

NEWSEUM YOU CAN'T SAY THAT IN SCHOOL?!

Name _____ Date _____

Taking Exception: Modern First Amendment Issues

Directions: Apply what you learned about exceptions to the First Amendment in schools by studying one of the modern situations below (see attached articles). Remember that the freedoms guaranteed by the First Amendment are applied differently in public and private settings, and in schools. Summarize the facts of the situation and then present your opinion about whether you believe the actions of the individual in the situation should be protected by the First Amendment. If you disagree with the court, school or law enforcement's decision, be sure to explain why you disagree.

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1 Religion

Ten Commandments Monument Can Stay on Texas Capitol Grounds

By The Associated Press

10.07.02

AUSTIN, Texas — Thou shalt not remove the Ten Commandments from the Capitol grounds.

A federal judge has ruled that a 5-foot stone slab with the biblical passage next to the state Capitol building does not violate the constitutional separation of church and state.

Thomas Van Orden, a homeless man living in Austin, had sued for its removal, calling it an endorsement of Judeo-Christian beliefs by the state government.

In a 14-page ruling filed Oct. 2, U.S. District Senior Judge Harry Lee Hudspeth rejected those claims and said no reasonable person would consider the display a religious endorsement.

The ruling was praised by the Liberty Legal Institute, which defends religious freedoms and First Amendment rights.

“There is not (a) constitutional right to censor religious history or artifacts because some citizen feels offended,” said Kelly Shackelford, the institute’s chief legal counsel. Gov. Rick Perry also applauded the ruling.

“Today’s court ruling is a victory for those who believe, as I do, that the Ten Commandments are time-tested and appropriate guidelines for living a full and moral life,” Perry said in a statement.

“The Ten Commandments provide a historical foundation for our laws and principles as a free and strong nation, under God, and should be displayed at the Texas Capitol,” the Republican said.

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The monument was donated to the state in 1961 by the Fraternal Order of Eagles for the purpose of promoting youth morality to curb juvenile delinquency. The group gave similar monuments to several states.

Hudspeth's ruling said documents show Texas accepted the monument for secular, not religious, purposes.

The monument does not bear a state seal or the Texas star that is evident on 16 other Capitol monuments, most of them memorials to the state's history.

The legislative resolution accepting the monument made no mention of religion, and there is no record that either a Christian clergyman or a Jewish rabbi participated in the dedication ceremony.

Van Orden, who said he is not religious, told the court he found the monument offensive when he passed it on his way to the state law library in the Texas Supreme Court building.

The state countered that the slab is more historical than religious, with key segments of law founded on the moral and cultural ethics provided by the commandments. The judge noted that no one else complained about it for 40 years and that Van Orden personally waited six years before filing his lawsuit, undermining his claim that it caused him harm.

"If the plaintiff has the right to request removal ... he certainly slept on that right for a long time," Hudspeth wrote.

The judge also said that because of its location — turned away from a seldom-used door and facing away from vehicle traffic — most Capitol visitors didn't even know the monument was there.

Van Orden could not immediately be reached for comment.

Will Harrell, director of the Texas American Civil Liberties Union, which was not involved in the lawsuit, said he wasn't surprised by the decision.

An order to remove the monument would have bucked recent case law, Harrell said.

"The law has developed as such that there can be religious symbols associated with non-religious ones if they have historical values," Harrell said. "We don't go about fighting lost battles."

1 Religion

Rabbi Reflects on Role in Military Religious-Freedom Case

By David L. Hudson Jr.
First Amendment scholar
01.27.05

One in a series of interviews with principals involved in First Amendment-related U.S. Supreme Court cases (see below).

It might seem odd that a head covering in the military would lead to a legal dispute that ended up in the Court of Last Resort. But that's exactly what happened when military officials infringed on the religious liberty of ordained rabbi S. Simcha Goldman in the U.S. Air Force in the early 1980s.

