The Solomon Amendment in 2005

Introduction

In a nation the size of the United States, there are competing interests of virtually every degree in our day-to-day lives. Once in a while we come to an intersection of major concerns that create a potential for great damage, either to individuals or to the general good of the whole. When we reach these intersections it is imperative that we proceed with great care to avoid injury if at all possible, and if not, that we minimize the injury to the greatest extent wisdom allows.

Recently the courts have encountered such an intersection in challenges to the Solomon Amendment. At the crossroads of Congress' power under the Spending Clause and the cherished freedoms of speech provided by the First Amendment lies the prickly ground of the Doctrine of Unconstitutional Conditions. This crossroads is being navigated by the courts today.

This comment reviews the Solomon Amendment, its purpose and history. The challenges to the law have resulted in contentious litigation, but not unlike challenges the courts have faced in the past. After reviewing the past, this comment review the bases for each of the challenges in the current litigation and discuss the similarities of the several challenges. The analysis that followsdiscusses a single case as the flagship challenge and suggests that there is unlikely to be any major shift in the statutory direction of Congress. Finally, this comment looks beyond a final decision to the options available to the parties involved.

The Solomon Amendment

The Solomon Amendment, named for Representative Gerald Solomon of New York, was introduced in the House of Representatives during the second session of the 103d Congress.[1]

[1] 140 Cong. Rec. H3860-03, H3861.

The bill amended the National Defense Authorization Act for Fiscal Year 1995.[2] The purpose of the National Defense Authorization Act is to set military personnel strength and fund the budget requirements of the Department of Defense. The language of Representative Solomon's original amendment required that no funds would be made available to any educational institution through a Department of Defense contract or grant.[3]

The legislation ensured that federal funding, through the Department of Defense and in support of educational institutions, was not spent in places where military recruiters were not allowed on campus. The bill's sponsor, Representative Solomon, expressed his frustration with schools that accepted federal money but denied recruiters the opportunity to "explain[] the benefits of an honorable career in our military."[4] The amendment withheld Department of Defense funding provided "by grant or contract to any educational institution"[5] that prevented on-campus military recruitment by the Department of Defense.[6]

The Solomon Amendment passed through the House by a little better than a two-to-one vote.[7] The National Defense Authorization Act for Fiscal Year 1995 was passed by the Senate

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[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] *Id*.

[6] The original text of Mr. Solomon's amendment, entitled "Military Recruiting On Campus" is included here for reference. (a) Denial of Funds. (1) No funds available to the Department of Defense may be provided by grant or contract to any educational institution that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military purposes – (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students. (2) Students referred to in paragraph (1) are individuals who are 17 years of age or older. (b) Procedures for Determination. The Secretary of Defense, in consultation with the Secretary of Education, shall prescribe regulations that contain procedures for determining if and when an educational institution has denied or prevented access to students or information described in subsection (a). (c) Definition. For purposes of this section, the term "directory information" means, with respect to a student, the student's name, address, telephone listing, date and place of birth, level of education, degrees received, and the most recent previous educational institution enrolled in by the student. 140 Cong. Rec. H3860-03, H3861.

[7] 140 Cong. Rec. H3860-03, H3865 (ayes – 271 to noes – 126).

and enacted as law a few months later.[8] Since its debate in the House and subsequent enactment, the Solomon Amendment has come under attack.[9]

The amendment was offered by Representative Gerald Solomon, a Republican congressman from New York. Representative Solomon was a known supporter of the military, having served in the United States Marine Corps.[10] Though not the only member of Congress who might have sponsored this legislation, his role in its introduction to the House seems a natural extension of his work in Congress.[11] There does not seem to be any particular event that sparked Rep. Solomon to action; "[t]he apparent impetus for the Solomon Amendment was the continued refusal of many educational institutions to allow the military to engage in on-campus recruiting."[12]

There have been several changes in the language of the amendment. "In 1997 Congress amended the Solomon Amendment by expanding its penalty to include"[13] four additional departments beyond Defense,[14] but the premise of the law has not been lost to Congress.[15]

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[8] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337 § 558, 108 Stat. 2663, 2776 (1994) (codified as amended at 10 U.S.C. § 983 (2004)).

[9] 140 Cong. Rec. H 3860-03, 3861-3865. Representatives McNulty (NY), Dellums (Calif.), Unsoeld (Wash.), Schroeder (Colo.) and Mr. Underwood (Guam) all rose in opposition to the amendment. Representatives Dellums and Schroeder purported to speak for the Department of Defense, the American Bar Association, and numerous educational associations opposed to the amendment.

[10] Will Dunham, *Former Rep. Solomon, Ardent Conservative, Dies, at* http://slick.org/deathwatch/mailarchive/msg00372.html (last visited Mar. 5, 2005).

[11] *Id.* Mr. Dunham, in writing Rep. Solomon's obituary, notes that Solomon was "known as a committed Republican and aggressive conservative" and "was the chief sponsor of an unsuccessful amendment to the U.S. Constitution to prohibit the burning of the American flag."

[12] Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 278 (D.N.J. 2003). During the floor debate on his amendment, Rep. Solomon stated, "During the recent congressional hearings, Congress has been made aware that military recruiters are being denied access to educational facilities . . ." 140 Cong. Rec. H3860-03, H3861.

[13] *Id.* at 226.

[14] *Id.* (including Departments of Transportation, Labor, Health and Human Services, and Education).

[15] 151 Cong. Rec. H317-04 (the House voted overwhelmingly to reaffirm its support for the Solomon Amendment, passing House Concurrent Resolution 36, "Expressing Continued Support of Congress for Equal Access of Military Recruiters to Institutions of Higher Education" on February 2, 2005).

Through the previous decade, and especially with President Clinton's entry to the White House, there grew an ever increasing animosity between homosexual special interests and the military over the Defense Department's policies dealing with homosexual conduct and stated same-sex preferences for members in uniform.

During this period, the United States was involved in military conflict in Africa, South America, and Europe. At the same time, the military was reducing its size at the conclusion of the Cold War. Even though there were reductions in progress, there continued a need to recruit new personnel to meet the future needs of the military and to replace the many service members who were taking the opportunity to retire early or enter into civilian careers. Clinton, having come into office in 1992, had made an effort to fulfill a campaign promise to allow homosexuals to serve in the military. The President and his senior military advisors came to a compromise policy, now known as the "Don't Ask, Don't Tell" standard. The compromise did not create a new era of open accession into the military for homosexuals, but it did allow homosexuals who were in the military to remain and those who were willing to keep their preferences to themselves the opportunity to enter and serve in uniform.

The military policy did not comport with the non-discrimination policies of many colleges and universities around the country. Through the 1980s, many schools had adopted policies which limited employers who were allowed to recruit on campus.

A. Rules Implicated at a Legal Intersection

1. Congress' authority under the Spending Clause

The Constitution expressly gives Congress the right and the duty to collect taxes and spend those proceeds for the general welfare of the country.[16] Congress' spending power is well-

[16] U.S. Const., art. I, § 8, cl. 1.

established. The Supreme Court has held Congress has wide latitude under the spending clause to use funding to encourage compliance with its policy preferences.[17] There are limitations to Congress' power[18] but its broad power to spend has fewer restrictions than its ability to directly regulate activity through legislation.[19] As examples, Congress may not require that states raise the minimum drinking age but may condition highway funding on state legislation that raises the age to twenty-one.[20] Nor may Congress require that libraries install filters on internet computers open to the public, but Congress may withhold internet and computer funding from libraries that do not install those filters.[21]

The Constitution provides, even requires, that Congress is responsible for both the common defense and the general welfare of the nation. The general welfare can be provided for by regulating the actions of other governmental actors, the creation and operation of governmental agencies, or the direct funding of public needs. The last option, essentially the redistribution of wealth, results in the greatest surrender of Congressional control over the use of funds. The control of those funds is retained when Congress can refuse to continue funding if the recipient does not comply with Congress' purposes in providing the funding.

