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FEDERAL JURISDICTION

Semester II, 2002-03

Final Examination
UNM School of Law
Three Credits

Professor M. Browde
May 6 or May 10, 2003
9:00 a.m. to noon

INSTRUCTIONS

1. This is a three hour exam. There is a single fact pattern followed by three independent lawsuits, and discrete questions with respect to each. Two hours are allocated to the first lawsuit, and one-half hour is allocated to each of the other two. While, of course, you are free to use your time as you wish, grading of the questions will be weighted in proportion to the time allocated to each.
2. Please number your bluebooks in consecutive order; put your exam number and the name of this course on each bluebook; and turn in both the bluebooks and the exam.
3. In preparing your answer you may consult the textbook, supplement, handouts, and your notes. Outlines, however, are limited to those you participated in producing—i.e., no commercial outlines are allowed! You should bring your casebook to have access to the constitutional and statutory appendices.
4. The questions asked are somewhat open-ended. Thus, although the issues are not necessarily hidden, they are not labeled for you. Thus, this exam requires both identification of the issues, and reasoned analysis of those issues.

[EXAMINATION BEGINS ON PAGE 2]

The attack on 9-11 has awakened the American States as important players in the “War on Terrorism.” Many states have revitalized their constitutionally-based, State militias¹ as warriors against terrorism. These State militias have been reorganized on the state, and local levels, under the leadership of the State Secretary of Homeland Security, County Sheriffs (at the county level) and municipal Chiefs of Police (at the city and town level).

The New Mexico version of the “Uniform Militia-Men Against Terrorism Act,” (MMAT) provides, in part, that:

Sec 1. Militia-Men shall be organized into a state-wide officer corps. In order to tightly coordinate state wide efforts, state-wide leadership meetings are to be held every month led by the State Secretary of Homeland Security. County and municipal meetings of Neighborhood Cell leaders are to be held every two weeks, led by County Sheriffs and/or local Chiefs of Police;

Sec. 2. The operational level of the Militia-Men shall be at the Neighborhood Cell. The Neighborhood Cells shall be ever vigilant against terrorism in their neighborhoods, and shall report any suspicious behavior by their neighbors to the relevant Sheriff or Chief of Police, and to the State Secretary of Homeland Security;

Sec. 3. Neighborhood Militia-Men Cells shall be responsible for rounding up and interrogating any and all residents of Arab or Islamic background to obtain any information which might be helpful in the fight against terrorism;

Sec. 4. Each Neighborhood Militia-Men Cell shall maintain a system for constant surveillance of the individuals identified by activities mandated in Sec. 3, including a detailed written record of their comings and going;

Sec. 5. Copies of all reports of Neighborhood Militia-Men Cells shall be filed on a weekly basis with the New Mexico Dept. of Homeland Security, as well as with the Federal Dept. of Homeland Security; and

Sec 6. All actions of the Neighborhood Militia-Men shall be consistent with state constitutional standards, and respectful of state constitutional rights.

After its stunning military success in the “War to Free Iraq,” the Bush Administration has now turned its attention to ways in which it might free its own people from the yoke of tyranny and oppression. At the behest of Attorney General Ashcroft, Congress has passed, and the President signed into law the “War to Free America Act” (WFA). The WFA authorizes block

¹ See, e.g., N.M. Const. art. XVIII, § 1 (“The militia of this state shall consist of all able-bodied male citizens between the ages of eighteen and forty-five. . . .”). Such constitutional provisions also establish that “[t]he legislature shall provide for the organization, discipline and equipment of the militia . . .” see *id.* at § 2.

grants to the states to fund State-sponsored Militia-Men activities aimed at efforts to free Americans from terrorism. The WFA also provides:

Sec. 1. All activities by State Militia-Men, funded under this program, shall protect the federal constitutional rights of all citizens and residents.

Sec. 2. Any person aggrieved by the conduct or activities of State Militia-Men shall file a written complaint with the federal Secretary of Homeland Security, which he shall resolve within thirty (30) days, through the use of an Advisory Investigative Panel. The Panel shall follow the detailed administrative procedures established by the Secretary.

Sec. 3 Remedies provided under Sec. 2 shall be limited to orders to State Militia-Men concerning future conduct and practices and public denunciation of past practices. For the sake of uniformity, and the security of the States and the Nation, all such decisions of the Secretary shall be final, and not subject to review in any court.

Dr. Imran Kahn is a Pakistani native, and a practicing Muslim. He is a naturalized American citizen who has resided in New Mexico for 25 years. He lives in a gated community in the Northeast area of Albuquerque. The residents of that community are mainly devout Muslim practitioners. There is a community Mosque within the walls of the gated community, and each week, a holy leader of the sect, Amah Mohammad, who resides in Joplin, Missouri, comes to Albuquerque to lead the community in holy prayer at the Mosque.

The gated community was constructed on land owned by the Sandia Indian Tribe by a Tribally-owned Development Corporation. The Corporation owns the property, and all residents lease their homes from the Corporation. Also, since the Mosque is not used for Muslim religious purposes on Sundays, it is made available to the Tribe, for their religious uses on that day. Shaman Osawah, the Tribal religious leader conducts services in the Mosque every Sunday. The services are well attended by Tribal members.

