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# CHALLENGING THE WISDOM OF SOLOMON: THE FIRST AMENDMENT AND MILITARY RECRUITMENT ON CAMPUS

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## INTRODUCTION

Times of war and First Amendment<sup>1</sup> controversies — the two invariably and inevitably go hand in hand. Whether it is Paul Robert Cohen's anti-draft jacket<sup>2</sup> and the publication of the so-called Pentagon Papers<sup>3</sup> during the conflict in Vietnam, or Charles T. Schenck's anti-draft leaflets<sup>4</sup> and the publication of the *Staats Zeitung*<sup>5</sup>

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<sup>1</sup> The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>2</sup> *Cohen v. California*, 403 U.S. 15 (1971) (protecting, as freedom of expression, the right to wear a jacket emblazoned with the words "Fuck the Draft" in a Los Angeles courthouse corridor).

<sup>3</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (rejecting, as an unconstitutional prior restraint against freedom of expression, the efforts of the federal government to enjoin *The New York Times* and *Washington Post* from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Vietnam Policy").

<sup>4</sup> *Schenck v. United States*, 249 U.S. 47 (1919) (upholding, against a First Amendment argument to the contrary, the conviction of Schenck for violating anti-sedition laws, and creating the clear and present danger test for determining when speech is not protected). See generally JEREMY COHEN, CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING 90–104 (1989) (providing an analysis of the judicial process from which the *Schenck* decision was molded).

<sup>5</sup> *Frohwerk v. United States*, 249 U.S. 204 (1919) (upholding the conviction, against a First Amendment argument to the contrary, of Frohwerk for publishing anti-war sentiments in a German-language newspaper). See generally RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 99–100 (1992) (criticizing the U.S. Supreme Court's opinion in *Frohwerk*).

during World War I, the confluence of conflict and communication creates litigation.

The situation today, with fighting in both Iraq and Afghanistan, is no exception. For instance, several access-related disputes already have arisen. Notably, publisher Larry C. Flynt<sup>6</sup> lost a legal fight before a federal appellate court in February 2004, in which he claimed a First Amendment right of news media access to United States troops in combat operations in the Middle East.<sup>7</sup> The press lost an earlier battle for access to special-interest deportation hearings of individuals with knowledge of the September 11, 2001 terrorist attacks when the Supreme Court declined to review a federal appellate court's decision in *North Jersey Media Group, Inc. v. Ashcroft*.<sup>8</sup>

While these First Amendment access battles are now complete, another fight involving a very different type of access — access sought by the military, not by the press or private individuals — is now hitting full stride, and it is the subject of this article. In particular, a number of prominent law school professors, as well as a collection of anonymous law schools,<sup>9</sup> are challenging the constitutionality of a federal statute known as the Solomon Amendment.<sup>10</sup> This law allows the government to deny federal funding to institutions of higher education that prevent on-campus military recruiting.<sup>11</sup> The professors in *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*,<sup>12</sup> as well as those involved in three other cases simultaneously challenging the federal law,<sup>13</sup> are using the First Amendment not to gain access for

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<sup>6</sup> Flynt is a publisher of sexually explicit magazines, such as *Hustler* and *Barely Legal*. See generally Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONCEPTUS 159 (2001) (providing an in-depth look at, and interview with, Larry C. Flynt).

<sup>7</sup> Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004).

<sup>8</sup> 308 F.3d 198 (3d Cir. 2002), cert. denied, 538 U.S. 1056 (2003).

<sup>9</sup> The Forum for Academic and Institutional Rights (FAIR), the organization that is spearheading the litigation in the case that is the focus of this article, "is not releasing the names of member schools" on the grounds that "anonymity is important to protect law schools from retribution." Marcella Bombardieri, *United States Defense Department Sued on College Recruitment*, BOSTON GLOBE, Sept. 20, 2003, at B1.

<sup>10</sup> 10 U.S.C. § 983(b) (2003).

<sup>11</sup> *Id.*

<sup>12</sup> 291 F. Supp. 2d 269 (D. N.J. 2003).

<sup>13</sup> In total, four separate lawsuits have been filed "against the Defense Department over the military's right to recruit on law-school campuses." Alice Gomstyn, *Military Recruiting Goes to Court*, CHRON. HIGHER EDUC., Dec. 12, 2003, at A17.

In addition to the lawsuit brought by FAIR, a lawsuit was filed in October 2003 by twenty-one professors, one student organization, and six students at the University of Pennsylvania Law School. *Burbank v. Rumsfeld*, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. 2004). Another lawsuit was filed that same month by members of the faculty of the Yale Law School. *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004). Finally, a number of Yale law students filed their own lawsuit challenging the Solomon Amendment. *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004).

themselves but, instead, to deny it to the military. More precisely, the plaintiffs in *Forum for Academic and Institutional Rights* contend that the Solomon Amendment “conditions a benefit — federal funding — on the surrendering of law schools’ First Amendment rights of academic freedom, free speech, and freedom of expressive association,” and is unconstitutional.<sup>14</sup> The case thus represents a radical departure from the access disputes described above involving Larry Flynt and the North Jersey Media Group in which the First Amendment was used as a tool to try to gain access, not as a weapon to try to prevent it.<sup>15</sup>

The professors and law schools involved, however, are using the First Amendment to promote positive Fourteenth Amendment-based principles of equality under the law.<sup>16</sup> As Kent Greenfield,<sup>17</sup> a professor of law at Boston College and the president of the lead plaintiff organization in *Forum for Academic and Institutional Rights*, put it in a *Washington Post* commentary in November 2003:

Imagine if the government took away the driver’s license of anyone who opposed pay raises for government bureaucrats. Imagine it cut off Social Security benefits to retirees who protested the Iraq war. Suppose it withheld a university’s cancer research funds because the school refused to support the military’s policy of discrimination against gays and lesbians.

That last example isn’t imaginary — it’s the law of the land. The law is called the Solomon Amendment, and it gives the Department of Defense the power to cut federal funds to universities unless they give up deeply held beliefs about the equality of students.

The statute is pockmarked with constitutional flaws. Primary among them is the government’s attempt to use the power of the purse to reshape the academic environment and suppress educational messages in ways it could never accomplish by direct command.<sup>18</sup>

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<sup>14</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 274.

<sup>15</sup> *Supra* notes 7–8 and accompanying text.

<sup>16</sup> The Fourteenth Amendment to the United States Constitution provides in relevant part that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>17</sup> See Kent Greenfield Profile, at <http://www.bc.edu/schools/law/fac-staff/deans-faculty/greenfieldk> (last visited June 4, 2004) (Greenfield teaches “corporate law, administrative law, constitutional law, and business theory” and “served as a law clerk to Justice David H. Souter, of the United States Supreme Court, and to Judge Levin H. Campbell, of the United States Court of Appeals for the First Circuit. He also worked at the law firm of Covington & Burling, in Washington, D.C.”).

<sup>18</sup> Kent Greenfield, *Imposing Inequality on Law Schools*, WASH. POST, Nov. 10, 2003, at A25.

