

Constitutional Law Exam 2

Fact Pattern:

Last summer the FBI, as part of its effort to combat terrorism, began locking up in jail U.S. Citizens throughout the U.S. solely because they were Muslim or were persons of Middle Eastern descent. The FBI was questioning these individuals about their association with other people and groups, about their political views on the war in Iraq, and about what mosques people attended. These individuals remain in jail. No charges have been filed against them.

“There’s nothing to worry about because no charges have been filed against them,” said a government spokesman. “Besides we’re just exercising our rights under the New Patriot Act. The individuals are simply being forced to recite the pledge of allegiance every day until we think they mean it. And, if they’re lucky enough not to be in jail, they can sign up for the military and we give them \$500 in cash. It’s actually a pretty good deal.”

The New Patriot Act

Definitions: *Muslim* includes Individuals who are Muslim, talk to Muslims, or have ever picked up the Holy Koran just to have a look inside (we know because we already have your library and bookstore records from the first Patriot Act, ha!)

1. In order to fight terrorism, the FBI shall be given the power to take into custody, without charge, Muslim individuals or persons of Middle Eastern descent.
 - a. The individuals can be held as long as the FBI likes without charging them with a crime.
 - b. While in custody, the individuals will be forced to recite the pledge of allegiance every day.
 - c. While in custody, the individuals will be given a nice new Christian bible.
2. Any person of Middle Eastern decent who signs up for the military gets \$500 in cold hard cash.

Questions:

Discuss the constitutionality of the New Patriot Act.

Example Answer

Procedural Due Process

Does the New Patriot Act violate procedural due process?

Under the U.S. Constitution, the right to due process is found under the Fifth Amendment, which states that one cannot be deprived of life, liberty or property without due process of law.

Minimal due process requires notice and an opportunity to be heard, prior to deprivation of liberty or property. Courts weigh several factors when considering due process including the interest being affected; the risk of an erroneous loss; the government's interest and the burden of additional procedures.

Here, persons are being held without charge, indefinitely. Taking someone into custody, without charge, deprives them of liberty without being heard. Similarly, holding someone without charge denies them the ability to be heard.

Additionally, the interest being affected is paramount, namely someone's liberty not to be jailed. Furthermore additional procedures would not be burdensome, as the court system is already set up to hear criminal cases if there is justification for holding these individuals.

Although the government does have an interest in combating terrorism, on balance, the person's individual freedoms should prevail.

On the statute's face and as it applies to the individuals who have been jailed, the New Patriot act violates the due process clause under the Fifth Amendment to the U.S. Constitution.

Free Speech

Does the New Patriot Act violate the free speech clause of the First Amendment to the U.S. Constitution?

The First Amendment to the constitution states in part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . ."

Under the free speech clause, the Government may not control the content of expression. In addition, the U.S. Supreme Court has held that a government cannot compel anyone to speak, or endorse any particular words.

Here, the detainees are being forced to recite the pledge of allegiance. As stated above, the government may not compel anyone to speak. Forced recitation of the pledge is clearly a violation of free speech as interpreted by the U.S. Supreme Court.

As freedom of speech is a fundamental right, the Act will be subjected to the toughest standard: strict scrutiny. To survive under this standard, the law must be necessary for a compelling governmental interest.

As stated previously, although the government has an interest in combating terrorism, on balance, the person's individual freedoms should prevail. Under these facts, combating terrorism is simply not a compelling government interest.

Under these facts, the New Patriot act violates the freedom of speech clause of the First Amendment to the U.S. Constitution.

Equal protection

Does the New Patriot Act violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution?

The Fourteenth Amendment states that, "No State shall deny to any person. . . equal protection of the laws."

Here, the act clearly singles out "Muslims" and persons of Middle Eastern descent and applies the law only to those persons. This runs afoul of the equal protection clause of the Fourteenth Amendment. Under the equal protection clause, the government may not enact legislation that discriminates against any person or group. As stated above, although the government does have an interest in combating terrorism, on balance, the person's individual freedoms should prevail. Combating terrorism is simply not enough of a compelling government objective to lock persons of a particular ethnic origin, without charge, indefinitely.

Standard of review: As this legislation discriminates based on ethnic origin, strict scrutiny will be applied requiring a compelling government objective.

As stated previously, although the government has an interest in combating terrorism, on balance, the person's individual freedoms should prevail. Under these facts, combating terrorism is simply not a compelling government interest.

Under these facts, the New Patriot act violates the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

Freedom of Religion – Free Exercise Clause

Does the New Patriot Act violate the free exercise clause or the establishment clause of the First Amendment?

The First Amendment to the constitution states in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”

Under the free exercise clause, persons may not be punished on the basis of their sincerely held religious beliefs, whether or not the person is part of a formal religion.

Here persons are being locked away simply for being Muslim. This is clearly punishment based on religious beliefs.

As freedom of religion is a fundamental right, the Act will be subjected to the toughest standard: strict scrutiny. To survive under this standard, the law must be necessary for a compelling governmental interest.

As stated previously, although the government has an interest in combating terrorism, on balance, the person’s individual freedoms should prevail. Under these facts, combating terrorism is simply not a compelling government interest.

Under these facts, the New Patriot act violates the free exercise clause of the First Amendment to the U.S. Constitution.

Freedom of Religion –Establishment Clause

Does the New Patriot Act violate the establishment clause of the First Amendment?

The First Amendment to the constitution states in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”

Under the establishment clause, government may not pass any law that prefers or aids one religion over another, unless the law (1) has a secular purpose; (2) the primary effect neither advances nor inhibits religion; and (3) does not excessively entangle the government with religion.

Here the Act provides that the detainees will be given a Christian bible. Since one category of persons rounded up by the FBI are Muslim, this action could certainly be found to be preferring and advancing one religion (Christianity) over

another (Muslim). Handing out bibles by the government is simply too much of a government entanglement with religion.

As freedom of religion is a fundamental right, the Act will be subjected to the toughest standard: strict scrutiny. To survive under this standard, the law must be necessary for a compelling governmental interest.

As stated previously, although the government has an interest in combating terrorism, on balance, the person's individual freedoms will prevail. Under these facts, combating terrorism is simply not a compelling government interest.

Under these facts, the New Patriot act violates the establishment clause of the First Amendment to the U.S. Constitution.