From 1970 to 1972, Goldman wore the yarmulke, a symbol of significance for those of the Orthodox Jewish faith, in the U.S. Navy while he serving as a chaplain. Nobody said anything about it.

In 1973, Goldman entered the Armed Forces Health Professions Scholarship Program, completing his Ph.D. in clinical psychology in 1977. After that, he entered active service as a captain at March Air Force Base in Riverside, Calif. Once again he wore his yarmulke for several years without incident. He did not attract attention or controversy in part because when outdoors he wore the yarmulke underneath his service cap.

However, in April 1981, Goldman served as a defense witness in a court-martial hearing. In that hearing, Goldman took a position adverse to that of the prosecutor. The prosecutor retaliated, according to Goldman, by complaining about the yarmulke.

"The motive of the attorney who filed the complaint (about the wearing of the yarmulke at a military trial) was certainly retaliatory," Goldman said. "I clashed with this military prosecutor in a recent court-martial as a defense witness. I showed him up in court when he tried to play with my testimony. He then filed the complaint."

The attorney complained that Goldman had violated an Air Force regulation providing

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that “headgear will not be worn ... while indoors except by armed security police in the performance of their duties.”

A colonel then ordered Goldman to stop wearing the yarmulke. After Goldman complained to the Air Force general counsel, the colonel prohibited Goldman from wearing the yarmulke even inside the hospital. The colonel also withdrew a positive recommendation that he had given Goldman with respect to continuing his term of active service.

To Goldman, removing the yarmulke was unacceptable.

“The yarmulke is an important part of what I was and am,” he says. “I had worn the yarmulke for three and a half years in the Air Force without incident. I did a good job. Wearing a yarmulke in a hospital did not interfere with the base mission of launching nuclear-armed B-52s at a moment’s notice.”

“I didn’t like how I was being treated,” Goldman recalls. “The lack of appreciation for the human side of the issue really touched a nerve with me.”

Goldman enlisted the services of experienced D.C. attorney Nathan Lewin. “I thought there was an important principle at stake about religious freedom in general and religious freedom in the military,” Lewin says.

Federal lawsuit, lower court decisions

It touched enough of a nerve that Goldman filed a federal lawsuit, contending that Air Force officials had violated his First Amendment rights under the free-exercise clause. The Air Force contended that it had strong interests in maintaining a rigid uniform requirement to maintain esprit de corps and teamwork.

A federal district court judge agreed with Goldman. In July 1981, Judge Aubrey E. Robinson granted Goldman a preliminary injunction, preventing the Air Force from enforcing its headgear regulation.

“There can be no doubt that Plaintiff’s insistence on wearing a yarmulke is motivated by his religious convictions, and is therefore entitled to First Amendment protection,” Robinson wrote. “Because of the seriousness of the First Amendment allegations, and resulting pressure on Plaintiff to abandon his religious observances, injunctive relief is appropriate.” Judge Robinson also ordered the Air Force to withdraw a letter of reprimand and negative performance evaluation given Goldman.

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After a trial in September 1981, Robinson again ruled in favor of Goldman in April 1982. Robinson noted that the military failed to show any objective studies showing that religious exemptions would erode morale in the military.

The secretary of defense and the secretary of the Air Force appealed the district court decision to the U.S. Circuit Court of Appeals for the District of Columbia. The appeals court's three-judge panel showed more deference than had Robinson to the military's arguments about uniformity, esprit de corps and teamwork.

"Although we must not abdicate our responsibility to review the constitutional challenge, we cannot lightly substitute our judgment whether a closer accommodation of religious interests would be possible given the military interests in order and obedience," the appeals court wrote in its May 1984 opinion.

The appeals court concluded that "the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible."

"I was surprised by the court of appeals' decision, particularly because we had won before the district court," Lewin recalls. He sought en banc (or full panel) review by the appeals court, but it denied such review in August 1984.

