

Question 2

Out of a sense of patriotism, Charles enlisted in the United States Army. Charles had risen to the rank of Captain.

Shortly after that promotion, after serious reflection, Charles began to rethink his previous religious, philosophical, and political views. He modified the religious preference he listed on his Army records from "Christian" to "Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You." Charles concluded that his belief did not prohibit his assignment to duty in Country A, but it did preclude his assignment to duty in Country B.

Federal law requires military personnel to accept any assignment to duty, but when Charles was assigned to duty in Country B, he declined to go, and was charged with refusing to deploy. Since the charges were brought, Charles has frequently criticized American involvement in Country B.

Charles wishes to raise a defense against the refusal to deploy charge based solely on (1) the Free Exercise Clause and (2) the Establishment Clause of the First Amendment to the United States Constitution.

What is the likelihood of Charles prevailing? Discuss.

Answer A to Question 2

The First Amendment prohibits the federal government from interfering with the free exercise of religion, and it also prohibits the federal government from establishing a religion. In general, because the First Amendment protections are so important, laws are subject to strict scrutiny, which means they must be necessary to achieve a compelling state interest. Additionally, there must be no less restrictive alternative.

(1) FREE EXERCISE OF RELIGION

MUST THE RELIGION PROTECTED BE A RECOGNIZED RELIGION?

As indicated above, the federal government cannot enact laws that interfere with the free exercise of religion. A necessary threshold question, therefore, is which religions are protected by the First Amendment Free Exercise Clause. The Supreme Court has indicated that the religion need not be a generally accepted or recognized religion, so long as the individual who practices the religion has a genuine belief in the religion.

In this case, Charles' new religion, "Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You," is not a generally accepted or recognized religion. However, no facts indicate that Charles does not have a genuine belief in this religion. As indicated in the facts, he had rethought his views, which gives credence to the fact that Charles genuinely considered and believes in his new religion.

Accordingly, Charles' new religion qualifies as one which is subject to First Amendment limitations.

FREE EXERCISE OF RELIGION V. LAWS OF GENERAL APPLICABILITY

The Supreme Court has indicated that a law will be struck down as violative of a person's free exercise of religion only in the event that the law was enacted with the

purpose of interfering with the person's religion, and the law in fact does so interfere. Thus, laws of general applicability will not be struck down under the Free Exercise Clause. A good example of this is where the U.S. Government prevents mind-altering substances (i.e., drugs). In Native American religions, the Native Americans use peyote, a mind-altering substance, in the exercise of its religion. However, because the Supreme Court determined the law against drugs was one of general applicability and not directed at inhibiting Native Americans from practicing their religion, the law was upheld. Notably, two exceptions have been found: 1) The Amish do not have to send their children to school until age 16; and 2) people may still receive unemployment benefits if they quit a job due to religious beliefs. Neither exception is applicable here.

Rather, in this case, as is similar to the Native American peyote example, it appears the federal law is one of general applicability. Specifically, federal law requires military personnel to "accept any assignment to duty." Therefore, because the law was not enacted with the intent to interfere with religion [sic].

The law may, however, actually interfere with Charles' exercise of religion. Because he must accept any assignment to duty, and because he was charged with refusing to deploy, he therefore cannot exercise his religion which necessitates he refuse assignment to Country B. However, as indicated above, because the law was not enacted with the purpose of interfering with Charles' religion, it is one of general applicability and will be upheld.

NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST

Even if the federal law to "accept any assignment to duty" was enacted with the intent to interfere with religion, it may still pass muster under the Free Exercise Clause if it is necessary to achieve a compelling state interest. Of note, under this strict scrutiny standard, the burden is on the government to so prove the law passes muster.

Here, the law is necessary, as the U.S. military must maintain order with respect to its troops. There are hundreds of thousands of people in the U.S. military, and for

efficiency and administrative purposes alone, it would not make sense to allow individual military personnel to "pick and choose" where they are assigned. Indeed, the U.S. might have to forego a presence in dangerous areas if such was the case, as some military personnel may decline to go to war-torn parts of the world. Moreover, it is important that the military retain obedience from its troops and reduce tension, given the gravity of their missions and likelihood that American troops may be killed. Indeed, once Charles was assigned to duty in Country B, he frequently criticized American involvement in Country B, thereby disrupting efficiency and perhaps causing others to lose faith in the mission. Accordingly, the law is necessary.