2. Doctrine of Unconstitutional Conditions

The Doctrine of Unconstitutional Conditions is related to the spending clause. This doctrine provides that Congress may not withhold funding based on conditions that require the recipient to give up some other guaranteed right.[22] This doctrine limits Congress' ability under the

[17] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[18] *Id.* at 207-08.

[19] *Id.* at 209.

[20] *See id.*

[21] *See* U.S. v. American Library Ass'n, Inc., 539 U.S. 194 (2003).

[22] *FAIR*, 291 F. Supp. 2d at 299.

spending clause to induce compliance from a recipient. There must already be some right to receive the funding. Examples here might be that Congress cannot condition veteran's tax benefits on the recipient's taking a loyalty oath.[23] Nor may Congress condition federal funding to broadcasting stations on the stations' restraint from editorializing.[24]

3. First Amendment Rights of Free Speech and Association

The right of free speech is one of the most cherished constitutional guarantees enjoyed by Americans. The right of free speech is not unlimited, but several types of expression are protected. Political speech is protected where the speaker wishes to positively express him or herself.[25] The reverse of that positive expression is also protected in that a speaker cannot be compelled to speak for another; in particular, the government may not compel a speaker.[26] Related to the right of free speech is the right to associate with others and thereby express some common opinion.[27] The right of association does not require that a group express itself, only that it have the opportunity to do so.[28] The violation of these rights is subject to a standard of strict scrutiny.[29]

II. Solomon Amendment Litigation

1. Background Litigation

As part of the background for the Solomon Amendment, there were several cases that may have had some influence on Representative Solomon. The suits which follow, suits against law

[23] *See* Speiser v. Randall, 357 U.S. 513 (1958).

[24] *See* FCC v. League of Women Voters, 468 U.S. 364 (1984).

[25] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[26] *Id.*

[27] Boy Scouts of America v. Dale, 530 U.S. 640, 655 (2000).

[28] *Id.*

[29] Burt v. Rumsfeld, 354 F. Supp. 2d 156, 179 (free speech) and 187 (association) (2005).

schools and the government that seek to deny military recruiters any presence on college campuses, illustrate the issues that likely frustrated Rep. Solomon.

In *United States v. City of Philadelphia*,[30] the Third Circuit Court of Appeals affirmed a lower court's summary judgment, limiting a local order that prohibited Temple University Law School from supporting military recruitment.[31] Several students and a student organization brought a complaint to the city human resources office alleging violations of the city's fair employment ordinances.[32] The plaintiffs argued that because the military discriminated against homosexuals, the law school had violated fair employment opportunities by allowing military recruiters to exclude from interviews any gay and lesbian students. The city's Commission on Human Relations entered an order against Temple University Law School, disallowing military recruiters on-campus.[33] The military brought suit, joined by the law school, to avoid the order as a violation of the Supremacy Clause.[34] The circuit court held the city ordinance was in conflict with Congressional policy and could not be permitted to restrict military recruitment.[35] The federal law preempted the local ordinance only because the two were not compatible, not because Congress had moved to supplant state law.[36] The Third Circuit Court of Appeals returned to and distinguished this decision in *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, discussed below in this comment.[37]

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[30] U.S. v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986).

[31] *Id.* at 91.

[32] *Id.* at 84.

[33] *Id*.

[34] *Id.* at 85.

[35] *City of Philadelphia*, 798 F.2d at 88-89.

[36] *Id.* at 86 n.5.

[37] *FAIR*, 291 F. Supp. 2d at 234 n.15 (*distinguished from City of Philadelphia* because the law school in *City of Philadelphia* had invited the military as opposed to having the military recruiters imposed upon the school in *FAIR* and because there was no preemption question in *FAIR*).

Shortly before the Solomon Amendment was first enacted, the Federal District Court for the District of Minnesota held that recruitment was commercial speech that could be restricted in *Nomi v. Regents for the University of Minnesota*.[38] Plaintiff, Brian Nomi, was a student who sued the University of Minnesota Law School seeking an injunction against the school's non-discrimination policy.[39] Nomi argued that the school's policy was an unconstitutional limit on his First Amendment right to hear the recruitment message of the U.S. military or the Federal Bureau of Investigation.[40] The defendant characterized the recruitment message as commercial speech that could be restricted by the state where there was an important governmental interest.[41] The court agreed first that recruitment speech was commercial speech, "speech proposing a commercial transaction."[42] The court also agreed that the interest of the school in promoting equal opportunity was a sufficiently important governmental interest.[43] The court allowed the law school to keep its non-discrimination policy and Nomi's appeal was vacated as moot because he had graduated by the time the court of appeals heard his case.[44]

In *Gay and Lesbian Law Students Association (GLLSA) v. Board of Trustees*,[45] the law school faculty, certain students, and a student organization sued the University of Connecticut for violations of state law that protected sexual orientation.[46] In 1991 the Connecticut legislature

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[38] *Nomi v. Regents for the University of Minnesota*, 796 F. Supp. 412 (Minn. 1992) *vacated as moot*, 5 F.3d 332 (8th Cir. 1993).

[39] *Id.* at 415.

[40] *Id.*

[41] *Id.* at 416.

[42] *Id.* at 417.

[43] *Id.* at 419, *applying* the four-part test described in Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

[44] *Nomi v. Regents for the University of Minnesota*, 5 F.3d 332 (8th Cir. 1993).

[45] Gay and Lesbian Law Students Association v. Board of Trustees, 673 A.2d 484 (Conn. 1996).

[46] *Id.* at 486.

passed a Gay Rights Law.[47] The Connecticut law prohibited state entities from discriminating on the basis of sexual orientation and specifically prohibited such discrimination by "placement services provided by state agencies."[48] The legislature included "educational institutions, which provide employment referrals or placement services."[49] The Gay Rights Law excepted from its prohibitions the conduct and administration of Reserve Officers' Training Corps programs on college campuses.[50] The Connecticut Supreme Court made clear, however, that the state law would not require any greater assistance to the military than provided other discriminatory employers.[51] The Connecticut Supreme Court upheld the state law and affirmed a permanent injunction against the university, prohibiting military recruiters from using the law school's career placement services.[52]

These three cases highlight the trend against military recruitment on law school campuses. The non-discrimination policies of the nation's law schools, which began in the late 1970s,[53] began to set an unwelcome tone for the U.S. military through the 1980s. By the time the Solomon Amendment was proposed, the military was enduring many stresses through the early 1990s. These stresses included the draw down of troops at the close of the Cold War coupled with increasing overseas military commitments such as the Gulf War in Iraq and peacekeeping

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[47] 46a C.G.S. § 46a-81a (2005).

[48] 46a C.G.S. § 46a-81j, "Sexual orientation discrimination: Job recruitment and placement services provided by state agencies."

[49] 46a C.G.S. § 46a-81j(a) (2005).

[50] 46a C.G.S. § 46a-81q (2005).

[51] *GLLSA*, 673 A.2d at 499. The defendant argued that Connecticut law required military recruiters must be allowed access to on-campus recruiting according to 10a C.G.S. § 10a-149a, "Military recruiters; access to directory information and on-campus recruiting." That law was in force before the Gay Rights law was adopted, but was subsequently repealed in 1997 and replaced by § 10a-149c which only required that military access to school directories was only required from state schools to the extent required to keep the school in compliance with federal law and to prevent the loss of federal funding.

[52] *Id.* at 499.

[53] *See infra*, note 55 (late 1970s).

efforts in Somalia and Bosnia-Herzegovina. Given the accompanying budget difficulties the federal government was working through, it is not surprising that Representative Solomon might have been frustrated by impediments to military recruiting being erected by certain institutions of higher learning.