Interestingly, three judges dissented from the denial of en banc review. Those three judges were none other than future U.S. Supreme Court Justices Ruth Bader Ginsberg and Antonin Scalia, and Ken Starr, future solicitor general and U.S. independent counsel for the Whitewater investigation.

U.S. Supreme Court: *Goldman v. Weinberger*

Though he had left the military, Goldman still felt strongly about his right to wear a yarmulke in the armed services. He appealed his case to the U.S. Supreme Court, which agreed to hear it. The Court heard oral argument in *Goldman v. Weinberger* (Caspar Weinberger was named lead defendant because he was then secretary of defense) in January 1986.

During oral argument, Goldman said, "I recall the time box with the red and green lights. I am a very analytical person and I'm not sure the oral-argument process before the Court was a great process for getting at the truth." Lewin, who has argued 27 cases before the Supreme Court, recalls that several of the justices appeared hostile, including then Justice (now Chief Justice) William Rehnquist.

The Court didn't take long to issue its decision, which it did in March 1986. The result

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was a narrow 5-4 loss for Goldman. Writing the main opinion, Rehnquist emphasized that “courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”

“The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment,” Rehnquist continued.

He added that “the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations.” Chief Justice Warren Burger joined Rehnquist’s opinion.

Justice John Paul Stevens authored a concurring opinion, which was joined by Justices Byron White and Lewis Powell. Stevens appeared more sensitive to Goldman’s religious- freedom claims, writing that he presented “an especially attractive case for an exemption from the uniform regulations.” He also noted that there apparently was a “retaliatory motive” against Goldman in the case.

However, Stevens voted against Goldman, primarily because he believed that the rigid dress code served the interest of “uniform treatment for the members of all religious faiths.”

Justices William Brennan, Harry Blackmun, Sandra Day O’Connor and Thurgood Marshall dissented. All but Marshall wrote separate opinions.

Blackmun blasted the Court’s ruling for following a new standard of review that he termed “subrational-basis standard — absolute, uncritical deference to the professional judgment of military authorities.”

“I find it totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed to wear yarmulkes with their uniforms,” Brennan wrote.

In his conclusion, Brennan said the decision was devastating for “patriotic Orthodox Jews.” He wrote that “we must hope that Congress will correct this wrong.”

Congress did “correct the wrong” by enacting a provision in 1987 called in some circles the Religious Apparel Amendment. Lewin helped draft the language of the bill that

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Congress eventually adopted. The federal law, 10 U.S.C. § 774, provides for a general rule that “a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force.”

Significance of Court’s decision

Legal experts see the *Goldman v. Weinberger* decision primarily as a case standing for the general principle that First Amendment rights are circumscribed in the military. “When you put this case together with *O’Lone* (*O’Lone v. Shabazz*, a 1987 case about religious freedom in prison), you see that free expression is tempered in certain contexts,” said Robert O’Neil, founder of the Virginia-based Thomas Jefferson Center for the Protection of Free Expression. “It reflects something that I find in the Native American cases — a reluctance on the Court’s part to give credibility to non-Christian faiths.”

O’Neil said that despite the statute passed by Congress overruling the decision, the spirit of the *Goldman* decision, characterized by deference to the military, lives on. “My sense is that broad deference to the military is alive and well and would be so even without the heightened sense of awareness as a result of Afghanistan and the war in Iraq,” says O’Neil.

Lewin sees the case as granting “extreme deference” to the military.

Recollections

For his part, S. Simcha Goldman has had and continues to have a successful and fulfilling career and life. After leaving the Air Force shortly after filing his lawsuit, he continued to practice psychology. He ran a residential drug-treatment program for 11 years.

He currently works for a nonprofit comprehensive mental health agency and has a small private practice that focuses on marital and relationship counseling. Proudly, he says he’s “collecting grandchildren,” with “ten so far.”