There is also a compelling state interest - the protection and defense of the United States. Because national security and defense is such a profound interest to the United States, it qualifies as "compelling."

Moreover, there does not appear to be any less restrictive alternative. For example, the law could not allow some military personnel to accept some duties and reject others, while maintaining that others must accept any assignment (as such a law would be subject to equal protection claims).

Accordingly, because the law is necessary to achieve a compelling state interest, as maintaining order in troops in order to accomplish national security and defense, the law is valid. The government meets its burden in so proving.

Thus, given all of the above, Charles cannot successfully raise a defense based solely on the Free Exercise Clause.

(2) ESTABLISHMENT CLAUSE

As indicated above, the First Amendment prohibits the federal government from establishing a religion.

APPROVING ONE SECT OF RELIGION OVER ANOTHER

In the rare event that the U.S. government might establish one sect of religion over another, said law would be subject to strict scrutiny, as described above. Here, it does not appear that the federal government is approving one sect over another, as one must accept assignment to duty regardless of religious sect.

Therefore, the government is not approving one sect of religion over another.

LEMON TEST

The basic test the Supreme Court uses in determining whether the federal government has established a religion is the Lemon test, which is comprised of three inquiries: 1) was the law enacted for a secular purpose; 2) does the primary effect neither inhibit or advance religion; and 3) is there no excessive entanglement by the government? If all three inquiries can be answered affirmatively, the law passes the Lemon test, and accordingly, the Establishment Clause is not violated.

A) SECULAR PURPOSE?

As indicated above, the first inquiry is whether the law was enacted for a secular purpose. Here, the law that military personnel must accept any assignment to duty does not reference religion whatsoever. Moreover, it appears the purpose of the law was to maintain order and faith in the military missions, and not to establish a religion.

Accordingly, there is a secular purpose behind the law.

B) PRIMARY EFFECT?

It must be decided whether the primary effect is to advance or inhibit religion. The effect of the law is that a person in the military will have to accept assignment regardless of his religious preferences, and without taking said preferences into account. Thus, it cannot be said that the law advances or inhibits religion, as the fact that one has a religious leaning toward a particular assignment in a particular country is inconsequential as to whether the person is eventually assigned to a particular country.

Rather, the primary effect of the law is to maintain order and administrative military efficiency.

Accordingly, the primary effect of the law neither advances or inhibits religion.

C) EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION?

In order for a law to be valid under the Lemon test, there must not be excessive government entanglement with religion.

This inquiry may be Charles' best argument that the law should fail the Lemon test. Specifically, he can argue that the Army records list a religious preference. Accordingly, because he listed his religious preference, the military was on notice that his beliefs under his religion may conflict with assignment into particular countries.

However, the government can argue that any preference that Charles indicated has little to do with where he is eventually assigned to duty. Rather, military personnel are assigned where they are needed; where ongoing conflicts arise; etc. Thus, the law that a person must accept any assignment to duty, even if the military knows your religious preference/beliefs, does not excessively entangle with religion.

Accordingly, there is no excessive government entanglement with religion.

Thus, because the Lemon test is not satisfied, a court will likely find that the Establishment Clause has not been violated.

Charles will not succeed under either the Free Exercise Clause or the Establishment Clause.

Answer B to Question 2

1. Free Exercise Clause

Under the First Amendment's Free Exercise Clause, the federal government may not prohibit the free exercise of any religion.

Are Charles's beliefs religious?

The first question is whether Charles's nontraditional belief system is religious. A religion need not be a popular or generally recognized system of belief, like Christianity, but it must be religious rather than political or philosophical in nature. There is no single test for determining whether a belief system is religious, but courts look to factors such as whether the system has indicia of traditional religious beliefs like dealing with questions about the existence and nature of a higher power, life after death, holidays, rituals, and moral teachings for living one's day-to-day life.

Here, Charles's belief system seems to lack any of these traditional indicia of religious beliefs. The single belief that his religion espouses is one of noninterference, but that gives only limited guidance on how to live one's day-to-day life. There is no indication of beliefs in a god or gods, views on life after death, holidays, or rituals. Moreover, the fact that Charles's beliefs here are tied closely to the situation in particular countries (rather than, for example, a belief in nonaggression to all) and that Charles has been criticizing U.S. policy on this basis suggests that the beliefs are more political than religious.

