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Is the Solomon Amendment Unconstitutional

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Is the Solomon Amendment Unconstitutional?

by Dale Carpenter.

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ISSUE

Was the Third Circuit Court of Appeals correct in concluding that the Solomon Amendment likely violates the First Amendment by conditioning the receipt of federal funds on schools' relinquishment of their constitutionally protected right to exclude military recruiters?

FACTS

Secretary of Defense Donald Rumsfeld and the other petitioners (collectively, the government) are the heads of federal government departments that would cut off funding to schools that fail to give equal access to military recruiters. The Forum for Academic and Institutional Rights, Inc., and the other respondents (collectively, FAIR) are groups and individuals who support freedom of association for universities and oppose the military's policy of excluding openly gay service members. FAIR, the lead respondent, is an association of universities and faculties, especially faculties of law schools.

The case involves a challenge to the constitutionality of the Solomon Amendment, federal legislation sponsored by U.S. Representative Gerald Solomon (R-NY) and originally passed in 1994. The law originally mandated that "no federal funds available to the Department of Defense may be provided by grant or contract to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes ... entry to campuses or access to students on campuses."

In subsequent years the Solomon Amendment's funding condition was expanded to include funds available to universities from the Departments of Homeland Security, Health and Human Services, Labor, Education, and Transportation, as well as the National Security Administration and the Central Intelligence Agency. Congress also clarified that the condition applied

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RUMSFELD ET AL. V. FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.
DOCKET NO. 04-1152

ARGUMENT DATE:
DECEMBER 6, 2005
FROM: THE THIRD CIRCUIT

Case at a Glance

This case raises the issue of whether the government may, consistent with the constitutional guarantees of free speech and association, deny federal funds to an entire university if a single part of the university bars military recruiters from getting access to its facilities equal to that given to other employers for the purpose of conducting job interviews and other hiring activities.

to an entire university even if only a "subelement" within the university (e.g., a university's law school) denied access to military recruiters. Finally, in 2004, Congress further required that, under the funding condition, military recruiters must be given access to the institution "that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."

The Solomon Amendment runs afoul of many universities' non-discrimination policies, which forbid discrimination on the basis of, among other things, sexual orientation. Law schools especially, both on their own initiative and in compliance with the guidelines of the American Association of Law Schools, allow a prospective employer to recruit students in their facilities only if the employer signs a statement pledging not to discriminate on the basis of several criteria, including sexual orientation. The military, however, bans service by openly gay personnel under the "Don't Ask, Don't Tell" policy adopted by Congress in 1994. Thus, many law schools have prohibited, or would like to prohibit, military recruiters from their campuses.

At the same time, universities do not want to lose federal funding, which totals more than $35 billion annually and goes to many causes, such as important scientific and medical research. Thus, even law schools that do not themselves receive federal funds from any of the agencies and departments covered by the Solomon Amendment have reluctantly agreed to allow military recruiters in their facilities. This litigation is an effort to have the Solomon Amendment declared unconstitutional and thus to permit law schools and other parts of a university to bar military recruiting without losing all federal funds as a consequence.

In September 2003, FAIR (and the other respondents) brought suit against Rumsfeld (and the other petitioners) in a New Jersey federal district court, arguing that the Solomon Amendment violated their First Amendment rights. The district court denied FAIR's request for a preliminary injunction against enforcement of the Solomon Amendment.

FAIR then appealed to the Third Circuit. A divided panel of the Third Circuit held that FAIR was likely to prevail on its First Amendment claims and directed the district court to enjoin enforcement of the Solomon Amendment. However, on January 20, 2005, the Third Circuit granted the government's request to stay its decision pending appeal to the Supreme Court.

The Supreme Court granted the government's petition for writ of certiorari on May 2, 2005.

Case Analysis

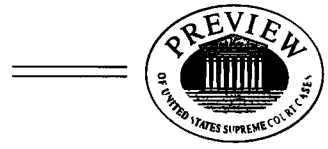
The government's basic argument is that it may condition the receipt of federal funds on the ability of the military to recruit on campus the very students whose education the government funding supports. This state interest is especially great, it argues, in the military context in which there is a strong national need to recruit the best talent. This is precisely what the Solomon Amendment does. It does not mandate that educational institutions admit recruiters; instead, it places a condition on funding. In short, the government argues, if the schools do not want to admit military recruiters they are still free to bar them, they just must forgo federal money.

