

COM 440/POLS 461 Assignment 1: Answer Key

This assignment, worth 10 percent of your course grade, reviews material discussed in Lessons One and Two, the first two forums, and chapters 1-3 in the textbook. Please compare the model answers below with your answers and let me know if you have any questions. For your reference, I've also provided the case problem and instructions. I'm using this grading scale for all assignments this quarter:

<http://faculty.washington.edu/scstrroup/Gradescale.html>.

Assignment 1: The first step is to read the facts of the case problem carefully and e-mail me if you have any questions. The next step is to identify the correct area (or category) of law that is applicable to each question of the case problem. In other words, does the question deal with sedition or fighting words or prior restraint or time, place and manner rules or another area (or category) of law covered in Lesson 2? This part of the analysis is essential because the legal rules differ depending on the area of law under consideration. Once you determine the area/category of law that's applicable, then the last step is to apply the correct legal rules to the facts of the case problem and to state your conclusions. Here's the case hypothetical, followed by instructions on how to prepare your assignment.

Case Hypothetical

Let's assume that Gloria Santos is the Green Party nominee, campaigning for the open congressional seat held by Representative Jim McDermott, who decided not to run for re-election this year. People opposing her candidacy have already created a website dedicated to her defeat. The website's domain name is GloriaSantosforCongress.com, and it is the first website that comes up in an Internet search for information about her candidacy. The website labels her a Communist and includes false statements about her positions on the environment, workers' rights, low-income housing and police accountability, among other issues. The website also attacks her character and fitness to hold political office, calling her a liar, a thief and an illegal immigrant. It promises to publish detailed accounts of her anti-business policies and illegal activities throughout the campaign season.

Gloria Santos and her supporters are outraged and contact the city prosecutor, who is her friend, asking for his help in shutting down the website. The city prosecutor asks a local judge to order the website's creator to shut down the website immediately before most voters become aware of it because of its lies, deception and character assassination.

1. Would such an order be constitutional? In other words, should the local judge, using equity law, order the website's creator to shut down the website? First, identify the specific area (category) of law that directly relates to this situation; second, identify the theory or interpretation of the First Amendment that is most applicable to this type of situation; third, apply the relevant legal rules; and, fourth, explain your conclusion. (35 points)

Answers: The specific area of law is prior restraint (please see Lesson 2 and pp. 74-81 in the textbook). The courts use the preferred-position balancing theory/interpretation of the First Amendment in deciding cases involving prior restraint (please see Lesson 2 and pp. 50-51, 75 in the textbook).

Using the preferred-position balancing theory, the judge would presume that the request for the prior restraint is unconstitutional and that the government would have a heavy burden of proof to show the necessity for it (see *Near v. Minnesota* and the *Pentagon Papers* and the *Progressive Magazine* cases for legal precedent). In other words, the government would have to prove (not just say) that there is a compelling interest of the highest order to justify the restraint. Otherwise, the prior restraint would violate the First Amendment and be unconstitutional.

According to the facts of this case problem, the government (in this case, the city prosecutor) asks the judge to shut down the website, *GloriaSantosforCongress.com* because the website is full of “lies, deception and character assassination” against Gloria Santos, who is running for a congressional seat. This is a form of prior restraint because, if the judge grants the request using the authority of equity law (please see pp. 7-8 in the textbook), then the First Amendment rights of the website’s creator and writers would be violated and the public would not have access to the information on the website, which is provided the full protection of the First Amendment (see pp. 135-138 in the textbook).

In reaching a decision about the constitutionality of this proposed prior restraint, the judge would most likely refer to the ruling in *Near v. Minnesota*, which involved a similar situation of a writer harshly criticizing public officials. The U.S. Supreme Court ruled that Near, the publisher, had the First Amendment right to publish highly offensive, negative information about city officials and that the public officials should have sued Near for defamation (libel) instead of shutting down his newspaper (prior restraint). In passing, the justices offered three situations where prior restraint might be constitutional (to protect national security, to prevent acts of violence, and to enforce obscenity laws). The facts in the *Near* case did not fall within these categories nor did the facts in this case problem.

Finally, from the Lesson 1 forum, we know that the Washington State Supreme Court has ruled that prohibiting lying specifically in political campaigns is unconstitutional (see *Rickert v. State Public Disclosure Commission*). Consequently, the judge should not shut down the website.

Continuing this case hypothetical, let’s assume that Gloria Santos’ supporters want to hold a political rally in Red Square on the UW-Seattle campus from noon to 1 p.m. on Monday, Memorial Day. They asked the appropriate university administrators for a permit, and some administrators expressed concern that people would assume that the university was supporting her candidacy if they allowed the political rally in Red Square.