The Neighborhood Cell of the Militia-Men in the vicinity of the Muslim gated community targeted that community for special attention. Militia-Men Tom Jones and Sam Smith, co-leaders of the Neighborhood Cell, have stopped each and every member of the community and conducted interviews which pried into every aspect of their personal and private lives. During the interview of Dr. Kahn, Jones' weapon was fired under circumstances which may have been in reckless disregard of human safety. The bullet ricocheted off a nearby rock and struck Dr. Kahn, causing serious and debilitating injury.

The entire Cell of Militia-Men have also been active in surveillance activities with respect to the community—erecting “listening and watching” towers outside the gates, which are manned twenty-four hours a day and every day of the week—including when the members of the Sandia Tribe are at their services. Those surveillance activities involve monitoring the movement of all members of the community. Furthermore, when Amah Mohammad made his last trip to Albuquerque Militia-Men Jones and Smith stopped him at the gate. Unlike the residents of the

community, who politely submitted to Militia-Men interrogation, Mohammad was belligerent and had to be physically restrained. He was aided in his resistance to Jones and Smith by several other members of the community. Felony charges were then brought against Mohammad and the members of the community who came to his aid for “assault on law enforcement officers,” and those charges are pending in State district court. As a result of Mohammad’s physically abusive conduct, Jones and Smith told him that under established Militia-Men guidelines he was “banned” from the neighborhood and would not be allowed to return.

Without the presence of their religious leader, formal prayer services at the Mosque have had to be cancelled. “Mid-East Caterers, Inc.” a regional chain operating in Albuquerque, but with its home office in Saint Louis, had a long-term contract with the Mosque Community Association, to provide the food for the weekly, after prayer evening feasts at the Mosque. As a result of the cancellation of the services, the Association terminated the contract.

Cell reports in Albuquerque are made to Police Chief Alberto Giron, and State Secretary of Homeland Security, Alvin Armijo. Smith and Jones continually seek the advice of Chief Giron with respect to Cell activities in the neighborhood. The Chief has, however, told them “under New Mexico law, this is a neighborhood program, and you guys are in charge. We’re happy to help if you’ve got questions, but you guys call the shots.”

The following lawsuits ensue:

Lawsuit No. 1: *Kahn v. State Dept. of Homeland Security* (Approx. 2 hrs.)

Dr. Kahn and the members of the Muslim community bring an action in federal court in Albuquerque, alleging violation of their 4th and 14th amendment rights, violation of their 1st amendment religious freedoms,² as well as violation of the WFA. They also raise state tort claims based on common law invasion of privacy.³ They seek declaratory and injunctive relief against the activities of the Militia-Men, as well as substantial compensatory and punitive damages.

The named defendants are: 1) The State Department of Homeland Security and Secretary Alvin Armijo in his official capacity; 2) The Albuquerque Police Department and Police Chief Giron in his official capacity; and 3) Militia-Men Smith and Johnson in their official and individual capacities.

You are the law clerk to the federal judge assigned to the case. She is newly appointed, and is not familiar with this kind of lawsuit. She asks you, as an experienced law clerk, to:

² The circuits are split on whether the surveillance activities of State Militia-Men are violative of 4th Amendment rights, although our circuit has not spoken on the issue. There are no cases on the 1st amendment question presented in *Kahn*.

³ You may assume for purposes of this exam that such tort claims are allowable against governmental officials under the N.M. Tort Claims Act.

- 1. Explain very briefly the nature of Plaintiffs' causes of action, and the bases for federal court jurisdiction.**
- 2. Explain what jurisdictional and other procedural motions she might expect from each group of defendants as well as any joint procedural motions from them all, your thoughts on how each of those motions should be resolved and why.**

[NB: You are not being asked to resolve the merits of Plaintiffs claims]

Lawsuit No. 2: *Mid-East Caterers, Inc. v. Mosque Community Association* (Approx. 1/2 hr.)

Mid-East Caterers, Inc. sues the Mosque Community Association (MCA) for breach of contract and damage to reputation in New Mexico State Court. Mid-East's chef, Akbar O'Riley, is also a plaintiff. Mid-East claims contract damages of \$50,000, and reputation damages of \$25,000. O'Riley has a similar claim for damage to reputation. MCA removed the case to federal court, and Plaintiffs have moved to remand the matter back to state court.

Rule on the motion to remand, fully explaining your ruling.

Assume that some properly constituted Mid-East Caterers v. MCA suit remains in federal court, and MCA then files a third-party complaint against Mohammad under Rule 14, asserting that if MCA is liable, then Mohammad is liable to MCA for getting "banned" from the community. Mid-East Caterers then sues Mohammad as well. Early in the discovery process Mid-East settles with MCA. Mohammad then moves to dismiss the Mid-East complaint against him.

Rule on Mohammad's motion to dismiss, fully explaining your ruling.

Lawsuit No. 3: *Osawa v. Johnson* (Approx. 1/2 hr.)

Shaman Osawa files suit in tribal court against Militia-Men Johnson and Smith, alleging common law invasion of privacy on Tribal Land for their surveillance and reporting with respect to tribal members during Sunday services at the Mosque. Proper service is made on the defendants. The tribe has a sophisticated trial and appellate court system modeled after and similar to the New Mexico state court system. Johnson and Smith are fearful of having to defend in Tribal Court. They have retained you to represent them.

Explain to Johnson and Smith how you plan to proceed, why you plan to proceed that way, and the possible consequences of your plan.

[END OF EXAMINATION]