

PART ONE

DIRECTED ESSAYS

SUGGESTED TIME: TWO AND ONE-HALF HOURS (150 MINUTES)

PERCENTAGE OF EXAM POINTS: 85%

Question 1 is based on the following fact pattern:

As we discussed in class, the recent U.S. Supreme Court case of *Boumediene v. Bush* was determined primarily on the narrow question of whether our Constitution applies to foreigners imprisoned at Guantanamo Bay, Cuba. The *Boumediene* Court addressed the question of whether, following decisions in the *Hamdi* and *Hamdan* cases, individuals at Guantanamo defined as "enemy combatants" were entitled to habeas corpus review.

Shortly after 9/11, Congress passed the "Authorization for Use of Military Force" (AUMF), authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons who planned, authorized, committed, or aided" the September 11, 2001 terrorist attacks, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.

In *Hamdi*, the Supreme Court recognized that detainees who fought against the United States in Afghanistan were subject to the "necessary and appropriate force" Congress had authorized the President to use under the AUMF, but were entitled to a hearing on their status as enemy combatants. In response to this decision, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were "enemy combatants." The Executive Branch maintained that the CSRTs satisfied the due process requirements identified in *Hamdi*.

Pursuant to the AUMF, the Department of Defense ordered the detention of Lakhda Boumediene and other prisoners, who were transferred to Guantanamo. All were foreign nationals, but none was a citizen of a nation at war with the United States, and all denied membership in al Qaeda. Each appeared before a separate CSRT. After all had been determined to be enemy combatants, the prisoners sought writs of habeas corpus in the United States District Court for the District of Columbia.

While the *Boumediene* cases were pending, Congress passed the Detainee Treatment Act (DTA), which provided that "no court,

justice, or judge shall have jurisdiction to hear or consider ... an application for a writ of habeas corpus filed by or on behalf of an alien detained" at Guantanamo Bay. The DTA gave the Court of Appeals for the District of Columbia Circuit "exclusive" jurisdiction to review decisions of the CSRTs.

When the *Hamdan* Court determined that the DTA did not apply to pending cases, Congress passed the Military Commissions Act (MCA), which expressly applied the DTA to pending cases, and stripped the federal courts of jurisdiction to hear habeas corpus petitions.

In *Boumediene*, the Executive Branch argued that federal courts lacked the jurisdiction to consider petitioners' habeas corpus applications. Central to this argument was the position that the Constitution does not apply to non-citizens held at Guantanamo because, although the United States admittedly has maintained complete and uninterrupted control over Guantanamo for more than 100 years, Guantanamo is the essential equivalent of foreign soil, detached from the sovereign control of the United States.

The *Boumediene* Court acknowledged that the Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, but, citing *Marbury v. Madison*, asserted that "[t]he [Executive Branch's] formal sovereignty-based test raises troubling separation-of-powers concerns" when it is employed to "contract[] away" our "basic charter."

Question 1

1. From what you know about *Marbury v. Madison*, in the space provided below please briefly support the Supreme Court's position.

Questions 2 through 4 are based on the following fact pattern:

Hugo Zacchini is an entertainer who performs a "human cannonball" act, in which he is shot from a cannon into a net 200 feet away. In August and September 1972, Zacchini was engaged to perform at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 31, a reporter for a Scripps-Howard Broadcasting Co. television station attended the fair with a small movie camera. Zacchini noticed the reporter and asked him not to film the performance, but the reporter videotaped the entire act. Approximately 15 seconds of the film clip was shown on the 11 o'clock news program that night, together with favorable commentary.

Zacchini brought a tort action against Scripps for damages, alleging that he is "engaged in the entertainment business," that the act he performs is one "invented by his father and . . . performed only by his family for the last fifty years," that Scripps "showed and commercialized the film of his act without his consent," and that such conduct was an "unlawful appropriation of plaintiff's professional property." Scripps answered and moved for summary judgment, which was granted by the trial court.