Despite such impassioned pleas, Judge John C. Lifland denied the plaintiffs' motion for a preliminary injunction in November 2003 "on the basis that Plaintiffs [did] not establish a likelihood of success on the merits of their constitutional challenges to the Solomon Amendment."<sup>19</sup> The case is now pending before the United States Court of Appeals for the Third Circuit, with the plaintiffs having filed their brief in January 2004,<sup>20</sup> supported by a host of amici curiae including the American Civil Liberties Union,<sup>21</sup> the Association of American Law Schools,<sup>22</sup> and members of the faculty of Harvard Law School.<sup>23</sup>

This article, using the briefs and motions filed by the parties, as well as the judicial opinions issued to date, examines the First Amendment issues at stake in the ongoing litigation in *Forum for Academic and Institutional Rights*. In particular, Part I describes the history of the Solomon Amendment, tracing its evolution from initial proposal to its current version and the Department of Defense's interpretation of its meaning, as well as the aggressive enforcement of the law since September 11, 2001.<sup>24</sup> Part II then describes, contextualizes, and critiques the arguments of the parties now before the appellate court as they relate to the First Amendment issues in the case.<sup>25</sup> Next, Part III analyzes the district court's opinion regarding those issues and the denial of the plaintiffs' motion for a preliminary injunction.<sup>26</sup>

Part IV contends that this case is really about two sets of competing First Amendment interests — those of the military to engage in expressive activity at law schools (at least public law schools, for purposes of constitutional concern) across the United States which have created limited public fora for recruiters, and those of law schools not to associate with and give voice to the views of the military within academic fora.<sup>27</sup> The First Amendment issues, in turn, are complicated and clouded by the context in which the case will be decided: an increasingly controversial war

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<sup>19</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 275.

<sup>20</sup> Brief for Appellants, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03-4433 (3d Cir. filed Jan. 5, 2004).

<sup>21</sup> Brief of Amici Curiae American Civil Liberties Union et al. in Support of Appellants, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03-4433 (3d Cir. filed Jan. 12, 2004).

<sup>22</sup> Brief of Amicus Curiae Association of American Law Schools in Support of Appellants, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03-4433 (3d Cir. filed Jan. 12, 2004).

<sup>23</sup> Brief of Professors William Alford et al. as Amici Curiae in Support of Appellants and in Support of Reversal, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03-4433 (3d Cir. filed Jan. 16, 2004).

<sup>24</sup> *Infra* notes 33-69 and accompanying text.

<sup>25</sup> *Infra* notes 70-166 and accompanying text.

<sup>26</sup> *Infra* notes 167-235 and accompanying text.

<sup>27</sup> *Infra* notes 236-68 and accompanying text.

in Iraq;<sup>28</sup> the subtext of gay and lesbian rights that extends beyond the discriminatory “don’t ask, don’t tell” military policy<sup>29</sup> into the current battle over gay marriage against which President George W. Bush has spoken out;<sup>30</sup> and the nascent legacy of the Supreme Court’s opinion in *Grutter v. Bollinger*.<sup>31</sup> When viewed within the larger context of the confluence of these cultural and legal forces, the battle over the Solomon Amendment really amounts to a classic clash between the conservative military machine of the Bush Administration and the elite liberal confines of academia.

Finally, Part V concludes the article by arguing that the First Amendment interests of the plaintiffs-appellants outweigh the recruitment interests of the military, and that the appellate court should enter an order enjoining enforcement of the Solomon Amendment.<sup>32</sup>

### I. THE SOLOMON AMENDMENT: ITS EVOLUTION AND INTERPRETATION

Back in 1994, there was “a bill moving through Congress with little fanfare.”<sup>33</sup> A decade later, however, it would spark a firestorm of litigation. The measure in question was first offered in May 1994 by Gerald B. Solomon, a New York Republican then in the House of Representatives, as one of many amendments<sup>34</sup> to a massive bill authorizing appropriations for fiscal year 1995 for the military activities of the

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<sup>28</sup> The Solomon Amendment affects the ability of the military to recruit college-educated individuals to play a role in the war in Iraq, as well as other future wars and conflicts. The timing of the now-vigorous enforcement of the Solomon Amendment, as discussed in Part I, makes it clear that the case now before the United States Court of Appeals for the Third Circuit cannot be divorced from the wartime context.

<sup>29</sup> See generally Ron Martz, *Clinton OKs ‘Don’t Ask, Don’t Tell’ Military Ban on Gays Is Eased but Not Ended*, ATLANTA J. & CONST., July 20, 1993, at A1 (using the term “don’t ask, don’t tell, don’t pursue” to describe the policy adopted by President Bill Clinton in July 1993 under which gay men and lesbians are allowed to serve in the military but can be dismissed for homosexual conduct).

<sup>30</sup> See generally Mike Allen, *Bush Highlights Social Issues: Culture Joins Terrorism, Economy in New Campaign Speech*, WASH. POST, Feb. 27, 2004, at A8 (President George W. Bush called for a constitutional amendment to ban gay marriage and stated that Americans “will not stand for judges who undermine democracy by legislating from the bench, or try to remake the culture of America by court order.”).

<sup>31</sup> 539 U.S. 306, 343 (2003) (holding that “the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions”).

<sup>32</sup> *Infra* notes 269–90 and accompanying text.

<sup>33</sup> Dennis Kelly, *Congress Pressures Schools to Accept Military Recruiters*, USA TODAY, June 28, 1994, at 6D.

<sup>34</sup> H. AMEND. 569, 103d Cong. (1994), available at <http://thomas.loc.gov/bss/d103-query.html>.

Department of Defense.<sup>35</sup> A similar amendment was offered in July 1994 by Don Nickles, an Oklahoma Republican, in the United States Senate.<sup>36</sup>

Collectively, the amendments prohibited Department of Defense funds from being provided to institutions of higher education that deny campus access for military recruiting purposes. The House easily approved Solomon's amendment by a 271-126 vote on May 23, 1994,<sup>37</sup> and Nickles's bill was approved by a voice vote in the Senate on July 1 of that same year.<sup>38</sup>

Nickles observed at the time that "more than 100 colleges and universities across the country prohibit military recruiters on campus. Yet many are quite receptive when it comes to taking research grants from the Pentagon. . . . This bill will correct that situation."<sup>39</sup> Solomon, citing a decrease in interest in the military due to defense cuts, added "it's even more important now that recruiters have access to campuses to attract the best-qualified young men and women."<sup>40</sup>

Solomon, a former Marine "who in the 1980s sponsored an amendment that cut college aid to young men who had not registered for the draft,"<sup>41</sup> was serving in 1994 as chair of the House of Representatives Rules Committee — a key position because it is the body "that decides which amendments should be considered for which bills."<sup>42</sup> Around the same time, he also was leading the fight for legislation that was similarly imbued with deeply conservative undertones — a constitutional amendment that would allow states to ban desecration of the American flag.<sup>43</sup> Just

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<sup>35</sup> National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

<sup>36</sup> S. AMEND. 2148, 103d Cong. (1994), available at <http://thomas.loc.gov/bss/d103-query.html>.

