TOPIC:

THE CONSTITUTIONALITY AND CURRENT STATUS OF THE SOLOMON AMENDMENT

INTRODUCTION:

In March 2006, the U.S. Supreme Court (the “Supreme Court” or “Court”) ruled in Rumsfeld v. Forum for Academic and Institutional Rights [1] that the Solomon Amendment is constitutional [2]. This decision came after years of legal wrangling surrounding the question of military recruitment on college and university campuses. Many institutions had sought to exclude military recruiters from their campuses because they found the federal law concerning homosexuality in the military and the resultant sexual orientation discrimination to be offensive to their institutional values. The Solomon Amendment was enacted to override those exclusions by mandating that educational institutions afford military recruiters the same access provided to other recruiters or lose certain federal funds. The Supreme Court determined that this mandate is consistent with the First Amendment and does not violate the institutional freedoms of speech or association.

This NACUANOTE provides an in-depth review and analysis of the Supreme Court’s decision and discusses the implications of that decision for counsel and administrators dealing with current military recruiter requests.

DISCUSSION:

I. THE SOLOMON AMENDMENT

Under federal law, a person generally may not serve in the United States Armed Forces if he or she has engaged in homosexual acts, stated that he or she is a homosexual, or married a person of the same sex [3]. Consequently, military recruiters are required to engage in sexual orientation discrimination, with the result that homosexual recruits are automatically rejected, while heterosexual recruits are considered on their own merits.

For many colleges and universities, such sexual orientation discrimination offends institutional values (often embodied explicitly in institutional policies prohibiting discrimination on the basis of sexual orientation), and they therefore object to the presence of military recruiters on campus. Many of these institutions—particularly law schools—have sought to exclude or limit access of military recruiters to their campuses because they disagree with the military’s policy of sexual orientation discrimination. In response to these exclusions and limitations, Congress passed the Solomon Amendment [4], which now mandates that if any part of an institution of higher education denies military recruiters access to campus and students equal to that provided other recruiters, the entire institution will lose certain federal funds [5]. In other words, the Solomon Amendment “forces institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding. [6]”

Despite the similarities to other statutes requiring universities to refrain from certain acts as a condition of
receiving federal funds [7], the Forum for Academic and Individual Rights ("FAIR"), an association of law schools and law faculties established “to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education," challenged the constitutionality of the Solomon Amendment [8].

II. LOWER COURT HISTORY

A. District Court Decision

In 2003, FAIR sued the U.S. seeking a declaration that the Solomon Amendment was unconstitutional and an injunction prohibiting its enforcement [9]. At the time, the Solomon Amendment mandated only that military recruiters be allowed “entry to campuses.” [10] However, the Secretary of Defense interpreted “entry to campuses” to mean that institutions “must provide military recruiters access to students equal in quality and scope to that provided to other recruiters.” [11] FAIR argued that the Secretary’s interpretation of the Solomon Amendment unconstitutionally forced institutions “to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter’s message, and ensuring the availability of federal funding for their universities.” [12]

Although the district court doubted that the Secretary’s interpretation of the statute was correct, it nevertheless found the Solomon Amendment to be constitutional. [13] Specifically, the district court found that the statute did not “significantly affect the law schools’ ability to express their particular message or viewpoint,” [14] holding that recruiting students for prospective employment was conduct rather than speech. [15] Moreover, the Court held that Congress is allowed to regulate conduct even when it is expressive. [16] Accordingly, the district court denied the request for injunctive relief.

FAIR immediately appealed to the U.S. Court of Appeals for the Third Circuit. While the appeal was pending, Congress amended the Solomon Amendment so that the statutory text reflected the Secretary’s interpretation. [17] The revised statute denies funding to institutions that prevent military recruiters “from gaining access to campuses, or access to students ... on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.” [18] It was this version of the Solomon Amendment that was before the Third Circuit.

