

CONSTITUTIONAL LAW

SPRING 2002

Prof. Ariens

FINAL EXAMINATION-PART II

QUESTION I (70 minutes)

In 2001, several newspapers began reporting a substantial increase in the number of publicized cases in which parents were arrested for child abuse. The specific allegation made in a number of these incidents was that parents were spanking their children with wooden rods, paddles and belts, in addition to their hands, and doing so in public view. Graphic photographs of the bruises inflicted on several children were published in a number of newspapers and magazines. A news investigative report noted that about half of the states did not criminalize the actions of parents who physically corrected their children, including through spanking, if their intent was to correct a disobedient child. About a dozen states prohibited physical correction by a parent or guardian with any object other than a parent's hand, and a few states permitted a parent charged with child abuse to claim as an affirmative defense that they were correcting a disobedient child. A group calling itself A Demand: Hands Off Children (Ad Hoc) began petitioning Congress to put an end to "abuse of our children." In response, Congress passed the Welfare to End Child Abuse Now (WE CAN) Act, a law that stated, in pertinent part: "The abuse of children by parents and guardians is a crime that affects thousands of households in the United States. It is a crime that knows no boundaries, and because it is inflicted on the most powerless segment of our society, it often goes unnoticed and unpunished. Injuries to children inflicted upon them by parents and guardians totals over \$5 billion annually in medical costs, and it is estimated that children injured by their parents miss over 6 million days of school. This is a national emergency, which demands a uniform response to solve it. Parents and guardians are first and foremost guardians of the safety of their children. They must refrain from engaging in actions that may cause physical, emotional and mental harm to their children. Physical correction is harmful to the development of the child as a whole person. Consequently, any person who inflicts physical harm not resulting in death or substantial bodily injury upon a minor child of that person violates the federal criminal law, and may be imprisoned for a term not exceeding five years, or may be fined an amount not exceeding \$10,000, or both. However, a person teaching a minor in an educational capacity who uses physical correction upon that student while the person is acting in his or her educational capacity is not subject to this law, for that person is a *de facto* guardian rather than a guardian as a matter of law."

In January 2002, David Barnstead was arrested by federal marshals for physically correcting his 12-year old son with a wooden paddle. Barnstead later told marshals, "My son had refused to do any chores for several days, and had threatened his mother. He was talking back to me and I decided he needed to be made an example of. The Lord has told us that the father has the Biblical authority to correct his children. Our church believes that physical correction may be harsh, but it is also often necessary to bring a child up in the ways of the Lord. I took my son outside, and invited some neighbors to watch as I paddled him. He apologized to me and to his mother for his actions and behavior, and things have been fine at home ever since."

Barnstead's son has told the marshals "I deserved my paddling, and I want you to let my father

out of jail." Apparently, one of the neighbors who saw the paddling tipped off the marshals of Barnstead's actions, which led to Barnstead's arrest.

Barnstead's lawyer has filed several motions claiming that the WE CAN Act is unconstitutional. You are the judicial clerk to the federal district judge assigned to try this case. The judge has asked you to discuss all constitutional issues raised by the WE CAN Act and by the facts.

QUESTION II (35 minutes)

"The constitutional crisis of 1937 was a turning point in constitutional adjudication, but not for the reasons generally stated by Court commentators. The lesson learned by the Supreme Court had little or nothing to do with 'judicial activism,' and everything to do with recognizing the coming of the administrative state, a sense that the Court would have to understand that its decisions could not be made in a vacuum, but in light of the real changes occurring in American society during the Great Depression." Discuss.

QUESTION III (25 minutes)

You are working as a legislative assistant to a member of the Texas Senate. The Senator has asked you for a memorandum concerning the constitutional issue(s) related to the following proposed legislation, which states in part:

"Be it enacted: That no after-market automobile parts or accessories may be sold at any retail or wholesale establishment in the State of Texas without a minimum 12-month or 12,000 mile warranty, to be guaranteed by the manufacturer or seller of the automobile part or accessory." The sponsor of this act represents a senatorial district that encompasses the manufacturing home of After-Market Plus, Inc., a company that manufactures approximately 100 different parts and accessories sold in the automobile after-market. After-Market Plus, Inc. employs 1,000 people in the district, and generates about \$3 million in annual property tax revenues for the local school district. It is the largest employer in the area. It controls about 10% of the market for after-market parts and accessories for automobiles in its niche. It is one of two manufacturers of those particular 100 after-market parts that offers a 12-month or 12,000 mile warranty on its products. All other automobile after-market manufacturers scattered across the United States offer a 30-day warranty on parts and accessories.

QUESTION IV (20 minutes)

During May "sweeps" month, in which television stations promote sensational and sensationalized stories to gain ratings for purposes of determining advertising rates, a San Antonio television station aired a three-part series, "Selling Death." The series consisted of interviews with a man who claims to be a current "hit man," an assassin who has killed "between 15 and 20" people. To prove the hit man's credentials, the story offers his "tips" on how to kill someone efficiently without being caught.

Two months later, Frank Davila was murdered. Eventually, Davila's wife confessed to the murder, and claimed she got the idea from the "Selling Death" news reports. Davila's children have sued the television station for damages. The station claims its report was constitutionally protected, and has filed a motion to dismiss the claims.

You are the law clerk to the judge assigned to hear the motion to dismiss, and the judge has asked you to write a memorandum concerning the constitutional issue(s) involved.

END OF PART II OF THE FINAL EXAMINATION