<sup>37</sup> Kelly, *supra* note 33.

<sup>38</sup> Douglas Turner, *Senate Links Funds to Military Recruiting*, BUFF. NEWS, July 3, 1994, at 12.

<sup>39</sup> *Id.*

<sup>40</sup> Kelly, *supra* note 33.

<sup>41</sup> Christina Cheakalos, *Military Gets Off Bias Hook; GSU Law School Fears for Funds*, ATLANTA J. & CONST., Sept. 20, 1997, at F2.

<sup>42</sup> Scott Jaschik, *Bowdoin College Drops Ban on Military Recruiters in Response to a Congressman's Legislative Campaign*, CHRON. HIGHER EDUC., May 3, 1995, at A25.

<sup>43</sup> Katharine Q. Seelye, *House Easily Passes Amendment to Ban Desecration of Flag*, N.Y. TIMES, June 29, 1995, at A1. Solomon would lead similar fights for such an amendment in future years. See John Brinkley, *Skaggs Tries to Derail Resolution Seeking Ban on Flag Desecration*, ROCKY MOUNTAIN NEWS (Denver), Feb. 14, 1997, at 49A (describing how Solomon was leading the charge in 1997 for an anti-desecration amendment). The topic of amending the United States Constitution to prohibit the burning of the American flag is still generating controversy in 2004, several years after Solomon's death. See Vivian Berger, *Flag 'Desecration': Persuade, Don't Punish*, N.J. L.J., Jan. 26, 2004 (describing how the issue worked its way into the primaries for the 2004 Democratic nominee for President of the United States).

as First Amendment controversies inevitably surround the symbolic speech<sup>44</sup> that is flag burning,<sup>45</sup> so too would they later engulf Solomon's military recruitment legislation.

The Solomon Amendment, which "builds on nearly three decades of predecessor legislation addressing the perceived effects of anti-military policies on military recruiting,"<sup>46</sup> was first fully carried out in April 1996.<sup>47</sup> It quickly became entangled with the burgeoning gay rights movement and non-discrimination policies, as many universities, both public and private, objected to the Pentagon's anti-gay policies, including its policy that allows openly gay individuals to be dismissed from the military.<sup>48</sup> Those universities, in turn, banned military recruiters from campus because the military discriminates based on sexual orientation.<sup>49</sup>

The military's policy on homosexuals, announced in a controversial Secretary of Defense memorandum dated July 19, 1993, distills to this:

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<sup>44</sup> See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.6, at 1026–27 (2d ed. 2002) (discussing the symbolic speech doctrine under which certain forms of conduct are considered expression for purposes of First Amendment protection).

<sup>45</sup> See *United States v. Eichman*, 496 U.S. 310 (1990) (holding that the Flag Protection Act of 1989 is inconsistent with the First Amendment protection of freedom of expression); *Texas v. Johnson*, 491 U.S. 397 (1989) (reversing the criminal conviction of Gregory Lee Johnson for flag desecration and protecting the public burning of an American flag as a means of political protest).

Solomon, however, saw no First Amendment issues in the flag burning controversy, telling a reporter shortly after his proposal for a constitutional amendment against desecration of the U.S. flag passed overwhelmingly in the United States House of Representatives in June 1995:

Our goal is to restore the constitution to the way it was for the first 200 years of our nation's history. Today, we propose to restore the right of the people to protect our American flag. Some of the opponents of this proposal have tried to make it sound like there's some kind of threat to free speech. For 200 years, no one thought it denied them anything. They thought it protected the flag.

Nancy Mathis, *House OKs Amendment to Snuff Out Flag Burning*, HOUS. CHRON., June 29, 1995, at 1.

<sup>46</sup> Brief of Professors William Alford et al. as Amici Curiae in Support of Appellants and in Support of Reversal at 4, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03–4433 (3d Cir. filed Jan. 16, 2004) (citation omitted).

<sup>47</sup> See Carey Goldberg, *Colleges Feel Cost of Shunning Recruiters Over Gay Rights Issue*, N.Y. TIMES, Apr. 19, 1996, at A22 ("A new Federal law cuts off all Department of Defense grant money to institutions, public as well as private, that bar military recruiters, and last week that law began to be fully carried out said Representative Gerald B. H. Solomon, the Republican from upstate New York who fathered it.").

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



Individuals who apply for a commission or want to enlist are told about the policy of excluding and separating known homosexuals, but are not questioned about their sexual propensities and experience. In effect, they are cautioned not to volunteer the information if they should happen to be homosexual. Once in the service, they are expected to conform to standards that include refraining from consensual sodomy or related sexual crimes . . . .<sup>50</sup>

Campus activists at prestigious universities such as New York University School of Law "pushed for a strong position against the [Solomon] amendment as a way to protest President Clinton's 'don't ask, don't tell' policy on gays in the military."<sup>51</sup> When their university failed to take action against the government, savvy law students at New York University who were reportedly, "queers or queer-friendly," would reserve all of the interviews with military recruiters and show up donning buttons proclaiming "JAG OFF."<sup>52</sup>

The Solomon Amendment also conflicted with the policy of the Association of American Law Schools, "which has required since 1990 that its members have policies that ban discrimination based on sexual orientation."<sup>53</sup> As United States District Court Judge John C. Lifland wrote in his November 2003 opinion in *Forum for Academic and Institutional Rights*, "[l]aw schools are loathe to endorse or assist recruiting efforts of the United States military because of its policy against homosexual activity."<sup>54</sup>

Under the terms at issue in *Forum for Academic and Institutional Rights*, the Solomon Amendment applies to any funds made available by either the Department of Defense or the Department of Homeland Security, as well as to any funds made available by the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.<sup>55</sup> In particular, no such funds:

may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher

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<sup>50</sup> Arthur A. Murphy et al., *Gays in the Military: What About Morality, Ethics, Character and Honor?*, 99 DICK. L. REV. 331, 332 (1995).

<sup>51</sup> Siobhan Gorman, *Pentagon Launches Recruiting Offensive*, 30 NAT'L J. 942, 942 (1998).

<sup>52</sup> Safir Ahmed, *Don't Ask, Don't Tell, Don't Fight*, RIVERFRONT TIMES (Mo.), Nov. 22, 2000, at Columns, LEXIS, MO library, RIVTMS file.

<sup>53</sup> Katherine S. Mangan, *Law Students and Professors Start Drive Against Law on Military Recruiting*, CHRON. HIGHER EDUC., Feb. 12, 1999, at A36.

<sup>54</sup> 291 F. Supp. 2d 269, 281 (D. N.J. 2003).

