Constitutional Law II

Spring 2007

May 9, 2007 9:30 - 11:30

Professor Erin Daly

You are the lead partner in the law firm, "FirstAmendmentRUs" Your fame is so great that potential clients ask you to decide far more cases than you possibly have time to do. Often, you are asked by both sides in a case to be their lawyer. You are in fact so busy that you have two briefs on the merits to submit by 11:30 today.

Today, you need to write the trial brief in TWO of the following cases, explaining how and why the first amendment applies. You may choose to represent *either side*.

Notes:

- Both briefs will be graded equally.
- Choose your questions carefully. Since, in some situations, the questions raise overlapping issues, you should try to avoid repeating yourself. Double points will not be awarded for explaining the same doctrine in both briefs.
- A good advocate will incorporate and respond to the other side's arguments.

If you are writing in a bluebook,

- Please write as neatly as possible.
- Please write on one side of the page only and do not skip lines.

Case No. 1: State v. Berdovsky and Stevens

Peter Berdovsky and Sean Stevens were arrested in February 2007 and charged under a recently enacted statute making it a crime to place a hoax device that results in panic. They are charged with creating a panic by placing electronic light boards that caused a bomb scare in locations throughout the city.

Assistant Attorney General John Grossman called the light boards "bomb-like" devices and said that if they had been explosive they could have damaged transportation infrastructure in the city.

The boards depicted a cartoon character making an obscene gesture at passing motorists. Asked by the judge to describe what the figure on the light box was doing, Grossman said, "Colloquially, he was flipping the bird, your honor."

The "devices" were actually magnetic lights which resemble a character on the show "Aqua Teen Hunger Force", on Turner Broadcasting's Cartoon Network. "Aqua Teen Hunger Force" is a cartoon that airs as part of the Adult Swim late-night block of programs for adults on the Cartoon Network.

Berdvosky was apparently working for InterferenceInc.com, which was the company hired by Cartoon Network to carry out the ad campaign.

The suspicious device reports forced the temporary shutdowns of Interstate 93 out of the city, a key inbound roadway, a bridge, and a portion of the river but were quickly determined not to be explosive.

"It's a hoax -- and it's not funny," Gov. Deval Patrick said.

The first device was found at a subway and bus station located under Interstate 93 on Wednesday morning. The device was detonated and determined to be harmless, but as a precaution the station and the interstate shut down temporarily.

Then, around 1 p.m., four calls came into the Police reporting suspicious devices at the University Bridge and the Longfellow Bridge, which both span the River, and the corner of Stuart and Columbus Streets and at the Medical Center.

Mayor Menino said the hoax cost the state and cities about \$750,000.

Similar devices had been in place for two to three weeks in 10 cities: Boston; New York; Los Angeles; Chicago; Atlanta; Seattle; Portland, Ore.; Austin, Texas; San Francisco; and Philadelphia.

Berdovsky and Sean Stevens assert their First Amendment rights in defense of the charges against them.

Case No. 2: Phelps-Roper v. Jeremiah Nixon (Attorney General of Missouri)

Shirley Phelps-Roper, a member of the Westboro Baptist Church in Topeka, Kansas, filed this lawsuit on July 21, 2006. Plaintiff alleges that the members of her church believe that homosexuality is a sin and an abomination. [Citations to record omitted]. She further alleges that church members believe that God is punishing America for the sin of homosexuality by killing Americans, including soldiers. Plaintiff states that she and other church members express their religious views through picketing and protesting. She indicates that the purpose of picketing and protesting near funerals is to use an available public platform to publish the church members' religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not. Plaintiff indicates that funerals are the only place where her religious message can be delivered in a timely and relevant manner.

Missouri recently enacted Mo. Rev. Stat. § 578.501 (2006) and Mo. Rev. Stat. § 578.502 (2006) (which, in the event 578.501 is declared unconstitutional, criminalizes picketing within 300 feet of a funeral location).

The text of § 578.501 is:

- (1) This section shall be known as "Spc. Edward Lee Myers' Law." 1
- (2) It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor.
- (3) For the purposes of this section, "funeral" means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.