The Court of Appeals of Ohio reversed, holding that Zacchini's complaint asserted state-ground causes of action for conversion and for infringement of a common-law copyright. Another judge concurred on the ground that the complaint stated a cause of action for appropriation of petitioner's "right of publicity" in the filming of his act.

The Supreme Court of Ohio considered Zacchini's cause of action under state law on his "right to the publicity value of his performance." The opinion declared: (1) that, under Ohio law, one may not use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one; and (2) also under Ohio law, Scripps would be liable for the appropriation over Zacchini's objection and, in the absence of license or privilege, of Zacchini's right to the publicity value of his performance. The court nevertheless found against Zacchini:

A TV station has a constitutional privilege to report in its newscasts matters of legitimate public interest

which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.

The Ohio Supreme Court cited no Ohio case, statute, or state constitutional provision for its dismissal of the case. It did, however, cite two United States Supreme Court cases for support. Zacchini petitioned for certiorari to the United States Supreme Court. Enough justices believe that the Ohio Supreme Court was incorrect in interpreting the two U.S. Supreme Court cases to grant certiorari; that is, they believe that no substantive constitutional privilege applies in these circumstances.

Scripps's opposition to the petition for certiorari argues, however, that the U.S. Supreme Court does not have jurisdiction to take the appeal from the Ohio Supreme Court, and that its decision to do so violates fundamental principles of federalism.

2. Under what abstention/justiciability ground does Scripps advance its argument?

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3. Is Scripps correct that the U.S. Supreme Court should not hear Zacchini's appeal? (Circle only one.)

YES

NO

Question 4 is on the next page.

4. In the space provided below, please state your reasoning for the prior answer.

Questions 5 through 7 are based on the following fact pattern:

Following the terrorist attacks of September 11, 2001, the United States led a military invasion of Afghanistan and, later, Iraq. To support its military mission, the United States Army awarded Halliburton, Kellogg, Brown & Root, Inc. (KBR) a contract under the authority of its "Logistics Civil Augmentation Program" (LOGCAP) to provide logistical support services to the military forces operating in Iraq.

LOGCAP authorizes the Army to employ "civilian contractors to perform selected services in wartime to augment Army forces." LOGCAP contracts allow the Army to "achieve the maximum combat potential ... by capitalizing on the civilian sector" Army Regulations provide that contractors employed pursuant to LOGCAP are not under the direct supervision of the military, but also establish that the military must assess the risk of any mission and determine whether contractor support is suitable in certain situations and locations. This assessment must consider "the safety of contractor personnel."

The Army Field Manual makes clear that the military is responsible for providing adequate force protection and a safe workplace for contractors and their employees who are performing support services overseas. The provisions of the LOGCAP contract and the relevant implementing Task Orders make the

responsibility of the military explicit to provide security-related intelligence gathering and force protection for KBR convoys in Iraq.

To fulfill its obligations under the LOGCAP contract, KBR recruited civilian truck drivers in the United States to work in Iraq. KBR recruitment materials portrayed the work that the employees would be performing as rebuilding, and told recruits that they would not be sent to work in a "war zone or combat area." KBR assured recruits that "[f]ull 24 hour a day U.S. military protection will be in place to insure safety. With new heightened security you'll be 100% safe." In addition, KBR circulated a memorandum to its employees asserting that while their work would be performed in a "hostile environment ... [t]his does not mean your safety will be compromised."

KBR employees allege that KBR's promises of a safe work environment were proven false in April 2004, when a number of KBR convoys transporting fuel came under attack by Iraqi insurgents. The attacks resulted in the injury and death of several KBR truck drivers. KBR employees allege that KBR authorized these convoys even though it was aware that the routes they would travel were subject to a very high risk of insurgent attack.

KBR employees also allege that KBR misrepresented its ability to halt work if conditions in Iraq posed a threat to employee safety. KBR literature to employees assured employees that "[e]ach of you has ... authority to stop any activity which you believe to be unsafe." However, KBR employees allege that KBR failed to halt its convoys even though it knew conditions were unsafe in April 2004 or failed to inform its employees that conditions were unsafe, preventing them from opting not to participate in the convoys.

