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Examination No. \_\_\_\_\_

**519 LEGISLATIVE AND ADMINISTRATIVE PROCESSES**

Spring 2003

UNM School of Law  
Final Examination  
Three Credit Hours

Professors Bay and Canova  
Friday, May 9, 2002  
1:30 p.m. - 5:30 p.m.

**INSTRUCTIONS**

(Four Hours)

Good afternoon. This is a 4-hour exam, which consists of 2 Problems, each of which has 2 Parts. Each Problem is worth 100 points, for a total of 200 points on the exam. This exam is designed to be completed in 3 hours. The extra hour is being provided to give you ample time to read the Problems, outline your answers, and write coherently and legibly.

Read the Problems and Questions thoroughly, take each issue separately, organize your analysis, and budget your time.

You may have with you the class materials, state and federal constitutions, and any notes, outlines, or other materials you prepared yourself or with your fellow students. You may not have any other materials with you.

Organize your answers before you begin writing. You will probably find it helpful to outline your answers first. Please write neatly, in ink, and on only one side of each blue book leaf. If you type, please double space and be sure that your examination number, your professor's name, and the page number appear at the top of every page. Clarity of thought, simple writing and creativity will be amply rewarded.

**GOOD LUCK!**

**[EXAMINATION BEGINS ON NEXT PAGE]**

## **PROBLEM 1**

Total points: 100 points (½ total exam grade)

Recommended time to answer Problem 1: 120 minutes

### **Part A (50 points)**

#### **Background**

On October 17, 2002 President George W. Bush signed a congressional resolution authorizing him to use military force to enforce United Nations resolutions mandating that Iraq give up its efforts to develop weapons of mass destruction, including chemical, biological and nuclear weapons.

In early 2003, Raymond DuBois, the Deputy Under Secretary of Defense for Installations and Environment, had dinner with his old friend Cosmo Kramer, the chief executive of Kramerica. DuBois suggested that there would be lucrative opportunities for contracts for rebuilding in Iraq after the war, which was imminent. Kramer expended a full month preparing a proposal, which he submitted to the U.S. State Department's Agency for International Development (AID) on February 18th.

The Administrative Dispute Resolution Act (ADRA) of 1996 authorizes federal agencies, including AID, to promulgate Federal Acquisition Regulations for soliciting and receiving bids and offers, and for awarding federal procurement contracts. The ADRA vests the U.S. Court of Federal Claims with exclusive jurisdiction for preaward and postaward claims arising after Dec. 31, 2000.

Suppose that Section 313 of the ADRA directs federal agencies to solicit bids from interested parties by notice to the public, and to make awards "on the record after public opportunity for the submission of bids and offers by interested parties", and that such bids and offers are to be "opened and unsealed in a hearing, open to the public, after adequate notice."

On April 17, 2003, AID announced that it had awarded a contract worth up to \$680 million, to the Bechtel Group, Inc. for repair and expansion of the port at Umm Qasr, the only deep-water port in Iraq.

Kramer was upset to learn this news since the public had never been formally notified of any solicitation of bids or any bid specifications for the contract that was awarded to Bechtel. Instead, AID solicited bids from only four companies. Kramerica claims that it was entitled to public notice, as well as the opportunity to inspect and comment on competing bids and offers, and to have its own proposal considered by a neutral and impartial adjudicator. Kramer was also upset to learn that Bechtel's proposal had been prepared and submitted by his old nemesis, Franklin Delano Romanowsky, a former Army General now embedded as Bechtel's director of operations.

On May 1, 2003, after landing a Navy S-3B Viking anti-submarine aircraft onto the deck of the USS Abraham Lincoln aircraft carrier, President Bush declared the end of major combat operations in the “Battle of Iraq”, and that there was much work to be done in rebuilding the country.

### **Part A: Questions**

**(50 points total; 25 points for each question)**

**Assume you are counsel for Kramerica. Prepare a memorandum that considers the merits of each side’s positions in analyzing the following questions:**

- 1. Does your client have any claims that its constitutional due process rights were violated by the Agency for International Development procedures in choosing Bechtel?**
- 2. Could your client have any statutory claim against Agency for International Development procedures based on the Administrative Procedures Act (APA)?**

### **Part B (50 points)**

#### **Background**

Assume the following about AID’s contract with Bechtel: AID awarded the lucrative contract to Bechtel without soliciting any bids.

