

## Constitutional Law Exam 6

### **Fact Pattern:**

Tommy was the spokesperson for the censorship division of the Federal Communications Commission (“FCC”). Zak was head of the FCC. Recently, the FCC had decided to eliminate all censorship rules. By taking the position that “anything goes” the department hoped to let the market decide what trash it wanted to watch in the hopes of increasing business profits and tax revenue.

Tommy disagreed with the FCC’s position and refused to explain this position at a press conference. Instead Tommy said that Zak and the rest of the FCC were a bunch of idiots being controlled by big business. “My god will be vengeful against them,” he added.

Zak has come to you, his trusted attorney, to advise him on any constitutional issues surrounding Zak’s desire to control and direct Tommy’s speech concerning the FCC. Zak wants to order Tommy to only state the position of the FCC regarding the new censorship rules. He would also like to tell Tommy to stop talking about his vengeful god at press conferences. Finally, Zak asks you whether he can be held personally liable if any constitutional violations are found.

### **Questions:**

Discuss any constitutional issues surrounding Zak’s desire to control and direct Tommy’s speech concerning the FCC.

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## **Example Answer**

### State Action

Is Zak directing Tommy's speech sufficient state action to violate any constitutional provision.

In order for any action to be unconstitutional, the action must have been committed by a state or federal actor. Here, Zak is director of the FCC acting in his official capacity as FCC director. Under these facts, Zak is a federal actor as he is acting in his official capacity as head of a government department.

Zak directing Tommy's speech would be sufficient state action to potentially violate Tommy's constitutional rights.

### Free speech under the First amendment

Will Zak ordering Tommy to only state the position of the FCC violate Tommy's right to free speech under 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 public forums. In addition, the U.S. Supreme Court has held that a government cannot compel anyone to speak, or endorse any particular words.

Here Zak, a federal actor, wishes to control Tommy's speech in a quasi-public forum, namely a press conference. In addition, the FCC, as a public employer may not restrict their employees from commenting on matters of public concern. The rationale is that the public has a right to be informed of the functioning of the government and state employees are in the best position to communicate such information.

Thus, on its face, these facts potentially present a situation where Tommy's right to free speech has been violated.

Tommy's right to free speech in the workplace, however, is not unlimited. A public employer may restrict speech that interferes with an employee's duties. Here, Tommy is the spokesperson for the censorship division of the FCC. His job is to state the position of the FCC regarding censorship. Stating the FCC's position and keeping his own opinions regarding censorship to himself is his job.

In addition it is also arguable that Tommy's statement that his god will be vengeful against the FCC could be taken as "fighting words." Fighting words are

words which are likely to make the person to whom they are addressed commit an act of violence. Here it could be argued that Tommy's speech would not be protected at all since it could potentially cause a member of the audience to either attack persons at the FCC. However, since the statement was made at a press conference it is doubtful that members of the press would run off and attack FCC employees.

Under these facts, Zak controlling the speech of Tommy would not violate Tommy's First Amendment right to free speech.

### Freedom of Religion – Free Exercise Clause

Would Zak banning Tommy's statements about his vengeful god violate Tommy's right to the free exercise of religion?

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, Zak, a federal actor, wishes to control Tommy's speech when Tommy is acting in the official capacity of spokesperson for the censorship division of the FCC. By not being able to express his religious beliefs, Tommy's free exercise of his religion is potentially impaired.

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

Here the government has a compelling interest in keeping the public informed regarding the positions of the FCC. Here the only way to accomplish this goal is to control the speech of their spokespersons whose job it is to communicate with the public. There is no other way to accomplish this goal. Zak's actions are therefore necessary and narrowly tailored to accomplish the government's goal.

Under these facts, Zak's actions to control Tommy's political speech would not violate the free exercise clause of the First Amendment to the U.S. Constitution.

## Governmental Immunity

Is immunity available to Zak to protect him from a potential lawsuit from Tommy.

Sovereign immunity protects government agencies and their employees from being sued. Public employees are not personally liable if they were acting in their official capacity.

Here, Zak would be acting in his official capacity by restricting the speech of Tommy. Zak will therefore not be liable for carrying out his duties and immunity will protect him. Even if Zak's conduct actually violated Tommy's right to free speech under the First Amendment rights, Zak will still not be personally liable for any damages.

Immunity is available to Zak to protect him from a potential lawsuit from Tommy.