2. Current Litigation

This series of cases, primarily in the northeast United States, attack the Solomon Amendment as unconstitutional. The cases, all in federal court,[54] follow a similar line of arguments. The plaintiffs in these cases variously represent law school faculties, law school students, student organizations, and national law school organizations. The claims of these plaintiffs center on non-discrimination policies that have been in place since the late 1970s.[55] The non-discrimination policies include sexual orientation as a protected class.[56] In each case, the non-discrimination policies applied to the law school's career placement service.[57] The career placement service or office at each school required potential employers to sign an assurance to the school that the employer did not discriminate in any way which violated the school's non-

[54] Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004); Burt v. Rumsfeld 2005 WL 273205 (D. Conn. 2005); Student Members of SAME v. Rumsfeld, 321 F. Supp. 2d 388 (D. Conn. 2004); Burbank v. Rumsfeld, 2004 WL 1925532 (E.D. Pa. 2004).

[55] *FAIR*, 390 F.3d at 224; *Burt*, 322 F. Supp. 2d at 193.

[56] *Burt*, 322 F. Supp. 2d at 193; *SAME*, 321 F. Supp. 2d at 390; *Burbank* 2004 WL 1925532 at 2; *see also* Gay and Lesbian Law Students Association (GLLSA) v. Bd. of Trustees, 673 A.2d 484, 487 (Conn. 1996) (claiming a violation of state law). The American Association of Law Schools (AALS), a non-profit association of law schools voted in 1990 "to include sexual orientation as a protected category in law school non-discrimination policies." *FAIR*, 291 F. Supp. 2d at 291.

Most law schools have an office of career placement service whose job it is to help students and graduates locate employment and to help employers find and hire students and graduates from the school. Other services offered include skill training for job interviews, resume writing, and other job counseling for the students.

[57] *Burt*, 322 F. Supp. 2d at 193; *SAME*, 321 F. Supp. 2d at 390; *Burbank* 2004 WL 1925532 at 2; *see also GLLSA*, 673 A.2d at 487. The AALS policy also directed career placement services should not be made available to noncompliant employers. *FAIR*, 390 F.3d at 225.

discrimination policy.[58] If an employer could not or would not sign the assurance, the law school refused to allow that employer access to the career placement facilities.[59] Congress directed that Department of Defense policy should not allow homosexuals to serve if they acknowledge their sexual orientation or commit homosexual acts.[60] Military recruiters were unable to comply with the law school non-discrimination policies as a result.[61] In an effort to preserve the consistency of their non-discrimination policies, the law school faculty, students, and organizations in these cases sought to prevent the military from participating in on-campus recruiting efforts.[62]

Forum for Academic and Institutional Rights, Inc. v. Rumsfeld

The first of the four federal cases is styled *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld* (*FAIR*).[63] In September, 2003, a group of law school faculty organizations and students came together as groups and individually to challenge the United States' military's application of the Solomon Amendment. The District Court faced two issues; first whether the plaintiffs had legal standing and second, whether the plaintiffs' motion for injunction had "established a likelihood of success on the merits."[64]

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[58] *Burt*, 322 F. Supp. 2d at 193; *SAME*, 321 F. Supp. 2d at 390; *Burbank* 2004 WL 1925532 at 2. *Contra GLLSA*, 673 A.2d at 487 (quoting in footnote 4, stipulated fact 9., the specific exception for written certification from military recruiters). The AALS policy directed career placement services to obtain "written assurance" of compliance from employers. *FAIR*, 291 F. Supp. 2d at 280-81.

[59] *Burt*, 322 F. Supp. 2d at 193; *SAME*, 321 F. Supp. 2d at 390; *Burbank* 2004 WL 1925532 at 2 (military directed to the Univ. of Pa. Office of Career Services, rather than using the law school Career Planning and Placement Office); *see also GLLSA*, 673 A.2d at 487 (quoting in footnote 4, stipulated fact 9., that written certification was required before interviews were allowed).

[60] 10 U.S.C. § 654 (1993).

[61] *Burt*, 322 F. Supp. 2d at 193; *SAME*, 321 F. Supp. 2d at 390; *Burbank* 2004 WL 1925532 at 2; *see also GLLSA*, 673 A.2d at 487 (quoting in footnote 4, stipulated fact 11., allowing the military to amend or omit the law school non-discrimination certification).

[62] *FAIR*, 390 F.3d at 231; *FAIR*, 291 F. Supp. 2d at 281-82; *Burt, 2005 WL 273205 at 1; Burt*, 322 F. Supp.2d at 198; *SAME*, 321 F. Supp. 2d at 393-94; *Burbank*, 2004 WL 1925532 at 3.

[63] *FAIR*, 291 F. Supp. 2d 269 (D.N.J. 2003).

[64] *Id.* at 275.

The first issue faced by this court was the question of standing. The government, the defendant in this case, argued that the plaintiffs were third parties here, without an injury that was personal to them and that could be remedied by the court.[65] The plaintiffs were numerous and need to be described in order to understand the breadth of interests represented.

The first named plaintiff is "an association of law schools and law faculties"[66] called the Forum for Academic and Institutional Rights, Inc. (FAIR). The organization is described as a "membership corporation organized under the laws of New Jersey."[67] The district court described FAIR as follows:

> Membership is open to law schools, other academic institutions, and faculties that vote by a majority to join. FAIR's stated mission is 'to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education.' With few exceptions, FAIR membership is kept secret.[68] (citations omitted)

The second named plaintiff is another organization, the Society of American Law Teachers, Inc. (SALT).[69] This New York corporation includes a membership of "nearly 900" law school faculty members.[70] SALT members are committed "to making the legal profession more inclusive and to extending the power of the law to underserved individuals and communities."[71]

In addition to these two groups, two individual law school professors, Erwin Chemerinsky of the University of Southern California Law School and Sylvia Law of the New York University

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[65] *Id.* at 285.

[66] *Id.* at 275.

[67] *FAIR*, 291 F. Supp. 2d at 275.

[68] *Id.*

[69] *Id.* at 274.

[70] *Id.* at 275.

[71] *Id.*

Law School, are also plaintiffs.[72] The faculty organizations and individual professors represent a geographically large area, covering the width of the United States.

Finally, there are two student groups and three individual students who have joined as plaintiffs. The student groups include the Coalition for Equality of Boston College Law School and the Rutgers Gay and Lesbian Caucus of Rutgers University School of Law.[73] The three individual students are all from Rutgers.[74]

The plaintiffs named as defendants six United States department secretaries including Defense, Education, Labor, Health and Human Services, Transportation, and Homeland Security.[75] The departments all contribute to the grants and federal contracts that spend "billions of dollars"[76] each year in the country's many institutions of higher learning. The Solomon Amendment restricts funding from all these departments, not just the Department of Defense.[77]

This suit was brought to enjoin the defendants from enforcing the funding restrictions of the Solomon Amendment.[78] The plaintiffs argued that the law was unconstitutional on its face "because Congress cannot command law schools even to admit the military to campus" with a message that is in conflict with the law schools' stated mission and goals.[79] The plaintiffs also

[72] *Id.* at 275-76.

[73] *FAIR*, 291 F. Supp. 2d at 276.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] 10 U.S.C. § 983(d)(1).

[78] *FAIR*, 291 F. Supp. 2d at 276.

[79] *Id.* at 297.

argued the law was unconstitutional as applied by the military.[80] According to the law schools, the military was requiring "affirmative assistance" that involved an expenditure of resources.[81]

> "Plaintiffs contend that the Solomon Amendment is unconstitutional because it (1) conditions a benefit – federal funding – on the surrendering of law schools' First Amendment rights of academic freedom, free speech, and freedom of expressive association; (2) discriminates on the basis of viewpoint by promoting only a pro-military recruiting message and by punishing only those schools that exclude the military because they find the military's policy against homosexual conduct morally objectionable; and (3) violates the void-for-vagueness doctrine for lack of clear guidelines and for conferring unbridled discretion on military bureaucrats to decide which institutions to target and what acts or omissions amount to non-compliance with the statute."[82]

At issue was the non-discrimination policy adopted at most accredited American law schools.[83] The policy includes sexual orientation as a protected category of people.[84] The non-discrimination policy includes law school career placement services and does not allow the expenditure of school resources to support the recruiting efforts of employers that discriminate on the basis of sexual orientation.[85] The policy does not restrict the students' freedom to seek employment with any employer they may choose, but the students must go to the employers.[86] Plaintiffs argue that the Solomon Amendment is unconstitutional on its face and that the

[80] *Id.*

[81] *Id.*

[82] *Id.* at 274-75.

