Reform Act that would have increased border enforcement, created a guest-worker program, revised visa requirements for immigrants, and provided a pathway for potential citizenship for the approximately 12 million persons who live in the United States without proper documentation. Left in place were a myriad of federal laws governing immigration and naturalization. These laws regulate who may enter the United States and specify the conditions and procedures required to permit those who legally enter to remain in the United States. Please assume that these laws are based on a valid exercise of Congress's authority to regulate naturalization and commerce.

Specifically, § 1324a of Title 8 of the U.S. Code provides that “[i]t is unlawful for a person to hire an alien knowing that the alien is unauthorized to have entered or remained in the United States.” The law (1) establishes requirements and procedures for verifying the legal work status of an alien at the time of hire; (2) authorizes the Attorney-General of the U.S. to issue cease and desist orders to employers who fail to comply; (3) authorizes the imposition of civil penalties of not less than \$250.00 and not more than \$2000.00 for each violation; and (4) authorizes the imposition of criminal penalties for patterns and practices of knowing violations.

Many States and municipalities expressed frustration at Congress's 2007 failure to enact new tough measures against illegal immigration. Mapleton, Arizona was one such community. In the fall of 2007, after conducting hearings and making findings that undocumented aliens were burdening Mapleton's educational and health systems and that concentration of undocumented aliens contributed to urban blight, its City Council enacted a housing ordinance.

The ordinance was based on findings that the harboring of illegal aliens in dwelling units in the City and crime committed by illegal aliens harm the health, safety and welfare of Mapleton's legal residents. The City Council also found that illegal aliens are less likely to call the attention of the authorities to substandard housing and property maintenance thus contributing to blight. Accordingly, the law prohibits any owner of a dwelling unit in Mapleton from renting, leasing, or letting a dwelling unit without verifying that the lessee was authorized to enter the U.S. and is permitted to remain, unless the lessee had resided in Arizona for the past 12 months. Upon proof of violation, the owner's license to rent shall be rescinded with respect to the unlawfully rented dwelling unit, and the owner of such a dwelling unit is either required to evict the undocumented alien, or is precluded from collecting any rent or other thing of value from the undocumented alien.

Alonzo and Maria Romero entered the United States in 2000 without proper documentation. They lived in California until 2008 and had two children who were born in California. The family moved to Mapleton, Arizona, in January 2008 and rented a two-bedroom apartment from D.A. Warbucks. The Romeros and Warbucks signed a two-

year lease. Mapleton's licensing division received information that Warbucks had violated the housing ordinance. After a hearing in which evidence was produced of the Romeros' undocumented status, Warbucks' rental license was suspended and he was ordered to evict the Romero family. He refused on the grounds that the Romeros still had more than a year to go on their lease and that their small children were citizens of the U.S. Because he is precluded from collecting rent, he wishes to challenge the constitutionality of Mapleton's housing ordinance. Alonzo and Maria Romero wish to challenge the ordinance on behalf of their children. They all seek your advice. Evaluate the strengths and weaknesses of each of their constitutional claims. Please assume that the claims are justiciable. Explain how the claims should be resolved and why.

QUESTION II (60 minutes)

Another of the federal statutes that was left unaffected by Congress's failure to enact comprehensive immigration reform was the Secure Fences Act which authorizes the construction of a triple-layered fence across 700 miles of the U.S. Mexico border. This law directs the Secretary of the Department of Homeland Security (DHS), an executive branch agency, to take such actions as may be necessary to construct physical and electronic barriers to movements across the border. The Secretary is further directed to employ sufficient lighting in conjunction with the physical and electronic barriers as to enable border guards effectively to patrol the border. In 2005, Congress enacted and the President approved the REAL I.D. Act which provides, among other things, that:

§ 102(c) Waiver –

- (1) IN GENERAL – Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws, whether state or federal, that such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.

The stated purpose for both the Secure Fences Act and the REAL I.D. Act is to tighten the borders of the United States so as to protect the United States from the threats posed by drug smuggling, illegal immigration, and terrorism.

In April of 2008, the Secretary of DHS exercised the waiver provision contained in REAL I.D. His waiver covers 470 miles of the border from California to Texas. He waived "all federal, state or other laws, regulations and legal requirements deriving from or relating to the subject of" 30 laws, including the Endangered Species Act and the National Environmental Policy Act. His waiver includes all state and local laws dealing with environmental protection and water rights along the border. Construction of the triple-layered fence has already begun.

A. Defenders of Wildlife (DOW) is a membership organization devoted to protecting the environment, particularly endangered species and their habitat. The environmental organization has members who live in California, Arizona, New Mexico

and Texas. It wishes to challenge the Secretary's action under the waiver provision. Please assume that the claims are justiciable. Identify and discuss DOW's constitutional claims on the merits. Please explain how the claims should be resolved and why. (30 minutes).

