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

**Federal Jurisdiction**

**Examination – Spring 2004**

**UNM School of Law  
Final Examination  
Three Credit Hours**

**Professor Ruth Kovnat  
Friday, May 7, 2004, 9 a.m. – 12:30 p.m.  
Tuesday, May 11, 2004, 9 a.m. – 12:30 p.m.  
Three and ½ hours**

**Instructions**

1. This examination consists of four questions. The time indicated for each question is for your guidance as it reflects the relative weight of the question in the final grade. You should be able to answer the questions in **three hours**. The extra half-hour is allotted to encourage clarity and lucidity in your answers.
2. This is an open book examination. You may bring the casebook, class notes, any supplementary material I have provided, a book containing the federal rules of civil procedure and selected federal jurisdictional statutes, and any outline that you have prepared either alone or together with other students in the class. You may not bring into the examination any nutshells, hornbooks, commercial outlines, or other commercial materials.
3. An appendix containing some relevant statutes is attached for your convenience.
4. *Good luck and have an enjoyable summer.*

[End of instructions. Examination begins on page 2]

## 552 Federal Jurisdiction Examination

In 2003, before and during the conduct of the war in Iraq, the Secretary of Defense and other high officials in the Department of Defense realized that tasks of “regime change” and reconstruction of Iraq would stretch the limited capacities of the volunteer military services. In particular, they worried that looting and other ordinary crime would increase as a result of instability during the period of transition to a new Iraqi government and that military personnel were not well trained to undertake policing and prison supervision roles.

They found the solution to this problem by analogy to “privatization” of prisons in the territorial United States. They concluded that a number of United States corporations were in the business of operating security services and correctional facilities. Two companies, Blackguard Security Co. and Whitehat Protection, Inc., had proved themselves especially capable contractors for both the federal and some state governments. However, when Pentagon officials consulted with the management of these companies to determine whether they would be interested in bidding on new lucrative contracts for work in Iraq, they found that none of them would bid on contracts to supply police officers and prison guards for service in Iraq because the companies feared ruinous legal exposure.

Accordingly, in the Spring of 2003, the Pentagon proposed, Congress passed, and the President signed into law the Protection of Security Services Enactment (POSSE) as an exercise of federal war powers.

Among other things, POSSE provides:

1. The Secretary of Defense is authorized to contract with corporations incorporated in the United States for the purpose of providing personnel to carry out police and prison management in Iraq.
2. Contracts shall be awarded on the basis of competitive bidding and in accordance with the government contract laws of the U.S.
3. All successful bidders shall comply with the terms of the contracts awarded as well as with the provisions of the 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> amendments of the U.S. Constitution which respectively protect against unreasonable searches and seizures, denials of life, liberty or property without due process of law, and cruel and unusual punishments.
4. All disputes arising under or relating to a contract awarded under this section shall be exclusively submitted to the Military Board of Contract Review [hereinafter The Board.] The Board shall consist of the Deputy Secretary of

Defense, The Deputy Chairman of the Joint Chiefs of Staff, and the General in charge of field operations in Iraq.) Disputes may be submitted to the Board by any party to the contract or by any person affected by the performance or non-performance of the contract. If the Board finds a contractor in breach of any of the terms of the contract, the contract shall be immediately terminated. If the Board finds breaches that cause injury to any person, it is authorized to order reparations to the injured person up to no more than \$50,000 for each breach that causes injury. Review of the findings and orders of the Board shall be exclusively in the Secretary of Defense. Final orders of the Secretary of Defense shall be appealed in the Court of Federal Appeals (an Article III court.)

Blackguard Security Co., wholly owned by J. Blackguard, a citizen of the U.S. who resides in Qatar, is the successful bidder for the police work in Iraq. Whitehat Protection, Inc., a New York corporation, with its principal place of business in New York, is awarded the contract to run all civilian prisons in Iraq. They both began their operations in Iraq in early summer of 2003. Blackguard sent its highly paid employees to serve as the police force of Baghdad; Whitehat staffed the civilian prison of Baghdad, supplying all personnel from warden to prison guards.

As it turned out, neither corporation was able to carry out its responsibilities under its contract without the considerable assistance of both U.S. military and civilian personnel. Because it became so difficult to distinguish "ordinary" criminals from insurgents, Blackguard guards often effected arrests of looters with the assistance of U.S. Marines and conducted interrogations under the supervision of federal agents. In the civilian prison, U.S. Intelligence agents both established the policies for and conducted interrogations of prisoners with the assistance of Whitehat personnel. In some cases, arrest and interrogation techniques got out of hand.