KBR employees and their legal representatives filed a number of complaints against KBR in several federal courts. According to a complaint filed in federal court, KBR bears responsibility for their injuries under various theories of state and federal law. The state-law claims break down into two general categories. The first are fraud-based claims, including fraud and deceit, fraud in the inducement, intentional concealment of material facts, intentional misrepresentation, and civil conspiracy to commit fraud. The essence of these claims is that KBR utilized intentionally misleading and false advertisements and recruiting materials to induce employees to accept employment with KBR and

relocate to Iraq. As a result of their reliance on these statements, the plaintiffs allege that they suffered damages.

The second set of state law claims allege that KBR's actions constituted intentional infliction of emotional distress under Texas law. In addition, they assert claims for negligence and gross negligence, as well as wrongful death.

In addition to their state law claims, some plaintiffs allege federal civil rights violations under 42 U.S.C. § 1983 and violations, along with conspiracy to commit violations, of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c)-(d).

These cases have been consolidated. Each of the plaintiffs in each of the cases was employed by KBR (or is a proper legal representative of such an employee), performed jobs in Iraq while employed by KBR, and alleges to have been injured while in Iraq working for KBR on its LOGCAP contract with the U.S. Army.

5. KBR desires to defend the action in part by claiming that the case is non-justiciable. What justiciability argument should it raise?
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Question 6 is on the next page.

Question 6

6. Please state as many of the four (4) standards as you can that a federal court will apply in considering this justiciability argument.

A. _____

B. _____

C. _____

D. _____

7. In the space provided below, please apply these standards and state whether the action against KBR is or is not justiciable in a federal court.

Questions 8 through 19 are based on the following fact pattern:

The Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties. Its declared mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." FAIR members have adopted policies expressing their opposition to discrimination based on, among other factors, sexual orientation. They would like to restrict military recruiting on their campuses because they object to Congress' policy with respect to homosexuals in the military.

When law schools began restricting the access of military recruiters to their students because of their disagreement with the Government's policy on homosexuals in the military, Congress responded by enacting the Solomon Amendment. The Solomon Amendment requires the Department of Defense to refrain from paying certain federal funds to an entire academic institution when any one part of it denies military recruiters access equal to that provided to other recruiters. The statute provides an exception for an institution with "a longstanding policy of pacifism based on historical religious affiliation." In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access. In essence, therefore, the Solomon Amendment forces institutions to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding.

FAIR sued and sought to enjoin the Department of Defense's denial of federal funds, alleging that the Solomon Amendment infringed their First Amendment freedoms of speech and association. In its freedom of expression infringement claim, FAIR alleges, among other things, that since on-campus recruitment requires cooperation with the recruiters to some extent (distributing e-mails, flyers, and the like, and announcing room assignments, etc.), the law schools are being compelled to speak the government's message. None of the law schools and faculty members who were members of FAIR was listed as an individual plaintiff; FAIR was the sole plaintiff.

Question 8 is on the next page.

8. What justiciability issue that we studied this semester might the Department of Defense raise in attempting to get the case dismissed?

9. In the space provided below, please state whether the Department of Defense will prevail in its claim that the case should be dismissed on justiciability grounds, and the reasons supporting your conclusion.

10. Assume for this question that the case is not dismissed on the justiciability ground mentioned above. As part of its suit, FAIR asserts that Congress lacked the power to enact the Solomon Amendment (which denies federal funds to schools not allowing adequate military recruitment). If the Department of Defense prevails in its contention that Congress possessed adequate constitutional authority to enact the Solomon Amendment, what will that constitutional authority be?

Question 11 is on the next page.

11. There are five requirements that apply to the Congress's power to condition the grant of funds on standards it imposes as in the fact pattern pertaining to these cases. State as many as you can.

A. _____

B. _____

C. _____

D. _____

E. _____

Question 12 is on the next page.

12. In the space provided below, please make your best argument that those requirements have been satisfied.

13. Assume for this question and the next question that announcing room assignments for military recruitment events, sending emails advertising the events, posting notices of the events, distributing literature on behalf of military recruiters, etc. is considered to be speech under the First Amendment. Is such speech content-based or content-neutral? (Circle only one.)