Goldman does not regret his decision to go to court against the Air Force. “The experience itself and the impact it had on my family and me were very meaningful in my life.”

“First Amendment rights are very important,” he says. “Although people share much in common, they also differ significantly. At times, it can be a challenge to maintain a democracy without creating a ‘tyranny of the majority’ or of the minority. If our society isn’t constantly vigilant in clearly defining our constitutional freedoms as questions

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and challenges are raised, the goals of 'life, liberty and the pursuit of happiness' for all of our citizens I believe will be ultimately endangered."

Goldman adds: "I think that America is still coming to grips with how to have a rule of law and realize cultural and religious diversity."

Goldman should be remembered for his devotion to his religious faith and his commitment to waging a First Amendment battle all the way to the Supreme Court. His battle eventually led to a federal law that provided more protection for religious liberty for those in the armed services.

"On the one hand I was happy that Congress recognized (that) the minority religious need reasonable accommodation even by the Armed Forces," Goldman said. "On the other hand, I was still disappointed because since it was a statutory, rather than a constitutional right, the statute could be changed, if Congress wished."

2

Speech

Activist Sheehan Arrested in House Gallery GOP congressman says his wife was also ordered to leave

WASHINGTON (CNN) -- Peace activist Cindy Sheehan was arrested Tuesday in the House gallery after refusing to cover up a T-shirt bearing an anti-war slogan before President Bush's State of the Union address.

According to a blog post on Michael Moore's Web site attributed to Sheehan, the T-shirt said, "2,245 Dead. How many more?" -- a reference to the number of U.S. troops killed in Iraq.

"She was asked to cover it up. She did not," said Sgt. Kimberly Schneider, U.S. Capitol Police spokeswoman.

House rules bar demonstrations in the galleries.

On Wednesday, U.S. Rep. Bill Young, R-Florida, spoke on the House floor saying his wife, Beverly, had been "ordered to leave" the gallery during the speech for wearing a shirt that said, "Support Our Troops."

Young, an 18-term congressman, held up his wife's shirt during his remarks, speaking with anger and emotion about her treatment.

"She has a real passion for our troops, and she shows it in many, many ways," Young said.

"And most members in this House know that, but because she had on a shirt, that someone didn't like, that said, 'Support Our Troops,' she was kicked out of this gallery while the president was speaking and encouraging Americans to support our troops. Shame. Shame."

Sheehan held 4 hours

Sheehan was arrested around 8:30 p.m. ET Tuesday on charges of unlawful conduct, a misdemeanor that carries a maximum penalty of a year in jail, Capitol Police said.

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She was handcuffed and held in the Capitol building until she was driven to the Capitol Police headquarters for booking. According to her blog, she was released about four hours after her arrest.

Sheehan, who became a vocal war opponent after her son was killed in Iraq, was an invited guest of Rep. Lynn Woolsey, D-California. Woolsey has called for a withdrawal of troops in Iraq and supports legislation for the creation of a Department of Peace.

Sheehan gained national attention in August when she and hundreds of other protesters camped outside Bush's ranch in Crawford, Texas, and demanded an audience with the president.

She also recently penned a book, "Not One More Mother's Child."

In April 2004, Sheehan and other relatives of troops killed in Iraq met with Bush during a visit to Fort Lewis, Washington, shortly after the death of her son, Army Spc. Casey Sheehan, 24.

Sheehan later said that the president wouldn't look at pictures of her son and "didn't even know Casey's name."

The Vacaville, California, resident has said she'd like to meet with Bush again to discuss her opposition to the war.

The president has declined another meeting and has taken issue with Sheehan's calls for a withdrawal of troops from Iraq.

"She expressed her opinion; I disagree with it," Bush said in August. "I think immediate withdrawal from Iraq would be a mistake."

CNN.com's Elliott C. McLaughlin contributed to this report.