B. Third Circuit Decision

On appeal, a sharply divided Third Circuit reversed the district court’s decision and held that the Solomon Amendment was unconstitutional for three reasons. [19] First, the majority found the statute unconstitutionally required colleges and universities to surrender their First Amendment rights in exchange for a benefit—certain federal funds. [20] Second, unlike the district court, the majority believed that recruiting students was speech, rather than merely conduct. [21] Third, relying on the Supreme Court’s decision in Boy Scouts of America v. Dale, [22] the majority found that the Solomon Amendment violated the First Amendment Freedom of Association by undermining the institution’s ability to disseminate its message against sexual orientation discrimination. [23]

III. THE SUPREME COURT DECISION

The United States appealed the Third Circuit’s decision to the Supreme Court. In Rumsfeld v. FAIR, the Court held that “Congress could require law schools to provide equal access to military recruiters without violating the schools’ freedoms of speech or association,” and therefore found that the Solomon Amendment is consistent with the First Amendment. [24]

A. Meaning of the Statute

After briefly discussing the Solomon Amendment in general, the nature of FAIR, and the lower court proceedings, the Supreme Court turned to the proper interpretation of the statute. [25] Although both the United States and FAIR believed the Solomon Amendment required colleges and universities to allow military recruiters on campus, two groups of law professors argued that the statutory process for allowing recruiters
should be read narrowly. [26] These professors asserted that to comply with the statute, institutions need only apply the same policy to military recruiters that it applies to all other recruiters. [27] Thus, if an institution excluded an employer who violated the institution’s nondiscrimination policy, the institution also could exclude the military recruiters. In other words, an institution could exclude military recruiters as long as every other employer that engaged in sexual orientation discrimination also was excluded.

While the U.S. urged the Court to avoid addressing this interpretation, the Court determined that the issue of whether a statute is constitutional fairly includes the question of what that statute says, and that its “task is to construe what Congress has enacted” rather than what the parties thought that Congress had enacted. [28] Ultimately, the Court found the law professors’ interpretation to be incorrect [29] and also contrary to recent legislative changes to the Solomon Amendment, which had been designed to codify the Department of Defense’s interpretation. [30]

B. Spending Clause Analysis

Having decided that the Solomon Amendment requires military recruiters be permitted access to campuses and students, the Court turned to the constitutionality of the statute. [31] The Court began by noting that, while the Constitution gave Congress broad power to create and staff the Armed Forces, including recruiting on college campuses, this power was subject to structural and textual limitations imposed by the Constitution. [32] The Court then noted that by enacting the legislation through the Spending Clause, [33] Congress chose to achieve its purpose indirectly, rather than by directly using those broad powers enunciated in the Armed Forces Clauses. [34] The use of the Spending Clause therefore presented the question of whether Congress could require colleges and universities to compromise their institutional values as a condition of receiving federal funds. [35]

In answering this question, the Court emphasized that “a funding condition cannot be unconstitutional if it could be constitutionally imposed directly.” [36] Because military legislation, like all legislation, is subject to the First Amendment, [37] the Court began its analysis by determining whether the First Amendment would “prevent Congress from directly imposing the Solomon Amendment’s access requirement.” [38] If the First Amendment precluded the direct imposition of the Solomon Amendment, the statute could not be enacted using the Spending Clause. Conversely, if the First Amendment permitted the direct imposition of the Solomon Amendment pursuant to the Armed Forces Clauses, the statute was valid Spending Clause legislation.

C. First Amendment Analysis

Although “judicial deference ... is at its apogee’ when Congress legislates under its authority to raise and support armies,” [39] military legislation is still subject to the First Amendment. [40] FAIR contended that the Solomon Amendment violated both the First Amendment Freedom of Speech and the First Amendment Freedom of Association clauses.

1. Free Speech Analysis

Because the Third Circuit found three different First Amendment Freedom of Speech defects in the Solomon Amendment, it was necessary for the Court to address each one, and it ultimately rejected all three holdings. [41]

No Compelled Speech

First, the Court held that the Solomon Amendment did not compel the law schools or individual faculty members to engage in particular speech. The Court has consistently recognized that government may not compel an individual to speak, [42] but it found that “[t]he Solomon Amendment does not require any similar expression by law schools.” [43] While the schools are required to offer some form of assistance to the military, the Court found this assistance (such as sending emails or posting notices on bulletin boards advising of the opportunity to interview with military recruiters), which may contain elements of speech, was far from the compelled speech found unconstitutional in earlier cases. The Court determined that, unlike those earlier cases, the Solomon Amendment does not dictate the content of the speech at all, and noted that
in this case speech is only “compelled if, and to the extent, the school provides such speech for other recruiters.” Any compelled speech on the part of the law schools, the Court said, is incidental to the conduct (equal access for military recruiters) required by the Solomon amendment.