[83] *FAIR*, 291 F. Supp. 2d at 280.

[84] *Id.*

[85] *Id.*

[86] *Id.*

Department of Defense interpretation and enforcement of the statute is unconstitutional as it is applied.[87]

The government moved to dismiss on the grounds that the plaintiffs did not have standing to sue.[88] First, the government argued that the law schools were not "entitled to bring suit on their own behalf and potentially against the wishes of the parent institution."[89] Second, the government pointed out that the parent institutions, not the plaintiffs, were in the position to make a decision whether or not to comply with the Solomon Amendment.[90] Finally, the law schools were suing as third-party litigants on behalf of parent universities that had not chosen to be part of the suit.[91]

As an employer, the Department of Defense sends military recruiters to colleges and universities all over the country in search of candidates to fill a wide variety of jobs, including legal professionals. The military has a long-standing policy against homosexual activity.[92] The policy is codified into U.S. law[93] and traces a history that reaches back to 1916 when assault with intent to commit sodomy became reason for discharge.[94] The need for qualified candidates and the regulations prohibiting homosexual activity mean that military recruiters are unwelcome at law schools that enforce the non-discrimination policy.[95] The court in this case held that the plaintiffs did have standing.

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[87] *Id.* at 297.

[88] *Id.* at 285.

[89] *FAIR*, 291 F. Supp. 2d at 285.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 281; 10 U.S.C. § 654(a)(13) (1993).

[93] 10 U.S.C. § 654 (2005).

[94] Nat'l Def. Research Inst., RAND, MR-323-OSD, Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment 3-4, (1993).

[95] *FAIR*, 291 F. Supp. 2d at 281.

The court denied the plaintiffs' motion for a preliminary injunction.[96] Plaintiffs had the burden of establishing they had a "reasonable likelihood" of success on the merits, that they were likely to suffer "irreparable harm" if not granted relief, that the harm they might suffer would be greater than the harm to the defendant if the injunction were granted, and that the injunction was in the public interest.[97]

Burt v. Rumsfeld

In *Burt v. Rumsfeld* the faculty of Yale Law School brought suit against Secretary Donald Rumsfeld in his official capacity as the Secretary of Defense.[98] The faculty consisted of forty-five faculty members, one of whom chose to represent himself on a slightly different claim.[99] The faculty brought suit to enjoin the Department of Defense from enforcing the Solomon Amendment. They argued that the Solomon Amendment and 32 C.F.R. 216.4(c)(3) were unconstitutional both on their face and as applied to Yale Law School.[100] Further, the plaintiffs argued that the "equal access requirement of 32 C.F.R. § 216.4(c)(3) [was] not a reasonable interpretation of the Amendment."[101]

The Secretary of Defense moved to dismiss the action claiming the faculty lacked standing.[102] The defense argued that the proper party to the action should have been Yale University, not faculty at Yale Law School, because the university would be the party to suffer

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[96] *Id.* at 275.

[97] *Id.* at 296.

[98] Burt v. Rumsfeld, 322 F. Supp. 2d 189, 196 (D. Conn. 2004).

[99] *Id.* at 196. The faculty members, as a group, based their claim on the assertion that they were forced to communicate a significantly different message than they would have chosen. *Burt*, 354 F. Supp. 2d at 159. Professor Rubenfeld's argument is "slightly different" from the rest of the faculty. He claims that law compels him to adopt the military's message as his own. *Burt*, 354 F. Supp. 2d at 159-60.

[100] *Id.*

[101] *Id.*

[102] *Id.*

the loss of funding, not the law school faculty.[103] A motion to dismiss required the court to consider both standing and ripeness.[104]

The court first applied the three-part test to determine whether the faculty had standing. The test requires the plaintiff to demonstrate "(1) an injury in fact; (2) caused by the conduct complained of; (3) and that such injury is likely to be redressed by a favorable judicial decision."[105] The court noted that "[t]he defendant [had] not contested redressability"[106] and did not address that part of the test.

The court found the faculty met the first part of the test, having suffered injury. The faculty was "compelled" to suspend their non-discrimination policy in order to avoid the loss of Department of Defense funding to the university.[107] The suspension was an impairment of their freedom of speech and association.[108] This injury was suffered specifically by the faculty. The faculty was responsible for the non-discrimination policy, not the university.[109] The faculty had decided to apply the policy to "all aspects of law school life" and the compelled suspension of the policy was a violation of their free speech right.[110]

The conduct of the Department of Defense consisted of the threat of loss of federal funding that would impact not only Yale Law School but also the other schools in the Yale University system.[111] The threat by the Department of Defense led directly to the suspension of the law

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[103] *Id.*

[104] *Burt*, 322 F. Supp. 2d at 196.

[105] *Id.* at 196 (citing to Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

[106] *Id.* at 197.

[107] *Id.* at 197-98.

[108] *Id.*

[109] *Id.* at 198.

[110] *Burt*, 322 F. Supp. 2d at 198.

[111] *Id.* at 199.

school's non-discrimination policy.[112] The threat was the cause of the injury that the faculty suffered. The court went on to add that even if Yale University were seen as the financially injured party, the law school faculty was the constitutionally injured party because it was the law school's non-discrimination policy (as opposed to a University policy) that had been stifled.[113]

The court next turned to the question of ripeness. The defendant argued that no decision had been made to suspend financial benefits to Yale University or any of its schools, so the claim was not ripe for review.[114] The court held the question was ripe because the regulation that had resulted in injury to the plaintiff was final and was being challenged here.[115] The court further found that the faculty had suspended the non-discrimination policy on the threat of funding loss alone.[116] The court held the challenge was ripe because a concrete and ongoing injury had been sustained by the faculty that could not be remedied without judicial intervention.[117]

The court held the plaintiffs had standing and the issue was ripe for review. As a result, the defendant's motion to dismiss was denied.[118] This decision in June, 2004, cleared the way for the plaintiffs to pursue their injunction claim.

Having settled the standing and ripeness issue, the plaintiffs in *Burt* brought their claims forward.[119] The faculty sought summary judgment on their claims.[120] Their first claim was that the law school had not violated the Solomon Amendment because recruiting at Yale Law School

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[112] *Id.*

[113] *Id.* at 200 n.2.

[114] *Id.* at 200.

[115] *Id.* at 201.

[116] *Burt*, 322 F. Supp. 2d at 202.

[117] *Id.* at 203.

[118] *Id.*

[119] Burt v. Rumsfeld, 354 F. Supp. 2d 156 (D. Conn. 2005).

[120] *Id.* at 160.

took place off-campus.[121] The Solomon Amendment only applied to on-campus recruiting so the law school had not violated the statute. The second claim was that even if the law school had violated the Solomon Amendment, the law was an unconstitutional condition on a federal benefit.[122]

The court held that the Yale Law School did violate the Solomon Amendment because access to the official recruiting programs required employers to comply with the school's non-discrimination policy.[123] Plaintiffs argued that the military had the same opportunity as any other employer who wished to recruit on-campus, all the military had to do was sign the non-discrimination policy.[124] The court refused to equate "opportunity" with access to the school's recruiting program.[125] The language of the Solomon Amendment plainly required access that was "at least equal in quality and scope"[126] to the access provided other recruiters. The law school's Career Development Office was located on-campus and offered access through its official website.[127] Those services were not available to military recruiters because they could not comply with the non-discrimination policy. The military was "effectively prevented" complete access in violation of the statute.[128]

The court also held that the Solomon Amendment imposed an unconstitutional condition on the faculty of Yale Law School.[129] The government argued that the Solomon Amendment was

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[121] *Id.* at 170.

[122] *Id.* at 171.