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2 Speech

Teen Sues Over Confederate Flag Prom Dress

By The Associated Press
12.21.04



LEXINGTON, Ky. — A teenager is suing her eastern Kentucky school district for barring her from the prom for wearing a red dress styled as a Confederate flag.

School officials called Jacqueline Duty's homemade dress too controversial and kept her out of Russell High School's May 1 prom.

Duty's federal lawsuit claims the Russell Independent Board of Education violated her First Amendment right to free speech and her right to celebrate her heritage. She also is suing for defamation, false imprisonment and assault.

"Her only dance for her senior prom was on the sidewalk to a song playing on the radio," said her lawyer, Earl-Ray Neal.

At a news conference in front of the federal courthouse in Lexington yesterday, Duty acknowledged that some might find the Confederate flag offensive.

"Everyone has their own opinion. But that's not mine. I'm proud of where I came from and my background," said the 19-year-old who is now attending Shawnee State University in Ohio.

She also showed the sequined prom dress.

"I wanted to show part of my Southern heritage," she said, adding that she had worked on the dress' design for four years.

Kirk Lyons, one of her lawyers, said Duty waited several months to file the lawsuit

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because much of the legal work is being done for free. The Sons of Confederate Veterans also promised to help pay for some of the legal expenses.

Duty says she was told not to wear the dress by school officials shortly before the prom, and was turned away outside the prom when she asked administrators if they would change their minds.

The lawsuit says that after the prom, school officials made students wearing Confederate symbols change or remove the items even though the symbols were not creating any disruption in the predominantly white high school.

Officials from the Russell Independent Board of Education and Superintendent Ronnie Back did not return phone calls seeking comment for this article.

Federal court opinions on the display of the Confederate flag on clothing at public schools have been mixed.

In 2002, the 6th U.S. Circuit Court of Appeals overturned a case involving another Kentucky student.

In 1997, Timothy Castorina was suspended for wearing a T-shirt with a Confederate flag on it to Madison Central High School. He sued, but a federal judge ruled that T-shirts were not a form of free speech, and tossed out the case. However, the 6th Circuit overturned the decision and ordered a new trial.

The case was settled before the second trial began. As part of the settlement, Madison County revamped its dress-code policy.

The U.S. Supreme Court has not heard a case over whether a student can wear Confederate symbols to school.

White House Approves Pass for Blogger

The New York Times
March 7, 2005
By Katharine Q. Seelye

Another signal moment for bloggers is to occur this morning, when Garrett M. Graff, who writes a blog about the news media in Washington, is to be ushered into the White House briefing room to attend the daily press “gaggle.”

Mr. Graff, 23, may be the first blogger in the short history of the medium to be granted a daily White House pass for the specific purpose of writing a blog, or Web log. A White House spokesman said yesterday that he believed Mr. Graff was the first blogger to be given credentials.

He is being given a press pass as the editor of FishbowlDC (www.mediabistro.com/fishbowlDC), a blog that is published by Mediabistro.com, which offers networking and services for journalists.

Increasingly, bloggers are penetrating the preserves of the mainstream news media. They have secured seats on campaign planes, at political conventions and in presidential debates, and have become a driving force in news events themselves.

Mr. Graff said he was inspired to try to seek access to the White House by the controversy over James D. Guckert, who used the alias Jeff Gannon. Mr. Guckert was granted daily passes to White House briefings while writing for a Web site run by a Republican operative in Texas. The episode raised questions about who was a legitimate journalist and how access to the White House was granted.

White House press officials and others said it was relatively easy to get a day pass, prompting Mr. Graff to test that premise. He set about trying to get one and chronicled his attempt on his blog.

He made 20 phone calls and got nowhere. Bigger blogs picked up on his saga, and traffic on FishbowlDC increased tenfold, he said. But it was not until the traditional media joined in, Mr. Graff said, that the White House relented.

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“USA Today started making calls on Thursday. CNN mentioned it on ‘Inside Politics,’ and Ron Hutcheson, president of the White House Correspondents Association, raised the issue with the White House Press Office,” he said. “I think a combination of all of that made the White House pay attention and decide to let me in.”