2. Should university administrators allow this political rally? In other words, would this political rally be constitutionally protected under the First Amendment? First, identify the specific area (category) of law that relates to this

situation; second, apply the correct legal rules to the facts of the case problem; and, third, explain your conclusion. (25 pts)

Answer: The government (in this case, the university) is able to restrict speech/expression/rallies in some situations as long as the restrictions follow certain criteria. These criteria are commonly known as “time, place, and manner restrictions” (see Lesson 2, Practice Exercise 2-2, and pp. 111-20 in the textbook for details).

The legal rules for this area/category of law are fairly well-developed. The first step is the forum analysis to determine the type of forum involved (pp. 116-120 in textbook). As a public university, the University of Washington's Red Square has traditionally been considered a designated public gathering place on campus, similar to the specific designated areas at the University of Arkansas at Fayetteville (see *Bowman v. White* discussed on p. 116 in textbook) so it would fall within the protection of the First Amendment.

The legal rules that apply to traditional designated public forums are as follows: 1) any restriction must be content neutral; 2) it must not constitute a complete ban on communication; 3) it must be justified by a substantial state interest; and 4) the restriction must be narrowly tailored.

In this situation, Gloria Santos and her supporters want to hold a political rally on Red Square during the noon hour on Monday, Memorial Day, a federal holiday. Although some administrators worry that allowing the political rally might lead to the assumption that the university is supporting her candidacy, that concern would not be considered a substantial state interest (such as public safety) justifying the denial. Likewise, the administrators could not consider the contents (the political nature) of the rally because that would violate the content-neutrality requirement. Banning the one-hour, single-day rally on a federal holiday also would constitute a total ban on that public gathering place (Red Square) for that time/place and, thus, would not be narrowly tailored. Consequently, for all of these reasons, the university should allow this political rally.

Let's assume Santos' supporters did hold the political rally, and Santos spoke at it. During her speech, she called for a political revolution where ordinary citizens would unite to overthrow the billionaires and capitalists who control this country's economy and political system. Several opponents to her candidacy attended the rally and were offended by her call for a revolution. One man shouted that she and her supporters should be arrested for sedition because they were advocating the overthrow of the U.S. government and the country's economic system.

3. Should Santos and her supporters be arrested for sedition? In other words, would such arrests be constitutional? Please apply the correct legal rules and explain your conclusion. (20 pts)

ANSWER: As stated in the question, the correct area of law is sedition. The Smith Act of 1940 makes it a crime to “advocate for the violent overthrow of the government, to conspire to advocate the violent overthrow of the government, to organize a group that advocated for the violent overthrow of the government, or to be a member of a group that advocated the violent overthrow of the government” (please see Lesson Two and p. 60 in the textbook). With sedition law, it’s important to consider the *Yates* and *Brandenburg* cases (please see the table in Lesson Two and pp. 58-66 in the textbook), where the Supreme Court, using preferred-position-balancing, ruled that the First Amendment prohibits the restriction of abstract expression (such as talking about a revolution or overthrowing the government) except “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce some actions.” This legal concept has been broken down into four components. First, did the speaker(s) actually intend for the words to incite lawless action? Second, would this intended action have been imminent (immediate)? Third, would the conduct itself be lawless, and, fourth, would the lawless action likely occur?

Although Santos and her supporters are calling for “a political revolution where ordinary citizens would unite to overthrow the billionaires and capitalists who control this country’s economy and political system,” there was no evidence presented that they were actively planning to overthrow the government (e.g., sedition) or have the means or public support to do so immediately. Rather, they were engaging in the political process and campaigning for a specific candidate (Santos) with a specific campaign platform.

Consequently, Santos and her supporters should not be arrested for sedition.

Another man yelled that Santos was a dangerous Communist and would be a threat to the Seattle way of life if she were elected to Congress. He then tried to push his way to the podium, and when two of her supporters stopped him, he screamed insults directly at them for several minutes. Several bystanders urged police officers on the scene to arrest the man for fighting words.

4. Should the police arrest the man for fighting words under these circumstances? In other words, would such arrests be constitutional? Please apply the correct legal rules and explain your conclusion. (20 pts)

Answer: As stated in the question, the correct area of law is “fighting words” (please see Lesson 2 and pp. 124-129 in the textbook). Under the fighting-words doctrine, there must be a direct, face-to-face verbal confrontation that goes beyond expressive speech in order for the police to legally arrest someone (see *Chaplinsky v. New Hampshire*).

This type of prosecution is extremely rare, but, in this situation, one could make the argument that it would be constitutional, assuming there’s a state

law that precisely prohibits “fighting words,” because the man targeted specific individuals (the two supporters who stopped him from rushing the podium) screaming insults directly at them for several minutes. One could also argue that there was no clear evidence presented of an imminent breach of the peace (e.g., violence) and, consequently, the arrests for fighting words would not be constitutional. I accepted persuasive arguments for both positions.

Note: This assignment is worth 10 percent of your course grade. Please refer to the grading rubric to see how I will evaluate it. Here's the grading scale that I use for the four assignments: <http://faculty.washington.edu/scstrup/Gradescale.html>.