AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government

Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR), et al., 547 U.S. 47 (2006)

In the late 1980s and early 1990s, military regulations against the continued service of homosexuals in the armed services were a fairly specialized target within the gay rights movement. During his first presidential campaign, Bill Clinton promised to lift the ban by executive order. Before the president acted on that pledge, however, Congress enacted a law that froze the current regulations in place while it opened a series of high-profile hearings into the issue, mobilizing both civil rights groups and military officers to lobby Congress and the White House. The result was a compromise policy: "Don't Ask, Don't Tell." The policy was first adopted by Clinton, and then embodied in statute in 1993. By this policy, sexual orientation by itself was not a bar to military service, but homosexuals in the military were expected to maintain a low profile.

In practice, many regarded the compromise as having achieved little for gay soldiers and as falling far short of Clinton's pledge of removing the ban. Debates began at many colleges over whether to deny campus access to military recruiters or to reserve officer training corps (ROTC) programs. The government responded in terms with a series of statutory provisions, beginning with the first Solomon Amendment in 1995. The consequence of the provision was that if any part of the university (such as the law school) denied military recruiters equal access to students that was provided to other recruiters, the entire university would lose certain federal funds.

An association of law schools sued in federal district court, arguing that the Solomon Amendment violated their First Amendment rights of speech and association. The litigation did not challenge the government's policies on gays in the military. The central question for the court was whether Congress could attach such a condition to federal funds to universities. The trial court found no violation, but a divided circuit court reversed, ruling against the government. In a unanimous opinion (with Justice Alito not participating), the Supreme Court reversed the circuit court's ruling.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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The Constitution grants Congress the power to "provide for the common Defence," "[t]o raise and support Armies," and "[t]o provide and maintain a Navy." Art. I, § 8, cls. 1, 12-13. Congress' power in this area "is broad and sweeping," *United States v. O'Brien* (1968), and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. See *Rostker* v. *Goldberg* (1981). But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in *Rostker*, "judicial deference . . . is at its apogee" when Congress legislates under its authority to raise and support armies.

Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress' decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress' choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.

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Other decisions … recognize a limit on Congress' ability to place conditions on the receipt of funds. We recently held that "'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *United States* v. *Am. Library Ass'n* (2003). Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.

This case does not require us to determine when a condition placed on university funding goes beyond the "reasonable" choice . . . and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. See *Speiser* v. *Randall* (1958). Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. See Tr. of Oral Arg. 25 (Solicitor General acknowledging that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests"). As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*--afford equal access to military recruiters--not what they may or may not *say*.

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In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

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Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association, the Court of Appeals erred in holding that the Solomon Amendment likely violates the First Amendment. We therefore reverse the judgment of the Third Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the decision of this case.