[123] *Id.* at 173.

[124] *Id.* at 172.

[125] *Burt*, 354 F. Supp. 2d at 173.

[126] 10 U.S.C. § 983(b) (2004).

[127] *Burt*, 354 F. Supp. 2d at 173.

[128] *Id.* at 173-74.

[129] *Id.* at 175.

nothing more than the lawful exercise of Congress' power under the Spending Clause.[130] The court disagreed that this was a simple exercise of spending authority. Congress may not use its spending authority to coerce or compel a party to forego some other constitutionally guaranteed right.[131] The court noted that, "the Supreme Court has expressly recognized that, even though a person may not be entitled by right to a valuable benefit and 'even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.'"[132] The court found that the faculty had suspended their non-discrimination policy to prevent the loss of funds to Yale University and the defense conceded the suspension was a result of the Solomon Amendment requirements.[133] Congressional authority under the Spending Clause had exceeded the allowed coercion and turned to "compulsion."[134]

The compulsion of the Solomon Amendment worked to deny the faculty its right of free speech.[135] The right of free speech includes not only the right to speak out, but the right to remain silent.[136] It also includes the right to refrain from speaking for another person or the government.[137] The government may not compel an individual to aid a third party in disseminating a message with which the individual does not agree.[138] The faculty had been coerced into disseminating the message of the Department of Defense in violation of the

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[130] *Id.* at 174-75.

[131] *Id.* at 175.

[132] *Id.* at 174 (*quoting* Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

[133] *Burt*, 354 F. Supp. 2d at 175.

[134] *Id.*

[135] *Id.* at 179.

[136] *Id.* at 176.

[137] *Id.* (*quoting* Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[138] *Id.* (*citing* Pac. Gas & Elec. v. Pub. Util. Comm'n of Calif. 475 U.S. 1, 11 (1986) (Powell, J., plurality opinion).

faculty's stated non-discrimination policy.[139] The abridgement of the right to free speech resulted in an unconstitutional condition that Congress could not impose on the faculty at Yale Law School.

In similar fashion, the court found that the faculty was denied its right of free association. Using the test the Supreme Court established in *Boy Scouts of America v. Dale*[140] the court found the law school faculty was an expressive association whose viewpoint had been significantly affected by the government.[141] The "key" in *Dale* was the "substantial" deference given to the organization to determine both its message and what would interfere with the expression of that message.[142] In this case, the faculty had established their message through their non-discrimination policy.[143] The Solomon Amendment required that the faculty now be associated with the message of the Department of Defense, a message with which the faculty wished to disassociate.[144] This interference had a significant affect on the faculty's desired message that constituted an unconstitutional condition.[145]

The court applied strict scrutiny to both the free speech and free association rights to determine if perhaps the government's action could be justified.[146] Strict scrutiny was the appropriate standard because the right at issue is a First Amendment interest.[147] The compelling

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[139] *Burt*, 354 F. Supp. 2d at 178.

[140] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648-58 (2000).

[141] *Burt*, 354 F. Supp. 2d at 184 (*quoting FAIR*, 390 F.3d at 231, the elements are, "1.) whether the group is an 'expressive association,' 2.) whether the [governmental] action at issue significantly affects the group's ability to advocate its viewpoint, and 3.) whether the [government's] interest justifies the burden it imposes on the group's expressive association.").

[142] *Id.* at 186.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 186-87.

[146] *Id.* at 179-83, and 187.

[147] *Burt*, 354 F. Supp. 2d at 180 (*citing Pacific Gas*, 475 U.S. at 19 (Powell, J., plurality opinion)).

state interest, raising and maintaining a military, was not challenged by the plaintiffs and assumed by the court.[148] The compelling interest, however, must be accomplished by a narrowly tailored means.[149]

SAME v. Rumsfeld

A companion case to *Burt v. Rumsfeld* was brought by two student organizations of Yale Law School. In *SAME v. Rumsfeld*,[150] student organizations representing lesbian, gay, bisexual, and transgender students[151] brought suit against the Secretary of Defense. The two organizations were groups called SAME, which stands for Student/Faculty Alliance for Military Equality, and Outlaws.[152] The plaintiffs in this case argue violations of their First and Fifth Amendment rights as a result of the military's interpretation and application of the Solomon Amendment.[153] As in the *Burt* case, the defense moved to dismiss the suit for lack of standing and because the issue was not ripe.[154]

The court addressed four injuries asserted by the plaintiffs. The claims of the plaintiffs included impairment of their First Amendment rights of expressive association, to receive or hear the message of another, and to express a particular viewpoint, and a violation of their equal protection rights under the Fifth Amendment.[155]

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[148] *Id.*at 180-81, 187.

[149] *Id.* at 181 (*citing* Landell v. Sorrell, 382 F.3d 91, 125 (2d Cir. 2004).

[150] SAME v. Rumsfeld, 321 F. Supp. 2d 388 (D. Conn. 2004).

[151] *Id.* at 390.

[152] *Id.*

[153] *Id.* at 391-92.

[154] *Id.* at 392 (standing) and 397 (ripeness).

[155] *Id.* at 391-92.

The court began its discussion with a brief review of the requirements for standing of associations, which includes a greater burden than required of an individual.[156] An association can sue on behalf of one or more of its members if it can show, "(1) that their members would otherwise have standing to sue in their own right; (2) that the interests they seek to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[157] The defense had not challenged the standing of the plaintiffs to represent their members.[158] The court found that the requirements for standing were met by these two associations because any of the individual members could also have asserted these claims.[159]

The court first granted the defense motion to dismiss on the plaintiff claim based on a right of expressive association.[160] The court held that the law school faculty, a proper party in *Burt v. Rumsfeld*,[161] had created and were solely responsible for the law school's non-discrimination policy.[162] Neither the students nor the student associations had "an institutional voice" in that policy.[163] The students were "patrons" of the institution that had created the policy, not members, so the student associations could not claim an injury on behalf of the students.[164]

On the other hand, the court held that the plaintiffs did have a right to receive the message of the law school faculty. The right to express an opinion is pointless unless others have a right to

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[156] *SAME*, 321 F. Supp. 2d at 392-93.

[157] *Id.* at 392 (*citing* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

[158] *Id.* at 392-93.

[159] *Id.* at 393.

[160] *Id.* at 394.

[161] *Burt*, 354 F. Supp. 2d 156 (D. Conn. 2005).

[162] *SAME*, 321 F. Supp. 2d at 394.

[163] *Id.*

[164] *Id.*

hear and receive that information.[165] Having determined that the faculty had a right to express a particular associational preference, the court held that the individual students enjoyed a right to receive that message from the faculty.[166] The actions of the military in applying the Solomon Amendment impaired the students' right to receive the faculty's message. This injury was specific to the students and the court denied the defense motion to dismiss based on this claim.[167]

The next claimed injury was an impairment of the students' right to express a particular viewpoint. The court held that, like the expressive association claim, the faculty had expressed a particular viewpoint through the non-discrimination policy.[168] The students asserted that they had chosen to come to Yale Law School because of the viewpoint expressed in the non-discrimination policy.[169] The court held that "the mere fact that [the students] agree with the law faculty's viewpoint does not make their own viewpoint the target of the discrimination."[170] The defense motion to dismiss was granted on this claim because the plaintiffs were not the injured party.[171]

The last claimed injury was a violation of equal protection under the Fifth Amendment.[172] The students claim that Congress "singled out gays and lesbians" in passing the Solomon Amendment as punishment for those universities that protested the military "Don't Ask Don't

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[165] *Id.* ("the right to receive information [is] 'an inherent corollary of the rights of free speech and press' . . . and is a necessary 'predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.'") (*quoting* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982)). *Id.*

[166] *SAME*, 321 F. Supp. 2d at 395.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *SAME*, 321 F. Supp. 2d at 395.