CONTENT-BASED

CONTENT-NEUTRAL

Question 14 is on the next page.

14. Please explain your reasoning in choosing your answer in the prior question.

15. Based upon your answer to the prior question, what would be the standard of review a court would apply in on the case?

16. Normally, cases involving the free speech clause have factual bases in which the government *prevents* people from speaking or expressing themselves as they desire. Here, FAIR seems to be arguing that Congress has *compelled* its members to speak when they would rather keep silent or, at minimum, that Congress has *compelled* its members to host or accommodate government speech. Is it possible to support a First Argument argument under these circumstances? (Circle only one.)

YES

NO

19. Please explain the rationale of your prior answer.

Questions 20 through 31 are based on the following fact pattern:

We suggest that you peruse all the questions following this fact pattern before answering any of them because the manner in which you answer one may affect your subsequent answers.

Like most other states, the Commonwealth of Kentucky taxes residents' incomes. Tax is assessed on net income, which excludes interest on any state or local bond. Therefore, interest on bonds issued by Kentucky and its governmental subdivisions is entirely exempt from taxation for Kentucky residents, whereas interest on state or municipal bonds of other states and their political subdivisions is taxable. Interest on bonds issued by private companies is taxable, regardless of the company's location.

The stated reason for the exemption is the attractiveness of tax-exempt bonds at lower rates of interest than that paid on taxable bonds of comparable risk. In short, Kentucky's tax benefit makes lower interest rates attractive to in-state residents who will benefit from the tax exemption. Thus, limiting the exception to bonds issued by Kentucky and its subdivisions raises in-state demand. Between 1996 and 2002, Kentucky and its subdivisions raised \$7.7 billion in long-term

bonds to pay for spending on transportation and public safety, utilities and environmental protection.

Bob and Sheila Farrell are Kentucky residents who paid state income tax on interest from out-of-state municipal bonds, then sued the Commonwealth of Kentucky, claiming that Kentucky's differential taxation of municipal bond income impermissibly discriminates against interstate commerce.

20. Kentucky would like the Court to dismiss the case without reaching its substantive issues. What is the state's best argument?

21. What factors will the Court consider in deciding the motion to dismiss?

Question 22 is on the next page.

22. Please state the likely result and explain your reasoning

For remaining questions based on this fact pattern, please assume that the motion to dismiss was denied (even if you have determined that it should be allowed).

23. Now, considering the merits of the case, what is the Farrell's best issue that the Kentucky tax policy violates the United States Constitution?

24. Under the issue identified above, please state the standard of review that a court is likely to employ in considering the Kentucky scheme.

Question 25 is on the next page.

25. In the space provided below, please state whether the Farrells will prevail in overturning the Kentucky scheme, and the reasons supporting your conclusion.

For the remaining questions based on this fact pattern, please assume that the Farrells are African-American, and that they have produced indisputable proof that, in effect, Kentucky's stated tax policy disfavors black residents of the Commonwealth. They have also alleged a cause of action alleging a violation of the equal protection clause.

26. Please list the three categories or classifications must one consider when applying the equal protection clause?

1. _____
2. _____
3. _____

Question 27 is on the next page.

27. Please state the standard of review for each of the classifications you listed in you answer to the prior question.

1.

2.

3.

28. Which one of those categories/classifications *customarily* applies to a classification based on race?

29. Who customarily has the burden of proof in a case involving a racial classification? (Circle only one.)

THE GOVERNMENT

THE PLAINTIFF

30. Will the "customary" classification you identified in your prior answer apply in this case?

YES

NO

31. Please fully explain why or why not.

Questions 32 through 37 are based on the following fact pattern:

In *Stenberg v. Carhart*, the United States Supreme Court invalidated a Nebraska law prohibiting so-called late-term abortion, primarily because it did not contain an exception for the health of the mother.

A partial-birth abortion is a procedure, usually performed late in the second trimester, in which the size of the fetus' head is deliberately reduced so that the doctor can deliver the fetus intact, or largely intact. In 2003, Congress passed the Partial-Birth Abortion Ban Act (the Act), based on Congressional findings that

 a moral, medical and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy.