<sup>55</sup> 10 U.S.C. § 983(d)(2) (2003).

education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents —

(1) the Secretary of a military department or Secretary of Homeland Security from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.<sup>56</sup>

What, in a nutshell, does all of this mean? From the perspective of one politician-attorney who is a proponent of the law, “[i]f you’re getting our [government] dollars, you’ve got to let us in.”<sup>57</sup> Conversely, from the perspective of a Solomon Amendment opponent, it boils down to an “extortionist way of legislating. Any law school that is committed to keeping an academic environment free of discrimination is practically compelled to permit onto campus a blatantly discriminatory organization — which just happens to be the U.S. military.”<sup>58</sup>

Enforcement of, and controversy regarding, the Solomon Amendment was largely dormant for several years,<sup>59</sup> but all of that changed after the terrorist attacks on the World Trade Center and the Pentagon.<sup>60</sup> As the *Boston Globe* reported:

<sup>56</sup> 10 U.S.C. § 983(b) (2003).

<sup>57</sup> Michelle Lore, *Law Schools Closely Monitor Suit Over the Solomon Amendment*, MINN. LAW., Nov. 3, 2003, at News, LEXIS, LEGNEWS library, MINLAW file (quoting Don Betzold, a Minnesota state senator and “a Brooklyn Center attorney and a retired Army Reserve colonel”).

<sup>58</sup> *Id.* (quoting attorney Philip A. Duran, a “past president of the Minnesota Lavender Bar Association, a group of Minnesota attorneys and others dedicated to addressing sexual and gender identity issues within the legal profession”).

<sup>59</sup> See Patrick Healy, *Law Lets Colleges Bar Military Recruiters Without Risking a Loss of Student Aid*, CHRON. HIGHER EDUC., Nov. 5, 1999, at A38 (According to a spokesperson from the Defense Department, “[n]o college or institution ha[d] lost funds under the Solomon Amendment in recent years,” and the Pentagon had “worked out the differences” with the three colleges and seven law schools that it deemed were out of compliance with the law.).

<sup>60</sup> See Peter H. Schuck, *Equal Opportunity Recruiting*, AM. LAW., Jan. 2004, at 57

Three months after the Sept. 11, 2001 terrorist attacks, recruiters from JAG began enforcing Solomon with fresh vigor. They sent letters — copies of which were obtained by the *Globe* — to about 25 of the nation's 220 law schools objecting to three kinds of limits placed on JAG recruiting: outright bans, prohibitions against recruiting in law school buildings, and other limits on military recruiters that are more restrictive than for private law firms.<sup>61</sup>

The timing for such vigorous enforcement was fitting as a posthumous gift and legacy for Gerald Solomon, who died in October 2001.<sup>62</sup> For a man who once challenged Representative Patrick Kennedy, a Rhode Island Democrat, to “step outside” during a heated debate on the floor of the House of Representatives,<sup>63</sup> the real fight of his legislative legacy would begin shortly after his death. As the Pentagon in late 2001 and into 2002 “ratcheted up the pressure in its most recent round of reviews”<sup>64</sup> of the recruiting policies of law schools across the United States, the military “presented law schools with a choice: Administrators can either stand by their policies denying recruitment opportunities to employers that, like the military, discriminate against gay people, or lose hundreds of millions of dollars in federal research funds.”<sup>65</sup> While many law school administrators chose to comply with the law rather than suffer funding cuts<sup>66</sup> or take on a legal battle,<sup>67</sup> FAIR, the

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(observing that the Solomon Amendment “remained essentially a dead letter until the September 11 terrorist attacks”). There were some instances in the time just before September 11, 2001, however, of the government enforcing the policy. For instance, Washington University School of Law in St. Louis, Missouri, allowed military recruiters back on campus in February 2001 for the first time in a decade after “the Defense Department threatened to withhold federal funding from the entire university if any part of a university didn’t allow recruiters.” Greg Jonsson, *WU Law Students Protest Return of Military Recruiters*, ST. LOUIS POST-DISPATCH, Feb. 24, 2001, at 7.

<sup>61</sup> Patrick Healy, *Despite Concerns, Law Schools Admit Military Recruiters*, BOSTON GLOBE, Nov. 12, 2002, at A1.

<sup>62</sup> See Christopher Marquis, *Gerald Solomon, 71; Spurred Conservative Causes in House*, N.Y. TIMES, Oct. 27, 2001, at D7 (providing the obituary of Solomon, who died of congestive heart failure at seventy-one years of age).

<sup>63</sup> William Goldschlag, *Solomon to Retire; 3rd N.Y. GOP Rep to Quit*, DAILY NEWS (N.Y.), Apr. 28, 1998, at 51.

<sup>64</sup> Richard Morgan, *Amid Protests, Defense Department Steps Up Recruitment at Top Law Schools*, CHRON. HIGHER EDUC., Oct. 18, 2002, at A26.

<sup>65</sup> *Id.*

<sup>66</sup> For instance, 2003 marked:

the second year that Yale Law School waived its nondiscrimination policy to allow military recruiters to participate in its interview program — despite a longstanding policy that bars employers who

Society of American Law Teachers (SALT),<sup>68</sup> and a few individually-named plaintiffs, such as the University of Southern California's Erwin Chemerinsky,<sup>69</sup> chose to take the military to court to challenge the Solomon Amendment. The issues and arguments of the parties, as they relate to the First Amendment, are set forth in Part II of this article.

## II. *FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC. v. RUMSFELD*: THE FIRST AMENDMENT ISSUES AND ARGUMENTS

The issue before the United States Court of Appeals for the Third Circuit in *Forum for Academic and Institutional Rights* is a simply phrased, yet exceedingly complex issue: "Whether the Solomon Amendment violates the Free Speech Clause of the First Amendment."<sup>70</sup> While that is the government's succinct phrasing of the

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discriminate against gays. The law school backed down after the Pentagon threatened to cut off \$320 million in federal aid to the university following 9/11.

Kim Martineau, *Students Protest Military Interviews*, HARTFORD COURANT (Conn.), Oct. 10, 2003, at B1.

Yale was far from alone in taking the path of compliance. As the *Boston Herald* reported in October 2002, Boston College "joins other law schools nationwide, including Harvard, that are now allowing military recruiting for fear of losing millions of dollars in federal funds." Jessica Heslam, *Law Students Rip Military Campus Recruiting While Services Ban Gays*, BOSTON HERALD, Oct. 4, 2002, at 13.

<sup>67</sup> See, e.g., *New England in Brief/Cambridge; Harvard to Allow Military Recruiters*, BOSTON GLOBE, Nov. 26, 2003, at B2 (noting that Harvard Law School "would not sign on to litigation challenging the policy, known as the Solomon Amendment").

<sup>68</sup> SALT is "America's largest membership organization for teachers of law." SALT: Society of American Law Teachers, at <http://www.saltlaw.org> (last visited June 5, 2004). SALT is "a national organization of approx. 800 law professors." Paula C. Johnson Profile, at <http://www.law.syr.edu/faculty> (last visited June 5, 2004). The official Web site of SALT identifies three main missions for the organization:

- creating and maintaining a community of progressive and caring law professors dedicated to making a difference through the power of law,
- promoting the use of many forms and innovative styles of teaching to make our classrooms more inclusive, and
- challenging faculty and students to develop legal institutions with greater equality, justice and excellence.