Tell" policy.[173] The plaintiffs argue that gay and lesbian students have born the full brunt of the suspension of the law school's non-discrimination policy.[174] Plaintiffs argue that the discrimination against these students that has resulted bears no relation to any legitimate governmental objective.[175] The court held that this claim was at least sufficient to establish standing and the defense motion to dismiss was denied.[176]

Having found potential injury-in-fact on two of the four claims, the court next addressed whether there was a causal link between the claimed injuries and the actions of the military in enforcing the statute. The court held that the Department of Defense' actions were "fairly traceable" to the Yale Law School faculty's decision to suspend the non-discrimination policy.[177] The court held that the suspension of the non-discrimination policy caused both injuries to the students; they could no longer receive the non-discrimination message and they had suffered a loss of equal protection.[178] The court denied the defendant's motion to dismiss on the plaintiffs' claims of a right to receive information and equal protection.[179]

Finally, the court held that "this matter [was] ripe for adjudication" for the same reasons that had been provided in *Burt*.[180] The suspension of the school's non-discrimination policy was

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[173] *Id.* at 396.

[174] *Id.*

[175] *Id.*

[176] *Id.* The court expressed doubt that this claim would be successful on the merits because the "Don't Ask Don't Tell" policy has been held constitutional. None-the-less, because the argument for standing has a lower threshold, this argument was sufficient to establish standing before the court. *Id.*

[177] *SAME*, 321 F. Supp. 2d at 397. The court followed the instruction of the Supreme Court, citing from Bennett v. Spear, 520 U.S. 154, 169 (1997), in seeking to ensure the injury was "fairly traceable" to the defendant and not merely the last step in chain of injury. The "fairly traceable" standard includes injuries "produced by . . . coercive effect upon the action of someone else." *Id.* Here, the injury to the students could be traced to the military's coercion of Yale Law School in suspending the non-discrimination policy.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 397-98. *See supra* notes 85-88 and accompanying text.

effective based on the loss of funding threat alone, and the issue would be no more ripe if the Department of Defense took final action against Yale University to cut off funding. The defendant's motion to dismiss for lack of ripeness was denied.[181]

Burbank v. Rumsfeld

The last federal case in this review is *Burbank v. Rumsfeld* [182] In this case, the plaintiffs included faculty members, students, and a student organization all of the University of Pennsylvania Law School.[183] The claims in this case were very similar to the claims in *FAIR*, *Burt*, and *SAME*. The claims and standing issues were so similar, the court summarized the claims of the plaintiffs as "the same types of injuries-in-fact held sufficient to confer standing" on the various plaintiffs in those cases, citing each.[184] Similarly, the defense made the same motions to dismiss for lack of standing.[185] This court found no new arguments from either side and came to the same holdings as the courts in *FAIR*, *Burt*, and *SAME*.[186] The end result was that the defense motion to dismiss was denied because the plaintiffs did have standing to sue on First Amendment grounds.[187] The plaintiffs' motion for summary judgment was also denied, because the court found that there were still issues of fact that remained.[188]

III. Analysis of Recent Decisions

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[181] *Id.*

[182] Burbank v. Rumsfeld, 2004 WL 1925532 (E.D. Pa. 2004).

[183] *Id.* at 1.

[184] *Id.* at 3.

[185] *Id.* at 2.

[186] *Id.* at 3-5.

[187] *Id.* at 6.

[188] *Burbank*, 2004 WL 1925532 at 5. Given the favorable results for the plaintiffs in *FAIR* at the 3rd Circuit Court of Appeals, the plaintiffs in *Burbank* will not pursue their case unless and until the 3d Circuit Court's *FAIR* decision is overturned by the U.S. Supreme Court. Telephone interview with Richard L. Berkman, attorney for the plaintiffs in Burbank (Apr. 28, 2005).

Plaintiffs in the recent litigation have followed similar strategies in attacking the Solomon Amendment. In each case, the plaintiffs claimed First Amendment violations directed at the suppression of the non-discrimination policies of the law schools. The faculties claim to have suffered the loss of their freedom to express their opposition to the discriminatory policy of the United States military. The students and student organizations claim to have lost their freedoms to express their opposition to the military policies and their freedoms to hear the messages of the faculty at the schools where the students attend.

The *FAIR* case is the oldest of this series, having begun at the district court level in 2003. The District Court for the District of New Jersey held in favor of the government in that case, granting the defendant's motion to dismiss. That case was appealed and the Third Circuit Court of Appeals reversed the decision of the lower court in 2004. That reversal meant the plaintiffs won their injunction against the enforcement of the Solomon Amendment.[189] The government has appealed and the Supreme Court has agreed to hear this case, but not until the next session which begins in October of 2005.[190]

Litigation of the more recent cases has continued, but may slow until the Supreme Court decides *FAIR*. As of this writing, the plaintiffs in the *Burt* case have appealed to the Second Circuit Court of Appeals.[191] Plaintiffs in *Burbank* have not decided to continue immediately

[189] Kelly Field, *High Court to Hear Case on Military Recruiting*, THE CHRONICLE OF HIGHER EDUCATION, May 13, 2005, at A1. Since the injunction was granted, "only three law schools, Harvard, Yale, and the New York Law School, have publicly restored their restrictions on military recruiters." *Id.*

[190] *High Court to Consider On-campus Recruiting*, MONTGOMERY ADVERTISER, May 3, 2005, at 4A.

[191] E-mail from Kyle Wong, attorney, Cleary Gottlieb Steen & Hamilton L.L.P. to Jerry Daniel, law student at Thomas Goode Jones School of Law (May 2, 2005) (on file with author). The District Court for the District of Connecticut later declared the decision in *SAME* moot. The earlier decision in *Burt* resulted in relief for the primary prayer of the plaintiffs in *SAME*. *Id.*

with an appeal, choosing to wait the pending outcome at the Supreme Court.[192] The issues raised in *FAIR* will likely, then, also become dispositive in these other cases.

The New Jersey District Court opinion included a careful discussion of each of the issues, which include the intersection of the doctrine of unconstitutional conditions, the spending clause, and the first amendment rights of freedom of speech and expressive association. This analysis continues by covering each issue in the order of that opinion and comparing it to the holdings of the Third Circuit Court of Appeals. The recurring disagreement will be what interests to balance and the degree of balancing.

Like the funds at issue in the Solomon Amendment, the parties are contesting whose rights are more important. None of the rights mentioned have yet been declared absolute. There is no Congressional right that is absolute under the spending clause. That is the substance of the Doctrine of Unconstitutional Conditions. Congress has no absolute right to impair or deny rights guaranteed by the Constitution by withholding benefits that are otherwise due to an individual or an organization. The Court has given Congress wide latitude under the Spending Clause, but there are limits. Similarly, there is not an absolute right of free speech under the First Amendment. The Court has imbued this crucial freedom with great value and purpose, yet that right is not absolute and can be restrained under appropriate circumstances.

The Doctrine of Unconstitutional Conditions states that government may not impose conditions on the grant of funds "in order achieve indirectly those regulatory ends that the Constitution prohibits it from achieving directly."[193] This doctrine prevents the government from, in effect, buying off individual rights. The rights citizens have acquired through the Constitution should not be held hostage to spending power of the government. Certainly the

[192] Telephone interview with Richard L. Berkman, plaintiffs' attorney in *Burbank v. Rumsfeld* (Apr. 28, 2005).

[193] Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911, 1921 (Dec. 1995).

federal government has great spending power and Congress through its powers under the Spending Clause can wield great influence, if not coercion. To protect against the abuse of this power, the doctrine of unconstitutional conditions makes an assumption about the bargaining position of the individual before restricting the power of Congress to influence an individual's behavior. The doctrine assumes that the individual has some legal or legitimate claim to a right that he or she may relinquish. The right might be an express provision of the Constitution or a statutory provision made available to anyone who might qualify by a created set of standards. Statutory provision are sometimes referred to as entitlements and should not be withheld from a qualifying individual without good cause. A violation of the Unconstitutional Conditions Doctrine results when government attempts to force an individual to choose between one of two rights, foregoing one in favor of the other.