FAIR's basic argument is that an educational institution's decision to bar military recruiters is constitutionally protected, both as an expression of moral and professional disapproval of anti-gay discrimination and as an exercise of associational freedom. These constitutional interests are especially important in a setting, such as a university, where academic freedom is paramount. Thus, here as in other contexts, the government may not condition the receipt of a broad array of government benefits on the surrender of constitutional rights.

The government first urges that no freedom of association is injured by the Solomon Amendment. The central case in the argument between the parties is the Court's 2000 decision in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), in which the Court held that the Boy Scouts had an associational right to exclude an openly gay scoutmaster despite a state law barring discrimination against gays.

The government distinguishes *Dale* by noting that the Solomon Amendment does not affect the composition of the schools' membership; the recruiters' presence is only temporary and episodic. Further, the government argues that unlike *Dale,* this case does not involve an attempt by the state to convey any message about service by gays in the military since everyone understands that recruiters speak only for their employers and not for the schools in which they recruit. Finally, unlike *Dale,* this case involves a condition on funding, not a direct regulatory mandate.

FAIR responds that the freedom of association recognized in *Dale* is indeed at stake in this case. The Solomon Amendment, FAIR claims, violates the schools' freedom of association by infringing their "right to choose for themselves which causes to assist or resist." The freedom of association is not limited to the ability to control membership in an organization, FAIR argues, but



extends to the full range of associational activities by which a group aids or refuses to aid a cause.

The government next argues that the Solomon Amendment does not violate the "compelled speech" doctrine, under which citizens may refuse to be made the mouthpiece for some message the government would like to send. The Solomon Amendment, argues the government, simply does not force schools to send the message that they agree with the military's exclusion of gays.

FAIR counters that the Solomon Amendment does compel speech. It requires the schools to serve military recruiters affirmatively through quintessential "speech" activities, like distributing, posting, and printing literature announcing the presence of the recruiters; introducing students to the government; and sponsoring private forums for the exchange of information (the recruiting interview sessions themselves). This, argues FAIR, requires a school "to disseminate, carry, or host a message against its will."

The government further argues that the schools' refusal to admit military recruiters is not a form of "expressive conduct" protected under the intermediate scrutiny standard of *United States v. O'Brien,* 391 U.S. 367 (1968). Refusing to give recruiters equal access to facilities, argues the government, is not inherently expressive. Refusing such access is merely conduct and as such does not enjoy any First Amendment speech protection. Even if the *O'Brien* intermediate scrutiny standard applied, moreover, the government argues that the Solomon Amendment satisfies that standard since it is sufficiently tailored to achieving the government's important goal of hiring the best talent for military service and does not aim at speech for the purpose of suppressing ideas.

FAIR argues that, on the contrary, the schools' refusal to allow employers who discriminate to recruit is part of its overall message that such discrimination is immoral. Barring recruiters who discriminate is a way to "punctuate" a school's message by refusing to assist discrimination. Moreover, argues FAIR, the Solomon Amendment is not narrowly tailored to serve the government's admittedly compelling interest in military recruitment. There is no evidence, argues FAIR, that military recruiters require access to schools in order to meet recruiting goals, much less that the military must have "equal access" to achieve its recruiting goals.

Finally, the government argues that the Solomon Amendment does not violate the "unconstitutional conditions" doctrine, under which the government generally may not condition the receipt of a government benefit on the relinquishment of a constitutional right. First, the government contends that the Solomon Amendment would be constitutional even if it were imposed as a direct mandate requiring the schools to admit military recruiters on an equal basis with all other employers. Since there is no constitutional right enjoyed by the schools to exclude military recruiters, the government reasons, they have not been required to relinquish the exercise of any right in order to get a government benefit. Congress has not aimed at the suppression of ideas by adopting the Solomon Amendment, the government argues; it has simply used its constitutional power to spend in the interests of the nation.

FAIR responds that the Solomon Amendment places a penalty on the exercise of First Amendment rights and thus violates the unconstitutional conditions doctrine. This is not a case, notes FAIR, in which the government has simply required that certain funds be used only for the purpose for which they are provided (e.g., the government may require that education funds be spent on education). Instead, the Solomon Amendment attempts a sweeping denial of almost all federal assistance to an entire educational institution merely because one part of it—a part that might itself receive no federal money—refuses to allow the military to recruit.