SALT: Society of American Law Teachers, at <http://www.saltlaw.org/index.htm> (last visited June 5, 2004).

<sup>69</sup> Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science and the Academic Director of the Center for Communications Law and Policy at the University of Southern California. Faculty of Law Biography: Erwin Chemerinsky, at <http://lawweb.usc.edu/faculty/echemeri.htm> (last visited June 5, 2004).

<sup>70</sup> Brief for the Appellees at 1, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03-4433 (3d Cir. filed Feb. 17, 2004) (noting under a separate question,

issue in its brief.<sup>71</sup> the appellants' brief appealing the district court's order denying its motion for a preliminary injunction paints a very different, and much more complicated picture of three separate but related issues, each with its own First Amendment layers of analysis and implications:

1. Did the District Court err in concluding that the Solomon Amendment and the military's unwritten policy are subject only to intermediate scrutiny, where they require law schools (A) to provide a forum for, and to affirmatively disseminate, the military's recruiting message, and (B) to promote one viewpoint — the military's?

2. Do the Solomon Amendment and the military's unwritten policy violate the doctrine of unconstitutional conditions by penalizing a law school with an across-the-board, university-wide funding ban if the law school adheres to a policy of refusing to abet a discriminatory employer and disseminate the employer's recruiting message?

3. Are the Solomon Amendment, and especially the military's unwritten policy, unconstitutionally vague because they give military bureaucrats unbridled discretion to threaten a university with a complete funding ban based upon inconsistent standards as to what expressive efforts are permissible?<sup>72</sup>

The parties' arguments on these issues — as well as, where relevant, the arguments of various organizations filing friend-of-the-court briefs — to the Court of Appeals for the Third Circuit are described and contextualized in the remainder of this part of the article. In particular, Section A sets forth the First Amendment-related arguments made by and on behalf of the appellants, including FAIR and SALT, against the Solomon Amendment. Section B articulates the arguments made by the federal government on behalf of Donald H. Rumsfeld,<sup>73</sup> Tom Ridge,<sup>74</sup> and the other

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however, that Appellants raise a due process question — that the Solomon Amendment is void for vagueness).

<sup>71</sup> *Id.*

<sup>72</sup> Brief for Appellants at 1–2, *Forum for Academic & Institutional Rights* (No. 03–4433) (citations omitted).

<sup>73</sup> Rumsfeld, who was sued in his capacity as U.S. Secretary of Defense, was sworn in as the 21st Secretary of Defense on January 20, 2001. Before assuming his present post, the former Navy pilot had also served as the 13th Secretary of Defense, White House Chief of Staff, U.S. Ambassador to NATO, U.S. Congressman and chief executive officer of two Fortune 500 companies.

United States Department of Defense: Donald H. Rumsfeld Biography, at <http://www.defense->

named defendants<sup>75</sup> heading the various governmental agencies affected by the Solomon Amendment.

### *A. The Appellants' First Amendment Arguments*

Although the opening brief filed on behalf of the appellants measures more than fifty pages in length, the First Amendment-based arguments of the appellants can be encapsulated in a single sentence: The Solomon Amendment affects three distinct First Amendment rights of law schools — free speech, academic freedom, and freedom of expressive association — and it violates three distinct First Amendment doctrines — the prohibition against viewpoint-based discrimination, the doctrine of unconstitutional conditions, and the void-for-vagueness doctrine.<sup>76</sup>

Unpacking the three First Amendment rights, starting with the right of free speech, the appellants argue that law schools are “engaged in quintessential expression”<sup>77</sup> when they implement and enforce non-discrimination policies. What is the message? It is, primarily, a pedagogical one — “to teach students that invidious discrimination is a moral wrong”<sup>78</sup> and “to preach values of equality, justice, and human dignity.”<sup>79</sup> To this extent, the appellants contend that “[l]aw school non-discrimination policies are expressive to the core.”<sup>80</sup> The appellants are supported in this contention by the Association of American Law Schools (AALS) in a friend-of-the-court brief which provides in relevant part:

The AALS and its member schools believe so strongly in the value of non-discrimination that they have adopted a rule that failure to comply with this mandate, absent any exemptions, results in a loss of AALS membership. This strict rule lies at the

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[link.mil/bios/secdef\\_bio.html](http://link.mil/bios/secdef_bio.html) (last visited June 5, 2004).

<sup>74</sup> Ridge, who was twice elected governor of Pennsylvania, is the first Secretary of the Department of Homeland Security, working with “more than 180,000 employees from combined agencies to strengthen our borders, provide for intelligence analysis and infrastructure protection, improve the use of science and technology to counter weapons of mass destruction, and to create a comprehensive response and recovery division.” United States Department of Homeland Security: Tom Ridge Profile, at <http://www.dhs.gov/dhs-public/display?theme=11&content=13> (last visited June 5, 2004).

<sup>75</sup> These other individual defendants include: Elaine Chao, U.S. Secretary of Labor; Tommy Thompson, U.S. Secretary of Health and Human Services; and Norman Mineta, U.S. Secretary of Transportation. Brief for Appellants, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>76</sup> *Id.* at 19.

<sup>77</sup> *Id.* at 20.

<sup>78</sup> *Id.* at 2.

<sup>79</sup> *Id.* at 13.

<sup>80</sup> *Id.* at 16.

heart of the law school mission, and ensures that AALS member schools convey the message that discrimination in the law school community is unacceptable.<sup>81</sup>

Second, in terms of an unenumerated First Amendment right of academic freedom, the appellants contend that “if academic freedom means anything, it means that the decision [to teach non-discrimination values] is the law school’s to make, free from government interference.”<sup>82</sup> In support of this proposition, the appellants cite the Supreme Court’s decision in *Sweezy v. New Hampshire*.<sup>83</sup> Justice Felix Frankfurter, concurring in *Sweezy*, cited with approval a statement made about academic freedom in South Africa — that it includes not only what to teach, but how it shall be taught.<sup>84</sup>

Interestingly (albeit not surprisingly) on this point, the appellants carefully avoid the Supreme Court’s statement made more than thirty years ago that “[t]he college classroom with its surrounding environs is peculiarly ‘the marketplace of ideas.’”<sup>85</sup> This declaration clearly conflicts with the appellants’ position: if a university truly is a marketplace of ideas with all that this powerful free-speech metaphor portends,<sup>86</sup> then one reasonably would expect universities not only to allow, but to openly welcome, *all* messages on campus to compete freely and fairly, including those of the military in its recruitment sessions in the “surrounding environs.”<sup>87</sup> The appellants cleverly dodge this dilemma, however, by citing favorable high court language embodied with rich marketplace-of-ideas overtones: “Academic freedom thrives not only on *the independent and uninhibited exchange of ideas among teachers and students . . .*, but also, and somewhat inconsistently, on autonomous decision making

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<sup>81</sup> Brief of Amicus Curiae Association of American Law Schools in Support of Appellants at 2, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03–4433 (3d Cir. filed Jan. 12, 2004).

