

**PART I (2 1/4 hr.)**

There are three questions in Part I of the examination. The stated time allocations reflect my view of the relative difficulty of the questions and the weight to be given the answers.

**Question 1 (45 min.)**

Here are the opening paragraphs of the Seventh Circuit's opinion in *Brown v. Michigan City*, 462 F.3d 720 (7th Cir. 2006). Your assignment is to complete the opinion of the court.

On August 1, 2002, Robert Brown was banned from all properties or programs operated by the Michigan City Department of Parks and Recreation. On August 13, 2002, he filed this suit against the City of Michigan City, Indiana ("City"); he alleged that the ban violated his rights to procedural and substantive due process guaranteed by the Fourteenth Amendment. On September 19, 2005, the United States District Court for the Northern District of Indiana granted summary judgment in favor of the City. Mr. Brown now appeals.

Mr. Brown is a resident of Michigan City, Indiana. Washington Park (the "park") is the largest public park in Michigan City, and is located on the shores of Lake Michigan. Residents, including Mr. Brown, may enter the park free of charge with a resident pass. According to Mr. Brown, sometime in 1988, he began visiting Washington Park on a daily basis with his wife; they would "sit and watch the sunsets and sunrises, drink coffee, smoke cigarettes." After his wife passed away later that year, he continued this routine: Over the course of approximately fourteen years, in the morning, he would drive his R.V. to Washington Park, park near the lake, drink his coffee, smoke cigarettes and watch people at the beach, sometimes with binoculars. He did not leave his van on most occasions.

On July 2, 2002, Darrell Garbacik, the Recreation Director for the Michigan City Department of Parks and Recreation, received a phone call from LaPorte Recreation Director Karl Swihart. Swihart told Garbacik that Mr. Brown previously had been observed at Stone Lake Beach in LaPorte, Indiana, sitting in his R.V. and watching beach patrons through binoculars. The LaPorte police were notified and, after an investigation, they discovered that, in 1995, Mr. Brown had been convicted of one count of child molestation. Swihart faxed Garbacik the case report from this investigation. Garbacik subsequently notified the Michigan City Police Department ("MCPD") and the park staff of Mr. Brown's criminal history; he directed the park staff to be on notice of Mr. Brown's whereabouts in the park and to report any unusual behavior.

A picture of Mr. Brown's vehicle subsequently was circulated to parking attendants at the Washington Park gatehouse; they logged Mr. Brown entering and exiting the park daily, sometimes twice daily, from July 16 to July 29, 2002. In addition, staff at a day camp within the park observed Mr. Brown driving slowly by the camp, allegedly watching the children. The City acknowledges that, although Mr. Brown's people-watching at the park was in and of itself a largely innocent activity, when combined with his criminal history, it raised a "red flag[]" for the park staff.

Mr. Brown was approached by Officer Webb of the MCPD while sitting in his R.V. at the park in late July 2002. Officer Webb inquired about Mr. Brown's activities and whether he was bothering anyone; after a short conversation, he allowed Mr. Brown to remain in the park. Mr. Brown again was approached in the park the next day; after asking Mr. Brown what he was doing, Officer Mark Swistek of the MCPD suggested that he leave the park. Mr. Brown complied. A few days later, Mr. Brown was again in Washington Park when he was approached by two officers, who inquired

whether Mr. Brown was registered as a sex offender with the MCPD; he responded that he had registered with the Sheriff's Department in LaPorte County, but was not aware that he also needed to register with Michigan City officials. According to Mr. Brown, the fourth and last time he was approached by the police in the park, the officers were accompanied by a city attorney. The attorney took Mr. Brown's park pass; the officers informed him that he was no longer allowed in the park; if he returned, Mr. Brown was warned, he would be arrested for trespassing. Mr. Brown complied with this order.

On July 31, 2002, an officer of the MCPD hand-delivered a letter to Mr. Brown. It read:

The banning of your presence from the Michigan City Park properties will be presented to the Michigan City Parks and Recreation Board, Thursday August 1st at 6:00 in the 1st floor of the Park Office.