The Act provides, in relevant part, that "any physician who in or affecting interstate commerce, knowingly performs a partial birth abortion and thereby kills the fetus shall be fined or imprisoned not more than 2 years, or both."

The American College of Obstetricians and Gynecologists (ACOG) has found that intact "D&E" offers significant safety advantages for women with certain medical conditions, such as bleeding disorders, heart disease or compromised immune systems, any of which may pose a severe health risk to the mother during the later stages of pregnancy. ACOG has also found that intact D&E may be necessary to protect the life of the mother if the fetus has certain abnormalities, such as hydrocephalus (water on the brain).

Ida Wanna had what she and her doctor considered a healthy pregnancy. Ida had had two normal pregnancies and was excited about having another child. During the second trimester, however, the doctor discovered from a routine ultrasound that the fetus' head was disproportionately large. He diagnosed hydrocephalus, and informed Ida that her child, even if born alive, would die within a few days because the excessive amount of of pressure from the water in the brain would crush the brain. Because of Ida's small stature, the doctor also believed that carrying the pregnancy to term might present serious health risks for her. The doctor fears, however, that performing a partial-birth abortion at this time may violate the Act, because Ida's health has not yet been compromised by the fetus' abnormality, and will not be until the birthing process begins. Ida is afraid and told her doctor that she wants to terminate the pregnancy as safely as possible.

The doctor sues on behalf of Ida, claiming that the Act is unconstitutional.

32. What are the three requirements for constitutional standing?

1. _____
2. _____
3. _____

Question 33 is on the next page.

33. In the space provided below, please state whether the DOJ will prevail on a claim that the case should be dismissed for lack of standing, and the reasons supporting your conclusion.

For remaining questions based on this fact pattern, please assume that the motion to dismiss was denied (even if you have determined that it should be allowed).

34. Does the case involve what the U.S. Supreme Court has determined to be a fundamental right? (Circle only one.)

YES

NO

Question 35 is on the next page.

35. In the space provided below, please fully explain why this action does or does not involve a fundamental right, and, if it does involve a fundamental right, whether that right is express or implied, and, if implied, how it was derived.

36. What standard of review should the Court apply in evaluating whether the Act violates Ida's constitutional rights?

37. What is the customary standard of review in regard to fundamental rights?

Questions 38 through 42 are based on the following fact pattern:

Walter Disney was a longshoreman who works the docks in California, loading and unloading military cargo. He leased a house in Coronado, which he shared with fellow longshoreman Tim Brown and his wife, Stephanie. All three individuals had total access to the house and the garage, and the Browns were permitted to, and did store personal belongings in the garage. One day, while attempting to clean out the garage, Stephanie tried to move some cartons stored along the back wall. When one box was too heavy to lift, she opened it, and found what looked like ammunition inside. She called the police who opened the remaining boxes and discovered small-arms ammunition, explosives and pyrotechnics. The police notified the ordnance officer from the nearby Navy base, and it was determined that the ammunition was the property of the United States government.

Walter was arrested and charged with violating a federal statute that makes it a crime to

receive, possess, transport, ship, conceal, store, barter, sell, dispose of or pledge to accept for security for a loan, any explosive materials which are moving, or which have been shipped or transported in interstate or foreign commerce, either before or after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen.

Prior to trial, Walter brought a motion to have the charges dismissed on the ground that the federal government lacked the authority to charge him under the federal statute.

- 38.** What issue that we studied this semester should Walter raise in claiming that the federal government lacked authority to prosecute him?
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Question 39 is on the next page.

39. What three factors will the court consider in making its decision?

A. _____

B. _____

C. _____

40. In the space provided below, please make your best argument that the federal government did lack authority to prosecute Walter under the federal statute, and that his case should be dismissed.

41. In the space provided below, please make your best argument that the federal government had proper authority to prosecute Walter under the federal statute, and that his case should not be dismissed.

Question 42 is on the next page.