Under normal circumstances, federal agencies are required to put the contract out for competitive bidding according to the Section 313 procedures of the ADRA. But Section 444 permits agencies to bypass normal procedures and award contracts to a single company, without competition, in certain circumstances, including “in times of emergency involving national security.”

AID justified the closed bidding process as necessary and justified by the Section 444 national security exception since post-war Iraq remained hostile territory.

The sponsor of this provision, Senator Elaine Benis, stated during Senate floor debate that she intended the Section 444 exception to be read narrowly “to apply only to those situations in which it is impracticable to solicit bids or award contracts in a competitive bidding process.” Benis referred to the ADRA’s section entitled purposes and findings, which express the objective of providing “an open and competitive bidding process” for government procurement contracts, “consistent with military necessity in time of actual war and armed conflict.”

Benis also referred to hearings of the Senate Committee on Government Affairs in which Lieutenant General Arthur Williams, the Chief of Engineers and Commander of the U.S. Army Corps of Engineers (ACE), testified that he believed the exception would not apply to situations such as 1991 post-Persian Gulf War in Kuwait where ACE was awarding contracts for rebuilding

the facilities of a friendly, liberated ally. Although the President had used military force with Congressional authorization, Williams stated that the security situation on the ground in Kuwait had been quickly stabilized, even before hostilities had ended in Iraq, and that no emergency or national security exceptions would have existed.

The Report of the Senate Committee on Government Affairs concluded that the Section 444 exception would apply “only to genuine national security emergencies” that were made apparent “by Congressional declarations of war or Presidential proclamations.” During House floor debate, Congressman Tom DeLay of Texas stated that while war resolutions were sufficient to trigger the national security exception, they would not justify closed bidding after the cessation of hostilities.

**Part B: Question (50 points)**

**How should a court analyze whether the Agency for International Development properly invoked the Section 444 emergency and national security exception of the Administrative Dispute Resolution Act?**

**[END OF PROBLEM 1; PROCEED TO PROBLEM 2 ON NEXT PAGE]**

## PROBLEM 2

Total points: 100 (1/2 total exam grade)  
Recommended time: 120 minutes

### Background

After the November 2002 election, the Governor Mary Martin decided to institute election reform in the State of Ames. To that end, she consulted with members of the Ames state legislature. The state legislature is divided into a House of Representatives and Senate. The Governor then proposed legislation in which Ames would create a State Election Commission (SEC).

The proposed legislation stated as follows:

This Act shall be known as the "Ames Voting Reform Act of 2002."

Section 1. This Act shall create a State Election Commission.

Section 2. Purpose: The Commission is hereby authorized to promulgate such fair and democratic rules so as to ensure that each citizen's right to vote is respected in any and all elections in the State of Ames.

Section 3. Composition: The Commission shall be composed of six members.

- (A) The Governor shall appoint four members. The Governor's appointees shall include three members of the Governor's cabinet, as well as the Director of Citizens for a Democratic Ames (CDA), a non-profit, non-partisan organization dedicated to election reform.
- (B) The Chief Justice of the Ames Supreme Court shall appoint two members of the Commission. Such appointees by the Chief Justice shall be Ames State Court Judges.

Section 4. Removal Authority: Each commissioner shall serve for a term of four years. Except for the Director of the CDA, the Governor may remove any member of the Commission from the Commission. Any member removed by the Governor may be reinstated to the Commission by joint resolution of the Legislature.

Section 5. Voting: Rules promulgated by the Commission require a majority vote of the voting members. Each member of the Commission, except for the Director of the CDA, shall have one vote. The CDA Director shall be a non-voting member of the Commission but will otherwise be fully entitled to participate in Commission meetings.

Section 6. Effective Date of Rules: Once the Commission has promulgated a rule, it shall be effective within 90 days, unless the Governor recommends to the Legislature that the rule be repealed and the Legislature passes a joint resolution of repeal.

Section 7. The Commission is not an “Agency” within the meaning of the Administrative Procedures Act.

Section 8. Expiration Date: Unless reauthorized, the provisions of this Act shall expire on December 31, 2010.

In April 2003, the legislation passed both houses of the Ames state legislature. Governor Martin signed the bill, and it became law.

The SEC held extensive hearings in the fall of 2003. Many of its hearings focused on the election of County Commissioners in Pueblo County. Pueblo County has used a cumulative voting system for the past 12 years to elect 8 County Commissioners every four years during presidential election years. The elections have occurred on an at-large county-wide basis.