**No Unlawfully Compelled Accommodation of the Military’s Speech**

Second, the Court found that the Solomon Amendment did not compel the accommodation of the military’s speech. The Court has consistently held that the government may not compel a private party to accommodate the speech of another. Those decisions, however, were limited to situations where “the complaining speaker’s own message was affected by the speech it was forced to accommodate.” Here, the Court held, accommodating the military’s message by including military recruiters in interviews and recruiting receptions does not interfere with the law school’s speech because the law schools are not speaking when engaging in those activities. The Court noted that when an institution allows the military to engage in speech on their campus, there is little likelihood that the views of those engaging in the expressive activities would be identified with the school. Indeed, in the Court’s view, students understand the difference between speech by the school and speech by others that takes place on the institution’s property.

**No Unlawful Restriction of Expressive Conduct**

Third, the Court found that the law schools’ preferred course of conduct (barring military recruiters from their campuses) was not inherently expressive, and therefore the Solomon Amendment did not infringe on the First Amendment’s protection of expressive conduct. The Court noted that such conduct was expressive only if accompanied by speech explaining it and added, “if combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it.”

Moreover, the Court noted, even if the Solomon Amendment could be viewed as regulating expressive conduct, the statute was a “neutral regulation that promotes a substantial government interest that would be achieved less effectively absent the regulation.” “Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers.”

**2. Freedom of Association**

Having concluded that the Solomon Amendment did not violate the Freedom of Speech Clause, the Court next turned to the issue of whether the statute violated the First Amendment Freedom of Association Clause and concluded that it did not. Although there is a First Amendment right to associate with others for the purpose of expressing a particular message, the Court determined that the Solomon Amendment “does not . . . affect a law school’s associational rights.” “Students and faculty are free to associate to voice their disapproval of the military’s message; nothing about the statute affects the composition of the group by making group membership less desirable.” The Court found that since the statute does not impinge upon the right of Freedom of Association, it is constitutional.

In sum, the Court found that the Solomon Amendment was consistent with the First Amendment on both Freedom of Speech and Freedom of Association principles. Thus, Congress could have used the Armed Forces Clauses to impose the statute directly. And, for that reason, Congress also could impose the Solomon Amendment requirements indirectly, using the Spending Clause. Therefore, the Court declared the Solomon Amendment to be constitutional.

**IV. IMPLICATIONS OF THE SUPREME COURT’S DECISION**

The Supreme Court’s decision in *Rumsfeld* has several significant implications for colleges and universities. Most important, it is now settled (barring a legislative change) that institutions that wish to continue receiving the specified federal funds may not enforce their sexual orientation nondiscrimination policies against military recruiters and must provide such recruiters with access to their campuses and students “equal in quality and scope” to the access they provide other recruiters. Note, however, that nothing in the Solomon Amendment requires institutions to provide any particular kind of access or service to recruiters. To the extent that an
institution determines to discontinue a particular kind of access or service for all recruiters e.g., sending e-mail reminders of interview appointments or distributing employer-provided recruitment brochures, it need not provide that access or service to military recruiters, because it would not be “equal” to do so. Thus, institutions are free to re-examine the scope of recruitment access and services they provide.

In addition, the case has a number of broader implications both for military recruiting specifically and for constitutional law generally:

**Congress’ powers under the Armed Forces Clauses are quite broad.**

Given the Court’s holding and reasoning in *Rumsfeld*, one can imagine a host of other requirements, consistent with the Court’s view of the First Amendment, that Congress could choose to impose on colleges and universities, pursuant to either its Article I powers to raise and support the military or its Article I spending powers. While the presence of an all-volunteer military makes it easy to ignore at times, the constitutional reality is that Congress could conscript an institution’s entire student body. If Congress can conscript virtually all students into the military, Congress can certainly require that students register for the draft. If the students can be compelled to register for the draft, they almost certainly can be compelled to attend an on-campus presentation about military opportunities. If the students can be compelled to attend such a presentation, then certainly the institutions can be compelled to make a presentation available to students who wish to attend voluntarily.

**The government may, in some circumstances, compel a speaker to speak as long as it does not dictate the content of the speech.**

In its opinion, the Court highlighted the difference between previous cases in which the content of government-compelled speech (such as a pledge or motto that a school must endorse) was dictated and the expression found in the Solomon Amendment. [62] The Court noted that the compelled speech to which the law schools point is plainly incidental to the Solomon Amendment’s regulation of conduct, and “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” [63] The Court stressed that to compel a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to state a pledge or to display a motto.