B. In 1975, Murdoch bought a ranch in Arizona on the U.S.–Mexico border. After several years of experimentation, he found that the soil conditions were perfect for growing a rare species of hyacinths, a commercially valuable flower. He purchased sufficient water rights and invested in irrigation systems such that by 1985, he was the largest hyacinth grower in the United States. His business was extremely profitable. Unfortunately, the U.S. Border Patrol has detected numerous illegal border crossings on Murdoch's property. In late 2007, the Secretary of Homeland Security completed construction of the portion of the border fence abutting Murdoch's hyacinth ranch. Floodlights illuminate the fence 24 hours a day. They also illuminate a strip of Murdoch's ranch that measures $\frac{1}{4}$ mile by 10 miles. Hyacinths cannot grow in this strip of light. Murdoch sues the U.S for compensation. Please assume that his action is justiciable. Please identify and discuss all constitutional issues presented. How should Murdoch's claims be resolved and why? (For purposes of answering this question, please assume that there are devices available to sue the United States for damages despite sovereign immunity.) (30 minutes).

QUESTION III (75 minutes)

In 2005, the REAL I.D. Act was attached as a rider to a bill dealing with emergency appropriations for the Iraq war and Tsunami relief. At the last minute, it was inserted into the bill while the bill was being considered in conference by the House of Representatives. The Senate never discussed REAL I.D. specifically, and no Senate hearings were held on it prior to its passage.

Until its enactment as federal law, issuance of drivers' licenses was strictly a matter for regulation by the States. The REAL I.D. Act of 2005 changed the situation.

REAL I.D. establishes minimum national issuance standards for state-issued drivers' licenses that must be used for "official purposes," defined as including "accessing federal facilities, boarding federally regulated commercial aircraft, and entering nuclear power plants." The penalty for a State's non-compliance with REAL I.D. is borne by the State's citizens, who will be unable to access federal facilities, board federally regulated commercial aircraft, or enter nuclear power plants.

To issue a driver's license that complies with REAL I.D., the State must do the following things:

1. A State may not issue a driver's license unless it requires production of a document and verifies with its issuing agency, the issuance, validity and completeness of (a) a photo identification document or a non-photo document containing the individual's

full legal name and date of birth, (b) date of birth, (c) proof of a Social Security number (SSN) or verification of the individual's ineligibility for a SSN, and (d) name and address of the individual's principal residence.

2. States are required to verify an applicant's legal status in the United States before issuing a driver's license. With respect to non-citizens of the United States, a State may only issue a temporary driver's license with an expiration date equal to the period of time of the applicant's authorized stay in the United States. Undocumented individuals may not receive a driver's license.

3. States must adopt procedures and practices to (a) employ technology to capture digital images of identity source documents, (b) retain paper copies of source documents for a minimum of 7 years or images of source documents for a minimum of 10 years, (c) establish an effective procedure to confirm or verify a renewing applicant's information, (d) confirm with the Social Security Administration an SSN presented by a person and take appropriate action if a SSN is already registered to or associated with another person to whom any State has issued a driver's license or identification card.

4. REAL I.D. also requires States to maintain a motor vehicle database that contains all data printed on drivers' licenses. If a State elects to issue a driver's license that does not conform with the Act, it must use a unique design to alert officials that the document is not to be accepted for any "official purpose."

5. After 2011, a federal agency may not accept for any "official purpose," a driver's license issued by a State to any person, unless the State is meeting the requirements specified in the REAL I.D. Act. All States have been granted an extension until December 2008 to take measures to bring the State into compliance.

A. Utah's legislature has enacted a statute prohibiting its Director of Public Safety from taking any action to implement or plan for implementation of the REAL I.D. Act. In passing the law, the legislature found that REAL I.D. is both beyond the scope of Congress's regulatory powers and is inconsistent with the State's policy of protecting public safety, which is presently fostered by offering driver's licenses to undocumented individuals. Offering such licenses to undocumented individuals who can produce evidence of their identities by showing either a foreign passport or a valid driver's license issued in a foreign country increases the likelihood that such individuals will purchase insurance and thus be financially responsible in case of highway accidents.

Utah seeks a declaratory judgment that REAL ID is unconstitutional. Please identify and discuss all constitutional claims that Utah could raise. How should they be resolved and why? (50 minutes).

B. Utah has also enacted a statute prohibiting any airline that flies into a Utah airport from serving alcoholic beverages within two hours of landing in Utah. No national airline is either incorporated in Utah or lists Utah as its principal place of business. However, every national airline flies into and out of Salt Lake City, which is

also an International Airport. Only a small percentage of flights landing in Salt Lake City are international flights (approximately 5%). U.S. Airways, a domestic and international carrier, seeks to enjoin Utah's law on the grounds that it is unconstitutional. Please assume that the case is justiciable. Please identify and discuss all constitutional claims that U.S. Airways could raise. How should they be resolved and why? (25 minutes).