<sup>82</sup> Brief for Appellants at 21, *Forum for Academic & Institutional Rights* (No. 03–4433) (citation omitted).

<sup>83</sup> 354 U.S. 234 (1957).

<sup>84</sup> *Id.* at 263 (Frankfurter, J., concurring).

<sup>85</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>86</sup> “The ‘marketplace of ideas’ is perhaps the most powerful metaphor in the free speech tradition.” SMOLLA, *supra* note 5, at 6. It “consistently dominates the Supreme Court’s discussions of freedom of speech.” C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7 (1989). The metaphor is frequently used today, more than eighty years after it first became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes, Jr.’s often-quoted admonition “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See generally W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a relatively recent review of the Court’s use of the marketplace metaphor).

<sup>87</sup> *Healy*, 408 U.S. at 180.

by the academy itself.”<sup>88</sup> The emphasized language makes clear that, from the appellants’ perspective, the only bona fide players in a university’s marketplace of ideas are *teachers* and *students*, not outside individuals or entities such as the military. The appellants are supported in their academic freedom argument by, not surprisingly, the American Association of University Professors in an amicus brief.<sup>89</sup> It argues “that the Solomon Amendment places an excessive and unconstitutional burden on the academic freedom of law schools and their faculties to choose the manner in which they establish an academic environment free from discrimination and teach important concepts of legal ethics and justice.”<sup>90</sup>

Finally, the third First Amendment interest at stake, according to the appellants, is the right of expressive association. The appellants argue that a university is an “organization with an expressive purpose.”<sup>91</sup> In the context of the right of academic freedom discussed above, this right of association, along with the right of speech, is “more pronounced and more rigorously safeguarded than the same rights in other contexts.”<sup>92</sup>

Ironically, to support this argument, the appellants rely in large part on the Supreme Court’s holding in *Boy Scouts of America v. Dale*<sup>93</sup> — a case that ruled against the application of an anti-discrimination law and in favor of the Boy Scouts’ right to exclude gay scout leaders.<sup>94</sup> The appellants cite *Dale* for the proposition that a state law that prohibited “the Boy Scouts from firing the scoutmaster undermined the values the organization tried to teach.”<sup>95</sup> They contend that this principle applies with even more force in the case of the ability of law schools to exclude military recruiters “because the law school’s message is so much more explicit and central”<sup>96</sup> than the message of the Boy Scouts’ views on homosexuality.

Compounding the irony is the appellants’ use of a second decision involving homosexual discrimination in order to stake their claim to an expressive association

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<sup>88</sup> Brief for Appellants at 21–22, *Forum for Academic & Institutional Rights* (No. 03–4433) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985)) (emphasis added) (citations omitted).

<sup>89</sup> Brief of Amicus Curiae American Association of University Professors in Support of Appellants and Reversal of the District Court Decision, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03–4433 (3d Cir. filed Jan. 12, 2004).

<sup>90</sup> *Id.* at 5.

<sup>91</sup> Brief for Appellants at 22, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>92</sup> *Id.*

<sup>93</sup> 530 U.S. 640, 644 (2000) (holding that the application of New Jersey’s public accommodations law “violate[d] the Boy Scouts’ First Amendment right of expressive association”).

<sup>94</sup> Brief for Appellants at 22–25, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>95</sup> *Id.* at 23 (citation omitted).

<sup>96</sup> *Id.*



right. In particular, the appellants favorably cite<sup>97</sup> the Supreme Court's opinion in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.<sup>98</sup> In that case, the Court held that Massachusetts could not require private citizens who organized a parade to include among the marchers a group imparting a message the organizers did not wish to convey.<sup>99</sup>

How are the First Amendment interests of free speech, academic freedom, and freedom of expressive association harmed or interfered with by the Solomon Amendment? The appellants contend there are multiple injuries and interferences with these rights. They are addressed below.

### 1. Muddling the Message, Silencing the Students

First, the appellants contend that, by being forced to allow military recruiters on campus upon penalty of losing federal funds, their own message of equality and justice "is not getting through."<sup>100</sup> This, in turn, has caused a palpable "chilling effect within the law school communities,"<sup>101</sup> as "[d]iscourse has suffered"<sup>102</sup> and "some students feel like second-class citizens, marginalizing them and silencing them."<sup>103</sup>

It is important to note the appellants' use of the chilling effect argument as it relates to the silencing of student speech on campus. This is very much reminiscent of the now aging arguments from the late 1980s and early 1990s of those who would restrict so-called "hate speech"<sup>104</sup> on college campuses through the use of speech codes.<sup>105</sup> From the perspective of hate speech opponents, "the visceral shock and the preemptive impact of hate speech silence[s] minorities."<sup>106</sup> As Professor Owen Fiss describes it, hate speech may have a "silencing effect" that "disables or

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<sup>97</sup> *Id.* at 22–23.

<sup>98</sup> 515 U.S. 557 (1995).

<sup>99</sup> *Id.* at 559.

<sup>100</sup> Brief for Appellants at 13, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>101</sup> *Id.* at 14.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Although there is no legal definition of hate speech, it may be thought of as "speech that expresses hatred or bias toward members of racial, religious, or other groups." Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 487 (1990).

<sup>105</sup> See generally ROBERT D. RICHARDS, *FREEDOM'S VOICE: THE PERILOUS PRESENT AND UNCERTAIN FUTURE OF THE FIRST AMENDMENT 27–38* (1998) (describing the rise of speech codes on college campuses).

<sup>106</sup> Stephen Fleischer, *Campus Speech Codes: The Threat to Liberal Education*, 27 J. MARSHALL L. REV. 709, 731 (1994).

discredits a would-be speaker.”<sup>107</sup> It has been said that hate speech’s “sole purpose is to intimidate and silence.”<sup>108</sup>

For the opponents of the Solomon Amendment, such silence is anything but golden. In particular, the military’s policy of “don’t ask, don’t tell” is directly akin to hate speech. In turn, the on-campus presence of military recruiters, who embody that discriminatory policy, causes harm in the form of silence to certain law students, according to the appellants.<sup>109</sup>

Even more striking here are the parallel arguments that underlie both the case against hate speech and the case against the Solomon Amendment. Professor Charles R. Lawrence III, in a seminal article regarding hate speech and the need to restrict it on college campuses, wrote in 1990 that “[a]t the center of the controversy is a tension between the constitutional values of *free speech* and *equality*.”<sup>110</sup> Similarly, the case against the Solomon Amendment also can be framed or pitched as one of speech versus equality. In particular, it is the speech of the military, reflected in its anti-homosexual “don’t ask, don’t tell” policy<sup>111</sup> and embodied by the presence of its recruiters speaking on campus, that constitutes hate speech. As the appellants write in their brief, the military conveys “a message [the law schools] abhor — a message of discrimination that violates the core values they inculcate in their students and faculty.”<sup>112</sup> This abhorrent speech, in turn, interferes both with the message of equality conveyed by the anti-discriminatory policies of law schools, and with the law schools’ efforts to create an environment of equality on campus. The hate speech parallel, from the perspective of the appellants, should not be stretched too far. Why? Because, as Helen Ginger Berrigan, Chief Judge for the United States District Court of the Eastern District of Louisiana, recently observed, “the First Amendment guarantees that hate speech will have a unfettered forum in the marketplace of ideas.”<sup>113</sup>

It also is significant to note that the appellants contend that the military’s presence on campus interferes with the mission of law schools in “*nurturing a delicate academic environment*.”<sup>114</sup> Such language may strike the appellate court judges, who know the rough and tumble of both the legal profession and the highly competitive nature of law school, as somewhat disingenuous. The idea of a

<sup>107</sup> OWEN M. FISS, *THE IRONY OF FREE SPEECH* 25 (1996).