42. As early as *Marbury v. Madison*, the so-called "necessary and proper clause" of the Constitution became an area of focus at the Supreme Court, and over the years it has arisen in several contexts. In the space provided below, please explain the necessary and proper clause and discuss how it might apply in this situation.

Questions 43 through 45 are based on the following fact pattern:

Pursuant to its franchise agreement with the municipal government of Akron, Ohio, Time Warner Cable Northeast (Time Warner) is obligated to provide at least one community service channel, also known as a "public access channel," that is available to broadcast programming submitted by members of the community. In the agreement, Time Warner reserved the right to promulgate rules and regulations for the channel; but before new rules can become effective, they are "subject to approval of the Akron Public Utilities Commissioner, whose approval shall not be unreasonably withheld." From the agreement's inception in 1983 until 2004, Time Warner did not charge a fee when members of the public submitted tapes to be broadcast on the public access channel, nor did the cable company pre-screen the tapes before airing them.

In December 2004, Time Warner proposed new regulations for the public access channel. Most notably, an administration fee of \$25 per program would apply to each tape submitted for broadcast

and only residents of Akron and surrounding communities would be allowed to submit programs. Pursuant to the franchise agreement, Time Warner submitted the rule changes to the city. Since the city did not have an acting Public Utilities Commissioner, Mayor Don Plusquellic approved the new regulations on behalf of the city.

Rose Wilcher is a resident of Akron, who has been producing a substantial amount of programming for Time Warner's public access channel since March 2000. As of early 2005, Wilcher had reserved approximately 20 hours per week of broadcasting time on the Akron public access channel. Wilcher has filed a complaint against Time Warner, the City of Akron, and the mayor in the Federal District Court, asserting that the \$25 fee violates her First Amendment rights of expression.

- 43.** Time Warner would like to seek to dismiss the case on summary judgment without reaching the merits of the constitutional claims. What issue would be Time Warner's best argument that Wilcher's case should be dismissed without reaching the merits of constitutional law?
-
-

Question 44 is on the next page.

44. List and describe the two exceptions to the doctrine you listed in your answer to prior question.

1. _____

2. _____

Question 45 is on the next page.

45. In the space provided below, please apply the two exceptions and determine whether each applies.

1.

2.

Questions 46 through 48 are based on the following fact pattern:

Under the federal Securities Exchange Act (the Act), a law enacted by Congress, any person conducting securities-related business must be associated with a registered securities association such as National Association of Securities Dealers (NASD). The Act requires all such persons to meet "standards of training, experience, competence, and such other qualification as the [Securities Exchange Commission (SEC)] finds necessary or appropriate in the public interest or for the protection of

investors." Under express authority of the Act, the SEC has, in turn, delegated to NASD the responsibility of devising a broker qualification exam to measure the competency of applicants. The delegation involves close oversight; the SEC approves all rule changes by a registered securities association such as NASD, no matter how minor. If the SEC deems it necessary, it may also amend a registered securities association's rules itself. The Exchange Act requires registered securities associations to comply with the Act, the SEC's rules, and their own rules. Failure to do so can result in severe sanctions, such as revocation of an association's registration.

The NASD administers the "Series 7 examination," a computerized multiple-choice test, as part of the comprehensive regulation of the securities industry. Electronic Data Systems ("EDS") is a private corporation, hired by NASD for technical services related to administration of the Series 7 exam. For each exam, NASD randomly draws 250 questions of varying difficulty from a larger pool; each applicant receives only a 250-question subset of the larger pool on his or her particular examination. After an applicant takes the Series 7 exam, a software program developed by EDS scores the exam, adjusting for level of difficulty, and reports the results immediately to the applicant.

Sometime before October 1, 2004, an EDS maintenance technician inadvertently switched two of the three difficulty variables for approximately 213 questions. On October 1, 2004, those 213 questions were added into NASD's pool of questions. From that point forward, tests for many applicants included at least some of the 213 affected questions. Although the answer choices for the affected questions were not disturbed, the mistaken alteration of the difficulty ratings caused some test scores to be misreported. Between October 1, 2004 and December 20, 2005, when NASD discovered the mistake, 60,500 applicants had taken the test.