This concept will have the effect of making it more difficult for litigants to prevail. The fact that the government compels you to speak is no longer enough. Rather, the government must compel the speech and dictate the content. [64]

**The government may force a speaker to accommodate the message of another speaker where the complaining party’s speech is unaffected by the accommodation.**

In other words, if there is no speech by the complaining party or if the complaining party’s own speech is unaffected by the accommodation, then there can be no constitutional violation. Although this does not appear to disturb any existing case law, [65] it will diminish the ability of future litigants to complain about forced accommodation.

**First Amendment protection is limited to conduct that is “inherently expressive.”**

The Court referred back to the standard set in *O’Brien* and explained that “the expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it." Therefore, when the actions must be accompanied by speech conduct to express the speaker's views, the conduct at issue is not so inherently expressive that it warrants protection under *O’Brien*. [66]

While this narrower standard does not appear to affect any current case law, it will make it more difficult for future litigants to win constitutional protection for conduct. [67]
A requirement of interaction with those who disagree is not a violation of the Freedom of Association.

As the Court observed: To comply with the Solomon Amendment, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore “associate” with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students -- not to become members of the school’s expressive association. This distinction is critical. Unlike the public accommodations law in Dale, the Solomon Amendment does not force a law school “to accept members it does not desire” [68] The law schools say that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters. But just as saying conduct undertaken for expressive purposes cannot make it symbolic speech, so too a speaker cannot “erect a shield” against laws requiring access “simply by asserting” that mere association “would impair its message.” [69]

Again, the narrower definition does not seem to alter the Court’s current jurisprudence, but it does seem to diminish the chances of expanding the right of Association.

“[S]tudents and faculty are free to associate to voice their disapproval of the military’s message.” [70]

In other words, an institution, its faculty, or its students need not remain silent about their disapproval of military recruiter presence on their campus, and may conduct demonstrations, leafleting, and the like. While there no doubt is a point at which the expressions of disapproval would constitute a denial of access, and thus a violation of the Solomon Amendment, there still is ample room to express opposition to the military’s sexual orientation discrimination. [71]

Congressional power under the Spending Clause does not exceed the scope of its other Article I powers.

The reasoning adopted by the Court (in essence, that Congress could not accomplish indirectly via the Spending Clause that which it could not otherwise do directly under its Article I or other powers granted to Congress in certain amendments) may herald a more restrictive view of Congressional authority under the Spending Clause. If that proves to be the case, some statutes and conditions enacted pursuant to the Spending Clause may now be in question.

CONCLUSION:

Rumsfeld has both practical and constitutional consequences. From a practical standpoint, the Solomon Amendment is constitutional. Thus, colleges and universities must decide whether they value federal funds more than their principled stand that sexual orientation discrimination is wrong. From a constitutional standpoint, Rumsfeld: (1) reaffirms the vast power of Congress when it utilizes the Armed Forces Clauses; (2) narrows the scope of the First Amendment with respect to compelled speech, compelled accommodation of speech, expressive conduct, and Freedom of Association; and (3) appears to signal a shift in the Court’s view of the Spending Clause.

FOOTNOTES

AUTHOR:
RESOURCES FOR COUNSEL:

NACUA Resources:


Case Law:

- Board of Comm’rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668 (1996)
- Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995)
- West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)
- Speiser v. Randall, 357 U.S. 513 (1958)
• Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3rd Cir. 2004)


**Statutes:**

• U.S. Const. art. I, § 8, cl. 1.


• 10 U.S.C. § 654

• 10 U.S.C. § 983

• 20 U.S.C. § 1681

• 29 U.S.C. § 794

• 42 U.S.C. § 2000d

• 42 U.S.C. § 2000e et seq.


• 32 CFR Part 216

**Institutional Policies:**

• University of Maine School of Law Military Recruitment Policy

• University of South Dakota Law School – Notice on Military Recruiting

• Marquette University Law School

• Loyola University of New Orleans College of Law – Military Recruitment Nondiscriminatory Statement

• Washburn University School of Law

**Additional Resources:**

• SolomonResponse.org

• American Association of Collegiate Registrars and Admissions Officers – Solomon Amendment Resources

• The Association for Legal Careers Professionals (NALP) Solomon Amendment Information

The Response to the Supreme Court's Decision - Letter from Kent Greenfield, Founder & President of FAIR