<sup>108</sup> Judge Helen Ginger Berrigan, “*Speaking Out*” *About Hate Speech*, 48 *LOY. L. REV.* 1, 8 (2002).

<sup>109</sup> *Supra* notes 100–03 and accompanying text.

<sup>110</sup> Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *DUKE L.J.* 431, 434 (1990) (emphasis added). See Berrigan, *supra* note 108, at 2 (“The purpose of hate speech is to promote inequality and intolerance.”).

<sup>111</sup> See *supra* note 50 and accompanying text (describing the policy).

<sup>112</sup> Brief for Appellants at 2, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>113</sup> Berrigan, *supra* note 108, at 15.

<sup>114</sup> Brief for Appellants at 20, *Forum for Academic & Institutional Rights* (No. 03–4433) (emphasis added).

"delicate academic environment" also conflicts with the appellants' citation to language from the Supreme Court that academic freedom thrives "on the independent and uninhibited exchange of ideas."<sup>115</sup> The give-and-take, push-and-pull of the marketplace of ideas butts up against the contrived image of "nurturing"<sup>116</sup> law school professors who foster a "delicate academic environment."<sup>117</sup>

## 2. Compelling Speech, Remaining Silent

The Supreme Court has long recognized that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views."<sup>118</sup> As Professor Gabriel Chin and Saira Rao recently observed, "the Court has made clear that the First Amendment prohibition against compelled speech is extremely robust."<sup>119</sup>

It is not surprising, then, that the appellants argue to the Court of Appeals for the Third Circuit that the Solomon Amendment and, in particular, the military's current interpretation of it, "is directed at forcing schools to disseminate or post the military's literature and give military recruiters access to a recruiting forum."<sup>120</sup> The appellants argue that the military broadly interprets the Solomon Amendment, such that it "compels law schools to disseminate the opposite message"<sup>121</sup> from that which law schools would like to disseminate. Such enforcement of a compelled-speech requirement — as the appellants put it, "compelled communications assistance"<sup>122</sup> — violates, according to the appellants,<sup>123</sup> the principles of *Hurley* discussed earlier.<sup>124</sup>

## 3. The Viewpoint-Based Nature of the Solomon Amendment

Viewpoint-based discrimination against expression is described by the Supreme Court as "an egregious form of content discrimination."<sup>125</sup> As Stanford University

<sup>115</sup> *Id.* at 21 (quoting from *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985)).

<sup>116</sup> *Id.* at 20.

<sup>117</sup> *Id.*

<sup>118</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (citations omitted).

<sup>119</sup> Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 434 (2003).

<sup>120</sup> Brief for Appellants at 16, *Forum for Academic & Institutional Rights* (No. 03-4433).

<sup>121</sup> *Id.* at 24.

<sup>122</sup> *Id.* at 27.

<sup>123</sup> *Id.* at 24.

<sup>124</sup> *Supra* notes 98-99 and accompanying text.

<sup>125</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Law School Dean Kathleen Sullivan and her late colleague, Professor Gerald Gunther, observed, “[t]he Court generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment.”<sup>126</sup> The Court has embraced the concept of viewpoint neutrality,<sup>127</sup> while viewpoint discrimination is scorned.<sup>128</sup>

The appellants contend that the Solomon Amendment runs afoul of the prohibition against viewpoint-based laws.<sup>129</sup> In particular, they argue that:

the focus of the regulation is viewpoint-specific: The only recruiting message that the government has ordered schools to disseminate and accommodate is the government’s military-recruiting message, and the government penalizes only those who exclude that message in protest. Viewpoint-specific regulation — even regulation of speech that would otherwise be afforded less protection — is subject to strict scrutiny.<sup>130</sup>

Under the standard of strict scrutiny referred to by the appellants, the government may “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”<sup>131</sup> It is the standard of judicial review to which content-based laws are subject.<sup>132</sup>

The appellants contend that while “[t]he government’s interest in raising an army is compelling”<sup>133</sup> and that “so, too, we can presume is its interest in hiring JAG lawyers,”<sup>134</sup> the government has failed to show that the Solomon Amendment is

<sup>126</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 212 (2d ed. 2003).

<sup>127</sup> See *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233–34 (2000) (discussing favorably the principle of viewpoint neutrality in the context of First Amendment jurisprudence surrounding the distribution of mandatory student activity fees at public universities).

<sup>128</sup> Justice William Brennan once remarked that “[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

<sup>129</sup> See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (“[A] content-based speech restriction” is constitutional “only if it satisfies strict scrutiny.” To satisfy this test a statute “must be narrowly tailored to promote a compelling Government interest.”).

<sup>130</sup> Brief for Appellants at 16, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>131</sup> *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>132</sup> See *Playboy Entm’t Group*, 529 U.S. at 813.

<sup>133</sup> Brief for Appellants at 39, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>134</sup> *Id.*

necessary to further either of these asserted interests.<sup>135</sup> The appellants contend that “[t]he government has never presented a shred of evidence that the military needs to force its way into private forums — much less co-opt others to disseminate its message — in order to recruit lawyers effectively.”<sup>136</sup>

The appellants are supported in this contention regarding the lack of evidence of any negative effect on the military by the Servicemembers Legal Defense Network in a friend-of-the-court brief.<sup>137</sup> It argues that the appellate court “should not blindly defer to the government’s asserted interest, or assume that the Solomon Amendment is necessary to further that interest.”<sup>138</sup>

#### 4. The Imposition of Unconstitutional Conditions

The twentieth century doctrine of unconstitutional conditions, which “maintains that government may not condition benefits on the forfeiture of constitutional rights,”<sup>139</sup> has been described by Harvard constitutional law scholar Laurence Tribe as “now somewhat eroded.”<sup>140</sup> Despite this fact, the appellants use it to pin much of their argument to the Court of Appeals for the Third Circuit. In particular, they argue that the surrender of First Amendment rights of speech and expressive association that takes place under the Solomon Amendment and the military’s interpretation of it:

is a violation of the doctrine of unconstitutional conditions. This condition is couched in terms that are most offensive to First Amendment values. Whereas other conditions the Supreme Court has struck have tied the strings to specific programs funded by government dollars, here the government has regulated the speaker, not just the program, threatening to withdraw every penny from an entire institution for a protest emanating from one corner.<sup>141</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Brief of Servicemembers Defense Network as Amicus Curiae in Support of Plaintiffs-Appellants Fair, et al. and Reversal of the District Court, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03-4433 (3d Cir. filed Jan. 12, 2004).