Cumulative voting means that voters receive as many votes to cast as there are seats to fill. Voters may then distribute the votes among candidates in any way they prefer. Voters may “plump” all their votes on a single candidate or divide their votes among each of several candidates. Thus, if there are eight seats to fill on the Board of County Commissioners, voters would have eight votes each to distribute as they saw fit.

All eight votes could be cast for a single candidate, or a single vote could be cast for eight different candidates, or two votes could be cast for four different candidates, or six votes could be cast for one candidate and two votes for another, or any other similar permutation as long as the voter did not cast more than the allotted eight votes. The eight candidates with the highest number of votes would be elected to office.

With eight seats to fill, cumulative voting ensures that as long as a bloc of voters constituted at least 1/8 (or 12.5%) of the population, it could elect the candidate of its choice as long as each voter in the bloc “plumped” – or cast all of -- his or her votes for the bloc’s preferred candidate.

Pueblo County is 3% African American and Asian Pacific American, 13% American Indian, 39% Hispanic, and 45% White. Those proportions have been relatively constant from the 1990 census to the 2000 census, as have the election results. One American Indian, one African American, three Hispanics, and three Whites were elected in the 1992, 1996, and 2000 elections.

In terms of party affiliation, Pueblo County has long had an active Green Party. Since 1990, the County has been 45% Democrat, 40% Republican, 13% Green Party, and 2% Independent or Other. In 1992, 1996, and 2000, the Green Party elected a Commissioner who was African American. In each of those elections, of the remaining seven Commissioners, four were Democrats and three were Republican.

After extensive hearings, the SEC decided to change from the cumulative at large voting system currently used in Pueblo County to eight single-member districts. The total population of the County is 800,000. District 1 would have 102,000 people; District 2, 100,000; District 3, 103,000; District 4, 98,000; District 5, 97,000; District 6, 100,000; District 7, 104,000; and District 8, 96,000. In drawing the districts, the SEC took race into account as one of a number of factors. For instance, each district was compact, contiguous, and respected various political subdivisions and communities of interest.

The SEC did not draw a majority-minority district for African-Americans or Asian-Pacific-Americans. The American Indian population was diffused throughout the County, and no majority-minority district was drawn for them. The Hispanic population tended to be concentrated in three parts of the County, and three majority-minority districts were created in those areas.

Members of the Green Party were diffused throughout the County.

With a change to single-member districts, uncontroverted testimony taken by the SEC showed that the Green Party would lose its one County Commissioner and that barring an extraordinary turn of events the Green Party would be unlikely to elect a candidate in the foreseeable future. Moreover, the American Indian population would also be unable to elect an American Indian candidate. The likely outcome of the SEC's plan would result in the election of four Hispanic Commissioners and four White Commissioners. On political lines, the Board would be split between four Democrats and four Republican.

Nevertheless, the SEC issued a rule that changed the voting system in Pueblo County from cumulative at large voting to eight single-member districts. This rule became law, when the Governor declined to recommend that the rule be repealed. The SEC's rule is scheduled to apply to the November 2004 election for County Commissioners.

#### **Part A (50 points)**

Assume that the Ames Constitution is modeled after the U.S. Constitution and that the Ames Supreme Court has previously held that decisions by the U.S. Supreme Court on separation of powers matters, including the non-delegation doctrine, are to be given authoritative weight by the Ames Supreme Court.

A group called "Liberty for Ames People" (LAP) has challenged the Ames Voting Reform Act of 2002 on separation of powers grounds, including the non-delegation doctrine, in state court. You are a law clerk to the Judge who is hearing the case. **Please write a clear and concise bench memorandum deciding the claims raised under the separation of powers and non-delegation doctrine.**



**Part B (50 points)**

Next assume that three other groups of plaintiffs challenge the new voting scheme: (1) a group of American Indian voters; (2) a group of African-American voters; and (3) members of the Green Party. Each group has filed a lawsuit in federal district court.

American Indian and African-American voters challenge the change to single-member districts under the 14<sup>th</sup> Amendment, the 15<sup>th</sup> Amendment, and the Voter's Rights Act, Section 2.

The Green Party challenges the change to single-member districts under the 14<sup>th</sup> Amendment.

Evidence suggests that the American Indian Commissioner had drawn the Governor's ire by blocking the Governor's attempt to raise property taxes in the County in early 2003 and that the loss of the Commissioner's seat was politically motivated.

**You are a law clerk to the Judge. Please write a clear and concise bench memorandum that decides each group's claims.**

**[END OF EXAMINATION]**