On September 1, 2003, Sharif Omar, a native Iraqi, and a naturalized citizen of the United States, a graduate of Princeton University, with a wife and children who live in New Jersey, was arrested in Baghdad during a "sweep" of the café where he was meeting with friends. He was in Baghdad to visit his mother who lived in a neighborhood that had suffered much disorder. He resisted his arrest, protesting that he had done nothing, but was finally imprisoned after a Blackguard policeman, Bill, wrestled him to the floor and a marine, James, shot him in the leg. He was taken to the prison operated by Whitehat. Because supplies were scarce and medical providers were busy elsewhere, Whitehat had no medical facilities at the prison even though its contract required it to do so. Omar received no treatment for his leg wound. After several days of solitary confinement, he was interrogated by two officers, one a Whitehat employee, Sam, the other, a U.S. intelligence officer, named Nancy. They questioned him off and on for 36 hours. During the interrogation, Omar was deprived of sleep, threatened with electrocution if he didn't talk, offered no food and water only occasionally. He

was never charged with a crime, was released after two weeks and returned to New Jersey.

There he faced more difficulties. Though he tried to return to his job as city planner for the City of Hackensack, his co-workers shunned him because he was an Iraqi. Moreover, he was not able to perform his job duties with his previous efficiency because of his leg injury which continued to cause him severe pain and because of post-traumatic stress syndrome. One month after his return, the chief city planner terminated Omar's employment with the city, saying that "Hackensack could no longer carry a gimp, nervous Iraqi in its planning department." Although Hackensack has a civil service code that would have afforded Omar the opportunity for reinstatement and back pay if the Civil Service Commission had found his termination unjustified, Omar was too disheartened to appeal, because, as a practical matter, the Commission usually affirmed the firing decisions of department supervisors.

#### Question I (30 minutes)

Omar filed a complaint in the federal district court for the district of New Jersey. He joined the chief city planner and the city of Hackensack as defendants under 28 U.S.C. section 1983. He claimed that his employment was terminated because of his national origin in violation of the equal protection clause. He also claimed that he was deprived of procedural due process and sought damages from both defendants. Both defendants moved to dismiss Omar's complaint. Rule on the motions giving your reasons for ruling as you do.

#### Question II (45 minutes)

Omar filed a reparations claim against both Blackguard and Whitehat before the Military Contract Review Board. The Board found that the force used to arrest Omar in Iraq was not excessive under the circumstances and that the interrogation techniques did not amount to a denial of due process or cruel and unusual punishment. Instead of appealing to the Secretary of Defense, Omar filed a complaint against the individual members of the Board in the federal district court of the District of Columbia alleging jurisdiction under 28 U.S.C. section 1331 (general federal question jurisdiction). He seeks an injunction against enforcement of their reparations order in favor of Blackguard and Whitehat on the grounds that the Board's order violates Article III of the federal constitution. The members of the Board move to dismiss the complaint arguing: a) POSSE deprives the court of jurisdiction; b) sovereign immunity; and c) official immunity. What result and why?

Question III (1 hour and 15 minutes)

On October 1, 2004, Omar also files a complaint in the Texas state courts. He names both Blackguard and Whitehat as defendants and chooses to file in Texas because both Blackguard and Whitehat are amenable to personal jurisdiction in Texas and have considerable assets there. His complaint contains multiple counts. Count I alleges that the conduct of both Blackguard and Whitehat constituted a breach of their contracts with the Department of Defense. As a third party beneficiary of those contracts, he seeks damages of \$5,000,000. Count II alleges that both Blackguard and Whitehat worked jointly with federal officers such that they are “governmental actors” who must conform with the 4<sup>th</sup>, 5<sup>th</sup>, and 8<sup>th</sup> amendments of the U.S. Constitution and that both Blackguard’s and Whitehat’s conduct amount to constitutional violations that entitle him to damages. Count III alleges that Blackguard’s employee, Bill and Whitehat’s employee, Sam, committed assault, battery, and intentional infliction of emotional distress in their treatment of Omar during the arrest and his subsequent confinement in the prison.

On October 28, 2004, Blackguard and Whitehat remove the case to federal district court for the middle district of Texas. On December 15, Omar moves to remand the case back to state court. Rule on Omar’s motion to remand. It may be helpful to consider each count separately for purposes of your rulings. Explain the reasons for your rulings.

Question IV (30 minutes)

Omar also files a complaint in federal district court against Nancy, the U.S. intelligence officer. He seeks damages from Nancy in her personal capacity for her alleged violations of the 5<sup>th</sup> and 8<sup>th</sup> amendments. She asserts official immunity as a defense. She argues that while the U.S. Supreme Court held some 20 years ago that deliberate withholding of health care in a prison is a violation of the 8<sup>th</sup> amendment, there is no case that holds that negligent withholding of health care in prison constitutes cruel and unusual punishment. Moreover, she argues that although 36 hour interrogations without sleep or food have been held to be unconstitutional, no standard has been established for conducting interrogations in prison during time of war. Rule on Nancy’s official immunity defense, giving reasons for your ruling.

## APPENDIX

### 28 USCS § 1331 (2004)

#### § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

### 28 USCS § 1332 (2004)

#### § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between--

- (1) Citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$ 75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

- (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and
- (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or

incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

*28 USCS § 1367 (2004)*

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under *Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure*, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.



28 USCS § 1441 (2004)

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [28 USCS § § 1441 et seq.], the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 USCS § 1446 (2004)

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to *Rule 11 of the Federal Rules of Civil Procedure* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be

ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

### *28 USCS § 1447 (2004)*

#### § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ or certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.