On January 6, 2006, NASD issued a press release, publicly acknowledging the results for 1,882 applicants had been misreported as failing scores. All affected applicants had their results corrected and their applications approved. Some of the applicants who received incorrect Series 7 scores filed suit against NASD, and these actions became part of a nationwide consolidated class complaint asserting causes of action for common law breach of contract, negligence, and negligent misrepresentation.

46. NASD would like the complaint dismissed on summary judgment because it does not believe that the plaintiffs can maintain their common law causes of action against it. What issue that we studied this semester should OFA raise in its motion for summary judgment?

47. There are two general types of the issue you identified in your answer to the prior question, and one of those types has three permutations. In the space provided below, please explain these fully.

Question 48 is on the next page.

48. In the space provided below, please state whether NASD will prevail in its motion for summary judgment, and the reasons supporting your conclusion.

Questions 49 through 50 are based on the following fact pattern:

As part of its efforts to prevent illegal immigration, and enhance national security, in 2005 the federal Department of Homeland Security, Bureau of Customs and Border Protection (CBP), and the United States Border Patrol (Border Patrol) built a border fence between the United States and Mexico that resulted in the channeling of illegal immigrants onto the property of Stuart Wick, a citizen of the United States. According to Wick, Border Patrol agents his property to round up, arrest, and deport immigrants on an "almost daily" basis.

The federal government admits that the Border Patrol has entered onto the Wick because it "is located within the patrol responsibility of Chula Vista Station." The government contends that "illegal aliens have been transiting Wick's property as a passageway into the United States for many years." Wick, however, argues that the presence of illegal aliens on his land was relatively rare until the completion of the 1,722-foot fence in 2005. He asserts in a "geometric multiplication of Border Patrol presence and activities" on his property, and, an "almost continuous, round-the clock occupation of the subject property."

Wick maintains that, "since the completion of the fence in 2005, Border Patrol activities - including new road construction and other use of my land - have dramatically increased over the level of activity that I witnessed on the property prior to 2005."

Wick has sued the federal government, alleging that the actions of the CBP and Border Patrol constitute an uncompensated taking of its real property in violation of the 5th Amendment.

49. Please list and describe the three categories of takings that we discussed this semester:

1. _____

2. _____

3. _____

Question 50 is on the next page.

50. Please state which one applies to this action, and apply it to the fact pattern in the space provided below.

END OF PART ONE

PART TWO

ONE SHORT ESSAY QUESTION

SUGGESTED TIME: THIRTY (30) MINUTES

PERCENTAGE OF EXAM POINTS: 15%

INSTRUCTIONS FOR PART TWO:

This part consists of one (1) short essay question. Please put your answer in a blue book entitled "Part Two," and not into this examination booklet. Please limit your answer to four (4) single-spaced bluebook pages.

QUESTION

Due to the dramatic increases in gang violence and drug abuse in City, City's School Committee promulgated regulations for High School which stated in their entirety as follows:

1. Gang-related activities such as display of colors, symbols, signals, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the School Committee for expulsion."

"2. Any assembly or public expression that advocates the use of drugs or other illegal substances is prohibited. Students in violation will be suspended from school and/or recommended to the School Committee for expulsion.

Susan, a student at High School, was stopped by High School's Principal, who asked Susan to come to Principal's office. There, Principal informed Susan that the small cross tattooed on her hand was a symbol used by the Blue Knight gang and that it violated the School Committee regulation. Susan, an honor student, explained to Principal that she was not a gang member, was unaware of the tattoo being a gang symbol and had chosen the tattoo simply because she liked its design. Later, after a further meeting with Susan and her parents, Principal wrote a letter to them, advising them that Susan was suspended for 10 days and further that when she returned to school, unless the tattoo had been removed or covered, a further suspension and/or recommendation to the School Committee for expulsion would be considered.

Susan believes her constitutional rights have been violated. In no more than four (4) bluebook pages (one side is one page, one sheet has two pages), please address her rights.

END OF EXAM