In their challenge to the Solomon Amendment, the plaintiffs charge that Congress has attempted to wrest away their First Amendment rights by denying funding in the form of grants and contracts from federal agencies. Plaintiffs claim Congress is seeking to exchange the law schools' freedoms of speech and expressive association in return for continued funding. Certainly the plaintiffs have legal claim to their First Amendment rights. The issue is whether the plaintiffs have relinquished those rights in favor of continued funding.

The difference of opinion between the district court and the circuit court of appeals in *FAIR* rests upon whether the First Amendment rights of the plaintiffs are absolute. The circuit court implied that the plaintiffs' rights are absolute and any imposition on those rights will violate the doctrine of unconstitutional conditions.[194] The district court noted that not even First

[194] *FAIR*, 390 F.3d at 229 ("[I]f the law schools' compliance with the Solomon Amendment compromises their First Amendment rights, the statute is an unconstitutional condition.").

Amendment rights were absolute.[195] This basic difference in entering arguments drives the conclusions of each court and explains the different outcomes.

The one conclusion both courts agree on is the status of the law schools as expressive associations. The district court relies upon the Court's three-step process in *Dale* to analyze a group's expressive association claim.[196] The first step in that process is to determine whether a group qualifies as an expressive association in order to make a claim of protection under the First Amendment. The law schools meet the *de minimus* threshold for such an association that includes a group that "merely engage[s] in some sort of expression" [197] or no expression at all.[198]

The district and circuit courts disagree as to whether the Solomon Amendment significantly interferes or affects the law schools' ability to express themselves. The district court held that interference was to be measured in degrees. Relying on the conclusion that the law schools' right to freedom of expressive association was not absolute, the court held the military recruiters were only "periodic" visitors whose presence on the campuses was only incidental.[199] The district court went further to explain why a military presence was only incidental and did not rise to the level of unconstitutionality. The court described two possible speech violations that could significantly interfere with the law schools' rights, suppression or compulsion.[200] Message

[195] *FAIR*, 291 F. Supp. 2d at 301 ("Like most freedoms, the right to academic freedom is not absolute.") and at 303 ("freedom of expressive association is not absolute.") (*citing* Boy Scouts of America v. Dale, 530 U.S. 640, 656 (2000)).

[196] *FAIR*, 291 F. Supp. 2d at 303 (*citing Dale*, 530 U.S. at 648).

[197] *Id.* (*citing Dale*, 530 U.S. at 655).

[198] *Id.* (*citing* Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 443 (3d Cir. 2000)).

[199] *FAIR*, 291 F. Supp. 2d at 304.

[200] *Id.*

suppression is referred to by the court using the terms "message dilution" and the "muddling of the speaker's message."[201]

The court distinguished *Dale*, holding that the military message of discrimination complained of in *FAIR* could be overwhelmed by the plaintiffs.[202] The message of the military would be lost in the expression of the law schools, whose message of nondiscrimination and opposition to the military policy would come through "loud and clear."[203] The district court also distinguished *Hurley*, which the plaintiffs had relied upon to support their claim of compelled speech.[204] The military defendants in *FAIR* did not seek to express a contrary message in recruiting on campus.[205] In *Hurley*, the Court struck down an antidiscrimination law that the plaintiffs in that case had relied upon to force their inclusion in a parade.[206] The message of the military, if one could be found, is not necessarily consistent with the message of the law schools, but does not significantly interfere with the law schools' freedom of expression.

The circuit court relied solely upon *Dale* and held that the law schools' freedom of expression was significantly affected only because the law schools so asserted.[207] The circuit court ended its analysis of the plaintiffs as expressive association here. In *Dale*, the Supreme Court gave deference to the Boy Scouts of America to determine what expression it would assert and what would impair that expression.[208] The Court further held, however, that an expressive association could not "erect a shield against antidiscrimination laws simply by asserting that

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[201] *Id.* at 305.

[202] *Id.* at 305-06.

[203] *Id.* at 306.

[204] *Id.*

[205] *FAIR*, 291 F. Supp. 2d at 307.

[206] Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995).

[207] *FAIR*, 390 F.3d at 233 (*citing Dale*, 530 U.S. at 653).

[208] *Dale*, 530 U.S. at 653.

mere acceptance of a member form a particular group would impair its message."[209] According to the circuit court, FAIR is to be given all deference, upon its assertion alone, that its message is impaired. The *Dale* Court, though, should not be understood to equate deference with capitulation and the circuit court's omission of any discussion of tempered deference subjects it to possible reversal on review.

The district court's holding that the law schools' rights are not significantly impaired results in another level of analysis, standard of scrutiny. FAIR argued that the court should apply strict scrutiny; a fundamental right such as the freedom of speech rights implicated here normally would require strict scrutiny.[210] The district court relied upon the standards set out in *Dale* and held that strict scrutiny applied where government action directly burdened expression.[211] The law schools were not so burdened. The Solomon Amendment was not aimed at any particular expression, only indirectly burdening the law schools. The burden on the law schools was created, arguably, by their own expression of the non-discrimination policies. The alternative to a rigorous standard of scrutiny is that standard adopted when governmental action results in an indirect burden on expression, or where the burden is incidental.[212] The district court applied the standards indicated by *O'Brien*.[213] O'Brien burned his draft card and challenged his prosecution as an unconstitutional restriction on his freedom of symbolic speech.[214] The Court held the incidental burden on O'Brien's free speech rights were justified by the government's substantial

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[209] *Id.*

[210] *FAIR*, 291 F. Supp. 2d at 310.

[211] *Id.*

[212] *Id.*at 311.

[213] U.S. v. O'Brien, 391 U.S. 367 (1968) (holding an intermediate level of scrutiny applies to government restrictions on conduct which incidentally impair the right of free expression).

[214] *Id.* at 369-70.

interests in lawful conscription and the narrow tailoring of a law which had an incidental impact on noncommunicative conduct.[215]

The standards of *O'Brien* permit a governmental restriction "if [that restriction] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[216] The district court in *FAIR* found the government interest in raising and supporting an army and navy were both within the power of the government and a substantial and important interest.[217] The court also found the Solomon Amendment did not target speech. The statute did not deny funds based on any particular viewpoint, especially one created by the school, but funds were denied based on the conduct of any school which denied access to military recruiters.[218] Finally, the court noted that narrow tailoring was not required under the lower standard of intermediate scrutiny and this law was reasonable in furthering the interest of Congress in raising an army and a navy.[219]

The circuit court applied strict scrutiny and sharply disagreed with the district court that the tests of *O'Brien* should be applied.[220] The circuit court would never have reached the *O'Brien* tests, concluding that those tests were not necessary when the speaker is protected on other First Amendment grounds.[221] FAIR was protected by the First Amendment as an expressive association and against compelled speech and the majority opinion would suggest that these

[215] *Id.* at 382.

[216] *Id.* at 377.

[217] *FAIR*, 291 F. Supp. 2d at 312-313.

[218] *Id.* at 314.

[219] *Id.* at 313 (*citing* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994)).

[220] *FAIR*, 390 F.3d at 243.

[221] *Id.* at 243-44.

protections are more than sufficient to protect the law schools' act of denying access to military recruiters. This circuit court position seems to be in direct opposition to the original holding in *O'Brien*, however.

The circuit court argues that because the law schools have made a verbal or written expression in the form of a non-discrimination policy, their conduct in preventing military recruiter access to campuses is also protected. The expression and the conduct were separated by the Court in *O'Brien* and are likely to be separated in this instance as well. The *O'Brien* holding does not seek to suppress the freedom of expression, but acts or conduct contrary to legitimate governmental operation should not be permitted as obstacles to the general welfare and defense. In this case, the law schools are free to oppose any military policy or governmental action they wish, but they should not obstruct the legitimate operation of the federal government in the course of that expression. Congress is required to raise and maintain an army and recruiting is a necessary and legitimate function to meet that mandate. The Supreme Court is unlikely to overturn *O'Brien* on these facts where conduct can be separated from expression.