The Michigan City Parks and Recreation Board met in regular session on August 1, 2002, at the Park Office in Washington Park. One of the items discussed at the meeting was Resolution 548, entitled, "A Resolution Prohibiting the Use of Park Department Properties by an Individual Having a Child Molesting History." In pertinent part, the Resolution read:

WHEREAS, the Michigan City Parks and Recreation Board and the Michigan City Parks and Recreation Department are by law responsible for the safety of all persons using the Park Department facilities or participating in Park Department programs, and

WHEREAS, it was brought to the attention of this Board by the Department staff and the Michigan City Police Department that during the period of a recent summer day camp program for children conducted at Washington Park, an individual, namely, Robert E. Brown . . . , who was recognized by members of the Michigan City Police force as a convicted child molester, was observed by the Police and the Department staff frequenting Washington Park in [a] recreational/camping vehicle, while having a set of binoculars and a camera in his possession, and

WHEREAS, this Board has determined that in order to discharge its responsibilities of child protection and safety, it is necessary to designate all properties and programs under the jurisdiction of the Department to be OFF LIMITS to any person who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years, and to ban such person from all Michigan City Parks and Recreation Department properties indefinitely.

**NOW THEREFORE, BE IT RESOLVED BY THE MICHIGAN CITY PARKS AND RECREATION BOARD AS FOLLOWS:**

(1) That ROBERT E. BROWN . . . is hereby BANNED from all properties or programs operated under the jurisdiction of the Michigan City Department of Parks and Recreation and that in the event said individual is found upon any such property, he shall be considered a trespasser, and shall be removed forthwith, or be subject to arrest for failure to depart the premises.

(2) That all properties and programs operated under the jurisdiction of this Department are hereby declared OFF LIMITS to any person who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years, and in the event that such individual is identified and found upon any such property, he shall be considered a trespasser and shall be ordered to remove himself forthwith, or be subject to arrest for failure to depart the premises.

Although the resolution applied to all persons convicted of child molestation, the City admits that Mr. Brown was the only individual mentioned in the resolution or at the Board meeting as "being a sex offender in the parks."

After this litigation was filed on August 13, 2002, the Board reconvened in a special session on August 29, 2002. At this meeting, [City Attorney] Donoghue recommended to the Board that they rescind Resolution 548 and instead pass Resolution 552, entitled, "A Resolution Prohibiting the Use of Park Department Properties by an Individual Having a Child Molesting History, Whose Observed Behavior Constitutes a Threat to the Safety of Children." The Resolution is similar in substance to Resolution 548; the difference is that, instead of making Michigan City park properties "OFF LIMITS to any person who has been convicted of child molesting," it makes those properties and park programs "OFF LIMITS to the said Mr. Robert E. Brown who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, and whose observed behavior in Washington Park is deemed by this Board to constitute a threat to the safety of children." Under the resolution, Mr. Brown is banned from "all Michigan City Parks and Recreation Department properties indefinitely." Donoghue explained the change to the Board members and other members of the public present at the meeting as prompted by the motion for class certification filed by Mr. Brown. Because the "immediate problem to be addressed is Mr. Brown," and the issue of other persons convicted of child molestation is "more remote," Donoghue urged the Board to "adopt [the new] resolution and rescind Resolution 548. . . . [O]ur Resolution No. 548 must be 'narrowly tailored' and it is 'narrowly tailored' if it targets and eliminates no more than the exact source of evil it seeks to remedy." The Board voted unanimously to rescind Resolution 548 and to adopt Resolution 552.

### **Question 2 (60 minutes)**

With the Iraq conflict dragging on, suppose a war weary Congress passes the following concurrent resolution:

The authority which was previously granted to the President to use all necessary and appropriate force in Iraq is hereby repealed. The U.S. Armed Forces may remain in Iraq no later than September 15, 2007. The President is hereby directed to begin immediately withdrawing U.S. troops from Iraq.

The President's response has been to reiterate that he will order the troops home when his military commanders tell him the Iraqi government can defend itself and protect the country against terrorists.

Following this resolution, assume several other events occur over the ensuing months. First, Congress attaches a rider to an Iraq war funding bill that authorizes any member of Congress to go to federal court to enforce the troop withdrawal resolution. Second, several enemy combatant detainees who were captured in Iraq and who have already appeared before a military tribunal file a habeas corpus action in federal court alleging they must be released after September 15, 2007, because the war is over. Third, Congress responds to these habeas petitions with the following legislation: "No court, justice, or judge shall have jurisdiction to consider an application for a writ of habeas corpus filed by or on behalf of any alien detained by the United States who has been determined by the U.S. to have been properly detained as an enemy combatant or is awaiting such determination." Finally, congressional leaders file a lawsuit in federal court against the President seeking to enforce the concurrent resolution.

Based upon the material covered this semester, identify, analyze, and resolve the issues presented.

### **Question 3 (30 minutes)**

Could Congress, without violating the Constitution, pass a law banning smoking in automobiles whenever a child is present? If not, could Congress compel or prompt the states to pass such a law? If Congress did nothing but Utah passed such a law, would there be a problem with enforcing it against out-of-state travelers? Explain your answers.