A court likely would conclude that Charles's belief system is only political or philosophical, not religious, and therefore his Free Exercise Clause claim will fail on this basis alone.

Genuineness

Religious beliefs also must be genuinely held to qualify for First Amendment protection. Here, there does not seem to be any question that Charles genuinely believes in his principle of noninterference, and thus this requirement would be met.

Religious accommodation

The Free Exercise Clause generally does not require accommodation of religious beliefs. The government may require a person to comply with neutral laws of general applicability even if doing so violates that person's genuinely held religious beliefs.

Here, the federal law requiring military personnel to accept any assignment is a neutral law of general applicability. It does not target only the religious or single out one religion for disfavored treatment, and there is no indication that it was adopted specifically to disadvantage religious persons. To the contrary, it probably was adopted for purely secular reasons, to prevent soldiers from undermining military planning by refusing to serve when deployed.

Even if it were not a neutral law of general applicability, the statute would be lawful if it satisfied strict scrutiny -- that it was necessary to achieve a compelling governmental interest and the least restrictive means of doing so. Although strict scrutiny is a demanding standard and the burden of proof is on the government, this law has a good chance of surviving this standard. The federal government has a compelling interest in military readiness and discipline among the troops; indeed, raising an army is one of the federal government's most important functions. The law is necessary to achieve that interest because if soldiers could refuse deployments, it would become difficult if not impossible to plan troop movements adequately and to keep units that trained together intact for battlefield activities. Even allowing a few religious exemptions could severely complicate these efforts if, for example, the objecting soldier had a unique role. And here the fact that Charles is a Captain rather than a low-level soldier suggests that there would be disruption in the chain of command if the unit were deployed without him. Therefore, the law should survive strict scrutiny even if that were the standard.

(I should note that Charles might have a claim under the Religious Freedom Restoration Act, which subjects all Free Exercise Claims to strict scrutiny. Although the law was struck down as applied to States, most courts continue to find it valid as applied to the

federal government. This is beyond the scope of the question, but as explained above Charles likely loses even under strict scrutiny.)

Therefore, the government can require Charles to comply with this law even if doing so violates his religious beliefs. Charles is likely to lose on this basis alone as well.

Military exception

Finally, another barrier to Charles's claim is the fact that he voluntarily enrolled in the army. Soldiers give up many of their constitutional rights, to the extent that they are inconsistent with important military functions. And as noted above the military has a strong interest in enforcing its requirement that soldiers accept all assignments. While conscientious objectors -- those who are religiously or philosophically opposed to all use of military force -- have traditionally been exempted from military service entirely, those who object to some but not all wars have never been exempted. And because Charles enrolled voluntarily rather than through the draft, his claim to an exemption would be particularly weak.

Conclusion

Charles will not prevail on his Free Exercise Clause claim.

2. Establishment Clause

The Establishment Clause prohibits the federal government from establishing an official religion or preferring religion over irreligion. A federal statute passes muster under this clause if it (1) has a secular purpose, (2) does not have the primary effect of promoting religion, and (3) does not excessively entangle the government in religious or ecclesiastical matters.

Secular purpose

As noted above, the federal statute has a valid secular purpose of promoting military readiness and troop discipline. Because this has nothing to do with religion, Charles will not prevail under this test.

Secular effect

The primary effect of this statute also does not seem to be promoting religion. The primary effect is to keep military units intact no matter where they are deployed. Religious and irreligious soldiers are treated the same way regardless of their belief. In fact, if the rule was to the contrary and religious soldiers could refuse particular deployments, that would at least raise serious Establishment Clause questions about whether the government was promoting particular religious beliefs (although most religious-accommodation statutes have been upheld against Establishment Clause challenges). Therefore, Charles is likely to lose under this test too.

Excessive entanglement

There is no real risk of entanglement between the government and religion under the statute. The statute does not require the government to make any quintessentially religious determinations because it applies equally to all regardless of religion or belief. Again, the rule Charles seeks would raise more difficult questions than this one does if it required the government to decide whether a person had a genuine religious belief precluding a particular deployment. Therefore, Charles will lose under this test too.

Conclusion

Charles will not prevail on his Establishment Clause challenge.