Plaintiff states that these laws invade her First Amendment rights.

The statute is named after Myers, whose funeral was protested by members of plaintiff's church.

Case No. 3: Pennsylvania v. Kiser

The second annual Second Amendment Rally at the Capitol drew hundreds of people, including two who held up a banner which read "Rep. Cruz should be hung from the tree of liberty for treasonous acts against the Constitution." Rep. Angel Cruz (D., Phila.) is sponsoring legislation (House Bill 760) to require gun registration and a \$10-a-gun annual fee, the penalty for violation of which would be confiscation of their weapons.

Kiser said his sign was meant to suggest that Cruz -- and any lawmaker supporting House Bill 760 -- should be impeached. "Our state representatives take the oath of office to defend the Constitution," said Kiser. He said the sign "shouldn't upset them." Paul Estus, of Ridgway in Elk County, who held the banner with Kiser, told The Associated Press it was "just a figure of speech."

A few days later, another representative (who also supports the legislation) received an email saying that he "should be shot while in the Capitol."

Kiser, Estus, and the anonymous sender of the email have been arrested. They assert their first amendment rights in their defense.

Case No. 4: Jackson v. York County School Division

In 2001, William Jackson began teaching Spanish at Tabb High School, a public high school operated by the School Board in Yorktown, Virginia. Some time in October 2004, an employee of the School Board received a complaint from a private citizen who expressed concern over certain materials posted on the bulletin boards within Jackson's classroom. The crux of the citizen's complaint was that some of Jackson's postings were overly religious in nature.

Crispin Zuma, the Principal of Tabb High, proceeded to Jackson's classroom to discuss the matter with him. Jackson was absent from school that day, however, and Zuma examined the materials posted on the bulletin boards in his absence. In so doing, Zuma discovered certain items that, in his view, should not have been posted in a compulsory classroom setting. Specifically, he testified that he "could not find any reason why [these items] would be posted in a classroom." Zuma removed five items (collectively, the "Removed Items" or the "Items") from Jackson's bulletin boards: (1) a 2001 National Day of Prayer poster, featuring George Washington kneeling in prayer; (2) a May 15, 2004, Daily Press news article entitled "The God Gap," outlining religious and philosophical differences between President Bush and his challenger John Kerry; (3) an October 14, 2002, USA Today news article entitled "White House Staffers Gather for Bible Study," describing how then Attorney General Ashcroft led staffers in voluntary Bible study sessions; (4) a November 1, 2001, Daily Press news article, detailing the missionary activities of a former Virginia high school student, Veronica Bowers, who had been killed when her plane was shot down in South America; and (5) a June 2001 Peninsula Rescue Mission newsletter, highlighting the missionary work of Bowers.² Zuma placed the Removed Items on Jackson's desk in the teachers' lounge and left an explanatory note in Jackson's school mailbox.

In his deposition for this case, Zuma testified that neither Tabb High School nor the School Board has any written policies on what a teacher may properly post on classroom walls or bulletin boards. Zuma explained, however, that there is an applicable unwritten policy, custom, and practice for York County teachers in that regard, authorizing teachers to place materials on bulletin boards that relate to the curriculum being taught or that are of personal interest to them. For example, some teachers place famous quotes, articles on current events, and pictures of sports figures on the bulletin boards of their classrooms. Under the unwritten policy, inappropriate postings include items that violate the First Amendment, that are offensive, that use profanity, or that are otherwise unrelated to curricular objectives. In evaluating whether a particular posting is subject to removal, Zuma primarily assesses whether it is relevant to the curriculum being taught by the particular teacher.

Jackson has brought suit alleging a violation of his First Amendment rights.

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When the Removed Items were taken from Jackson's classroom, Zuma decided not to remove a posted picture of Boy Scouts praying in memory of the September 11, 2001, terrorist attacks or a picture of a United States military pilot whose helmet said "Pray for America." He left the Boy Scouts picture on the bulletin board because many of the students and their parents had been personally affected by the September 11th terrorist attacks, and he felt that the picture embodied a sensitive issue for Tabb High. Zuma left the pilot's picture out of respect for Jackson's prior military experience.