Scott McClellan, the White House press secretary, said he had met with the White House Correspondents Association and they had decided to let Mr. Graff in. “It is the press corps’ briefing room and if there are any new lines to be drawn, it should be done by their association,” he said.

Mr. Graff said he was surprised at the help he received from “real” reporters covering the White House, given what he described as the animosity between some bloggers and the mainstream news media.

Mr. Graff is something of a bridge between those two worlds. Although he is a blogger, he has old-media genes: his father, Christopher Graff, is the chief correspondent in Vermont for The Associated Press; and his grandfather, Bert McCord, was the drama critic for The New York Herald Tribune.

Mr. Graff himself was executive editor of The Harvard Crimson. He said he became a blogger because “it’s the newest trend in journalism.”

In any case, Jay Rosen, a journalism professor at New York University and specialist in blogging, said Mr. Graff’s odyssey was significant for two reasons. First, he showed that it was harder to get a pass than the White House said it was after the Guckert case. Secondly, he said, Mr. Graff was expanding the definition of what constitutes the press, just as radio and television once pushed those boundaries.

3 Press

Apple Rumor Site to Shut Down in Settlement

The New York Times
December 21, 2007
By Brad Stone



SAN FRANCISCO — Apple on Thursday put to rest the last of a series of lawsuits it brought in a losing and costly effort to put a stop to Web leaks about its product plans.

The suits raised questions about whether independent Web publishers should be accorded the same legal protections as traditional journalists. They were aimed at the gaggle of Apple enthusiasts who have made both a sport and a business out of pre-empting Steven P. Jobs's big product announcements.

Nicholas M. Ciarelli, who operated a Web site for Apple rumors called Think Secret, was sued by Apple for publishing trade secrets in January 2005. In a brief statement Thursday on his site, Mr. Ciarelli said that he had reached a settlement with Apple and that he would stop publishing Think Secret.

Mr. Ciarelli, a senior at Harvard, would not comment on whether Apple had given him money to persuade him to cease publishing. But he said he was pleased with the outcome of the negotiations.

"We've been able to reach a positive solution," he said in a telephone interview. Mr. Ciarelli filed a countermotion against Apple in March 2005 under a California provision that makes litigants vulnerable to financial damages if they sue over what is determined to be constitutionally protected speech. Mr. Ciarelli's lawyer, Terry Gross, who represented him pro bono, said the motion could have resulted in a financially damaging and embarrassing ruling against Apple, a risk that he said led to this week's settlement.

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Mr. Ciarelli, a social studies major, also writes and edits for The Harvard Crimson, the student newspaper. He was a freshman when Apple sued him and the publishers of two other sites over leaks about unreleased products.

Apple lost the two other suits on appeal after a higher court ruled that the Web site operators were journalists and entitled to First Amendment protections. The court forced Apple to pay \$700,000 in legal fees to the sites.

Mr. Ciarelli said his agreement with Apple constituted a clear statement about the rights of online journalists: "Speaking more broadly, I think online journalists can feel confident that they can assert their First Amendment rights, even when they run up against large corporations."

However, some free speech advocates warned that the site's closing could be viewed as a partial victory for a large company that tried to squelch an independent voice.

"It's great for the individual critic to be paid to be quiet, but the public is worse off if we lose the ability to get more information in the marketplace of ideas," said Paul Alan Levy, a lawyer with the Public Citizen Litigation Group in Washington.

Despite Apple's attempts to use the courts to silence the ecosystem of sites that try to ferret out information about its products before Mr. Jobs unveils them on stage, the Apple rumor mill has continued to thrive.

None of Mr. Ciarelli's sources were revealed as part of the settlement, said Steve Dowling, an Apple spokesman. He called the settlement "amicable" but noted that the details of the agreement were confidential.