As is so often the case, entering assumptions have driven the results in the opinions surrounding the Solomon Amendment. The dissent in the circuit court decision emphasized that the court there should have opened with the assumption that all acts of Congress are constitutional.[222] Had the majority begun with the constitutionality of the Solomon Amendment, the law schools would have the burden of demonstrating first that their expressions of non-discrimination were actually violated by the presence of military recruiters.[223] If the law schools could make that connection, then, and only then, the court would have been correct to reach a First Amendment question in deciding whether the freedom of speech rights should "trump" the

[222] *Id.* at 248 (J. Aldisert, dissenting).

[223] *Id.* at 247 (J. Aldisert, dissenting).

Article I duties of Congress with respect to raising and maintaining military forces.[224] The dissent reaches the conclusion that the lawful acts of Congress in securing military enlistments is not properly impeded by the willful conduct of the plaintiffs based on perceived injustices in the otherwise lawful policies of the executive branch of the federal government. This conclusion is especially true of a statute that is not directed at any particular viewpoint of suppression of any particular viewpoint.[225]

None of the recently litigated decisions have reviewed the status of recruitment as commercial speech. The *Nomi* court held in 1992 that commercial speech did not enjoy all the protections of other types of political speech protected by the First Amendment.[226] The court expressly held that recruitment is commercial speech.[227] The test for commercial speech is "whether the speech proposes a commercial transaction."[228] There seems to have been an assumption in the current litigation that the non-discrimination policies are fully protected political speech. The law school policies, however, are directed at potential employers and recruiters.[229] The policies are directed toward who may recruit and how that recruitment is to be carried out at the individual campuses. It was the law school in Nomi that argued that even "the military must compete in the commercial marketplace."[230] The purpose of the law schools' non-discrimination policies in the current litigation is drenched in the commercial transaction of employment. If this language is assumed to meet the commercial standards of *Nomi*, then the

[224] *Id.* at 247 (J. Aldisert, dissenting).

[225] *Id.* at 262 (J. Aldisert, dissenting).

[226] *Nomi*, 796 F. Supp. 412 (Minn. 1992), *vacated as moot*, 5 F.3d 332 (8th Cir. 1993).

[227] *Id.* at 417.

[228] *Id.*

[229] *See e.g., FAIR*, 390 F.3d at 225 (describing typical language of a non-discrimination policy).

[230] *Nomi*, 796 F. Supp. at 416.

protections claimed under the First Amendment are not to be given the strict scrutiny treatment required by the Third Circuit Court of Appeals.

These foregoing assumptions are all likely to be reviewed by the Court when it hears the *FAIR* appeal in the 2005-2006 session. In the interim, Congress has reiterated its support for the Solomon Amendment. In February 2005, the House of Representatives passed House Resolution 59, expressing continued support "for equal access of military recruiters to institutions of higher education."[231] The debate over military policy regarding homosexuals in uniform is not likely to be settled by the success or failure of the Solomon Amendment.[232] The Court is likely to review the Solomon Amendment for its value to the stated purpose of military recruiting. Facially, the statute does not purport any viewpoint except support for the military's end-strength goals and the position of Congress that tax dollars should be spent where there is the greatest cooperation with the nation's needs for a quality self-defense force. If the Court begins with the assumptions of constitutionality and the compelling interests of Congress compared to the lesser protected rights for commercial speech, the Solomon Amendment is likely to be upheld.

IV. Impact

A. Schools

If the Solomon Amendment is upheld, the law schools do not have give up their policies; and they should not. For schools that feel as strongly as the plaintiff schools in the current litigation, a public statement in the form of school policy sends the strong message that is politically

[231] 151 Cong. Rec. H310-01, H310.

[232] Several commentators have discussed the advisability of the military policy. *See e.g.,* Eugene E. Baime, Major, U.S. Army, *Private Consensual Sodomy should be Constitutionally Protected in the Military by the Right to Privacy*, 171 MIL. L. REV. 91 (2002); Debra A. Luker, Comment, *The Homosexual Law and Policy in the Military: "Don't Ask, Don' Tell, Don't Pursue, Don't Harass" . . . Don't be Absurd!*, 3 SCHOLAR 267 (2001); Jeffrey S. *Davis, Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55 (1991). *See also*, Nat'l Def. Research Inst., RAND, MR-323-OSD, *Sexual Orientation and the U.S. Military Personnel Policy: Options and Assessment* (1993).

protected speech. Under the Solomon Amendment, the schools still have options with regard to career placement. Namely, the schools that so desire may choose not to provide any recruitment or career services on campus. The military would not be excluded or treated any differently than other employers where no recruiting takes place. Instead, the likely outcome is that many of these schools will choose to contract out their career placement to professional employment companies. There are several beneficial outcomes for the schools in this option. First, the school is free to find the most successful and prestigious employment companies to continue to attract the best possible students. In a free market system, the best firms and companies will compete to hire graduates from the law schools. Second, the law schools will no longer incur the expenses of staff and space that career placement offices occupy. That savings can be returned to the schools for other purposes. Third, it is possible that some contracts with employment companies might include commissions back to the schools for strong placement candidates. Since placement firms earn commissions from the eventual hiring employers, the law schools might be able to encourage the contracting placement firms to split those commissions for providing strong graduates. Finally, under contract situations, the law schools may provide more than the information the Solomon Amendment requires be made available to the military recruiters. Under the current law, the law schools will continue to be required to provide military recruiters basic information on the current enrollment such as name and contact information. If no other information is released to other potential employers, the schools will not be in violation of the law by releasing only the minimum required by the Solomon Amendment. The law schools need only advise and encourage their students that career placement services are provided by a placement firm and step out of the Solomon Amendment fray.

A. Government

The Solomon Amendment is unquestionably a values statement of Congress. Representative Solomon's frustration with the opposition of some institutions of higher education to the military or military policies was not a new frustration in 1994. Congress had dealt with public animosity toward the military policy during the late Vietnam era of the late 1960s and early 1970s. If anything, Representative Solomon can be commended for his restraint in not attempting to force recruiting on colleges and universities. The Spending Clause is a gentler way to persuade schools to assist the government where they can while providing breathing room to make their objections known. Not all schools will take advantage of the restraint embodied in the Solomon Amendment. Where that is true, Congress would do well to shift some of its focus to other productive programs that have supported governmental intentions.

Many schools do support the military recruitment purpose of the Solomon Amendment and Congress could do more to support them. Specifically, Congress should implement a program of support for cooperating schools modeled on the small business and minority business programs that garner many federal contracts. The military will not stop gathering information on which schools are the most productive recruiting grounds. Congress should take a more active role in reviewing and using this information to create a preference program. The Department of Defense should be directed to grow these relationships through the same grants and contracts now provided to traditional large schools that are not always as cooperative. Smaller schools should be encouraged to support the military and be rewarded for that support. Larger schools that are not cooperative with the purposes of Congress should expect to be seen as poor business partners with the government and lose their contracts.

The military should consider its recruiting program. The overhead of recruiting programs may not be an appropriate mission of the military. The federal government already has an Office

of Personnel Management. Perhaps the economies of scale of the federal government would be best put to use in a single administrative office. If all executive branch recruiting were handled by a single federal agency, the military might avoid some of the animosity it now endures on the nation's school campuses. Military recruiters could be detailed to the single agency for discussions with potential candidates, but more of the field work could be done by government recruiters in civilian attire to attract interested individuals to central, neutral locations to discuss the myriad of options available in government employment. The cost savings to the military should be substantial and the benefit to the potential employee is the chance to learn of work that might not have ever occurred to him or her.

V. Conclusion

Military recruiting is problematic, especially in times of conflict. The Solomon Amendment was a fair attempt by Congress to encourage schools to cooperate with the government in meeting a task mandated to Congress by the Constitution. The First Amendment rights of the nation's schools are not violated where their message is only incidentally impacted by government action. The Solomon Amendment should be upheld by the Supreme Court.