SIGNIFICANCE

This case rests at the intersection of three great controversies in modern American law and life. First, there are the needs of the military to recruit the best and brightest in a time of war and uncertainty about national security. The schools' decisions to exclude military recruiters would never be a very popular one—less so in present circumstances. To many, universities' exclusion of the military looks like the action of an elite caste mocking the soldiers who guard them while they sleep.

Second, the case is set in the context of the ongoing cultural struggle over whether discrimination against gays is ever acceptable and, if so, under what circumstances. To the schools, the exclusion of the military recruiters is a way to defend their moral perspective that discrimination against gays in the military is wrong and contrary to their professional standards. The use of *Dale,* which held that gays could be excluded from an association, to justify excluding those who exclude gays, is an especially ironic note in the litigation.

Third, the case raises the questions of the extent of government power over the lives of its citizens and of the continuing vitality of federalism—the relationship between the

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states and the federal government. Government power to suppress constitutional rights has historically taken the form of old-fashioned compulsion: for example, a threat of jail for failure to abide by the government's command. However, in an age of vast federal spending, government power to compel conduct is more likely to take the form of conditions placed on that spending. When that form of compulsion affects state institutions, like a state university, the central question ceases to be simply about the relationship between the federal government and the individual citizen and begins to be about the relationship between the federal government and the states.

To accept FAIR's claim, the Court will likely have to conclude both that (1) a school's decision to bar military recruiters is the exercise of a constitutional right (freedom of speech and/or freedom of association) and that (2) the government's denial of funding to the entire university for the exercise of this liberty is an unconstitutional penalty or condition.

To accept the government's claim, the Court need only agree with the government on one of these points. The Court could conclude, for example, that barring military recruiters from campus is not constitutionally protected (so that even a mandate to allow them would be acceptable). In that case, the Court would not even have to rule on the conditional funding question. Alternatively, the Court could conclude that the exclusion of military recruiters is indeed constitutionally protected, but that the government may refuse to give any funding to schools that bar recruiters.

Whichever way the Court rules, it will have the opportunity to clarify some rather murky constitutional doctrines. First, there is the question of the reach of the freedom of association. Is it, as the government contends, a doctrine that protects only the membership decisions a group makes? Or is it a much broader right that protects many associational activities by which a group promotes its message? If it is the former, the freedom of association is not a very robust doctrine, since it leaves the state free to hobble a group's message in numerous indirect ways. If it is the latter, the freedom of association risks giving expressive groups a broad right to refuse to comply with general regulations backed by important state interests.

Second, there is the question of how broadly the Court defines the unconstitutional conditions doctrine. If the government may deny an entire university all funding (e.g., cancer research funding) because one part of the university exercises a constitutional right, could it similarly leverage its economic power to require the university to allow a military officer on campus to deliver the government's message about the need for high defense spending? Could it threaten to withdraw all university funding unless the university agreed to forgo its right to "ameliorate" the recruiters' presence on campus (e.g., by posting written notices outside the interview room indicating the school's disagreement with the military's exclusion of gays)?

If, on the other, the government can't condition funding in this way, could it continue to condition funding on a school's agreement not to discriminate against students or employees on the basis of race or sex (as it now does through civil rights laws)? Or is there some way to distinguish the conditional funding embedded in civil rights law from the Solomon Amendment, as FAIR and its amici suggest?

Of course, there is always the possibility that the Court will rule without clarifying the answers to any of these questions.

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Amicus Briefs

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National Legal Foundation (Barry C. Hodge (757) 463-6133)

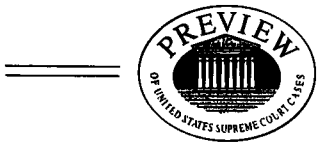
Richard Pombo et al. (William Perry Pendley (303) 292-2021)

Texas et al. (R. Ted Cruz (512) 936-1824)

In Support of Forum for Academic and Institutional Rights, Inc., et al.

American Association of University Professors (Kathleen Marie Sullivan (650) 801-5000)

American Civil Liberties Union et al. (Kenneth Y. Choe (212) 549-2500)



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The National Association for Law Placement et al. (Sam Heldman (202) 965-8884)

National Lawyers Guild (Zachary Wolfe (202) 265-5965)

National Lesbian and Gay Law Association et al. (Jonathan L. Hafetz (212) 649-4743)

Robert A. Burt et al. (Paul Michael Dodyk (212) 474-1000)

Servicemembers Legal Defense Network (Linda T. Coberly (312) 558-5600)

Student/Faculty Alliance for Military Equality and Outlaws (Carmine D. Boccuzzi Jr. (212) 225-2000)

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