<sup>138</sup> *Id.* at 2.

<sup>139</sup> David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 679 (1992).

<sup>140</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-8, at 681 (2d ed. 1988).

<sup>141</sup> Brief for Appellants at 16-17, *Forum for Academic & Institutional Rights* (No. 03-4433).

This last part of the argument — that the Solomon Amendment punishes an entire university's federal funding simply because of the actions of one of its units, namely a law school — is particularly crucial for the appellants. Why? Because the appellants rely on it to distinguish their case from *Rust v. Sullivan*<sup>142</sup> and *United States v. American Library Association*<sup>143</sup> in which, as the appellants acknowledge, "the Supreme Court . . . tolerated some strings attached to specific programs that Congress itself creates."<sup>144</sup> For instance, they distinguish the holding in *Rust* by arguing that:

even while upholding a law prohibiting doctors in a federally funded family planning clinic from counseling about abortions, the Court went out of its way to point out that the restriction was limited to the activities of the specific program funded, within that clinic's discrete space, and not to activities in the rest of the hospital.<sup>145</sup>

With the Solomon Amendment, the appellants argue that "[t]he government has crossed this constitutional line by withdrawing eligibility for all federal grants and contracts from every program within a university just because a law school asserts its constitutional right not to help military recruiters disseminate their messages."<sup>146</sup> The appellants thus contend that the Solomon Amendment violates the doctrine of unconstitutional conditions since the funding is conditioned on surrendering a First Amendment right not to speak (the compelled speech argument noted above) and the freedom of expressive association.<sup>147</sup>

## 5. The Vagueness of Solomon

In order to avoid being declared unconstitutionally void for vagueness, a statute must be "sufficiently clear that persons of ordinary intelligence can determine what is prohibited."<sup>148</sup> The appellants argue that the Solomon Amendment's phrase "in

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<sup>142</sup> 500 U.S. 173 (1991).

<sup>143</sup> 539 U.S. 194 (2003). In this case, the Court held that denying federal assistance to public libraries for Internet access unless they installed software to filter pornographic computer images was not unconstitutional. *Id.*

<sup>144</sup> Brief for Appellants at 36, *Forum for Academic & Institutional Rights* (No. 03-4433) (citations omitted).

<sup>145</sup> *Id.* (citations omitted).

<sup>146</sup> *Id.* at 37.

<sup>147</sup> *Id.* at 38.

<sup>148</sup> *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1056 (9th Cir. 2003) (citation omitted), *cert. denied*, 124 S. Ct. 1146 (2004).

effect prevents”<sup>149</sup> is so ambiguous in meaning that it has been exploited by the military recruiters “to demand absolute parity of treatment with non-discriminating employers.”<sup>150</sup> They contend that “the military’s interpretation [of the Solomon Amendment] has been a moving target, leaving schools second guessing as to what expressive activities will trigger harsh funding penalties — and how harsh the penalties could be — and leaving military bureaucrats free reign to target different schools with different standards.”<sup>151</sup> Such vagueness, the appellants argue, “is especially offensive to First Amendment values because it vests military bureaucrats with the power to adopt their own idiosyncratic interpretations of the Solomon Amendment, and apply them inconsistently to different parties.”<sup>152</sup>

In summary, the appellants contend that there are multiple ways, ranging from compelled speech to unconstitutional conditions to vagueness problems, in which their rights of free expression, expressive association, and academic freedom are violated by the Solomon Amendment and the military’s aggressive enforcement of it since September 11, 2001. The next section describes the counter-arguments of the military on selected points mentioned above.

### *B. The Appellees’ First Amendment Arguments*

The government opens its brief on appeal by asserting that the Solomon Amendment’s funding limitation is justified by the Spending Clause of the United States Constitution,<sup>153</sup> as well as the Army and Navy Clauses<sup>154</sup> and the Necessary and Proper Clause.<sup>155</sup> The government then contends that, from a public policy perspective, “[t]he Solomon Amendment reflects Congress’s determination that the security of the United States depends on the caliber of its military personnel and that the exclusion of military recruiting from university campuses undermines the ability of the armed forces to enlist skilled men and women in the nation’s defense.”<sup>156</sup>

Turning to the substantive First Amendment issues of free expression, academic freedom, and freedom of expressive association, the government contends that:

The Solomon Amendment leaves educational institutions, their faculties, and their students free to express whatever views they may have regarding any military policy. The Solomon Amend-

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<sup>149</sup> *Supra* note 56 and accompanying text.

<sup>150</sup> Brief for Appellants at 42, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>151</sup> *Id.* at 41.

<sup>152</sup> *Id.* at 43 (citations omitted).

<sup>153</sup> Brief of the Appellees at 2, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, No. 03–4433 (3d Cir. filed Feb. 17, 2004) (citing U.S. CONST. art. I, § 8, cl. 1).

<sup>154</sup> *Id.* (citing U.S. CONST. art. I, § 8, cls. 12–13).

<sup>155</sup> *Id.* (citing U.S. CONST. art. I, § 8, cl. 18).

<sup>156</sup> *Id.*

ment is directed not at what law schools or other educational institutions wish to *say*, but instead at what they wish to *do* — namely, to deny military recruiters entry to campuses and access to students.<sup>157</sup>

In the preceding passage, the military draws a dichotomy between speech and conduct. This is important because, as the Supreme Court recently observed in striking down a federal law that targeted virtual child pornography, “the Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.”<sup>158</sup> By suggesting that the Solomon Amendment affects only conduct and not speech, the government clearly attempts to mitigate the First Amendment interests at stake. Even if recruitment is considered expression, the government argues that it is merely symbolic expression subject to an intermediate level of First Amendment scrutiny rather than strict scrutiny.<sup>159</sup>

The government further argues that the Solomon Amendment leaves law schools, and their faculty and students, completely free to engage in First Amendment speech activities that criticize the “don’t ask, don’t tell” policy: “They may adopt resolutions condemning the military’s policies, hold rallies and marches, conduct open forums, and distribute leaflets and posters.”<sup>160</sup> The government adds that “[n]o educational institution has been denied federal funds, or sanctioned in any other way, for this open and vigorous criticism.”<sup>161</sup> Parsed differently by the government, “what is missing from this case is any effort by the government to deprive anyone of that [First Amendment] right.”<sup>162</sup>

In terms of the appellants’ contention that the law is viewpoint-based in its application, the government responds that the Solomon Amendment “does not discriminate among institutions on the basis of viewpoint; to the contrary, it applies even if an institution’s exclusion of military recruiters is not intended to express any viewpoint at all.”<sup>163</sup> The government also rejects any notion that academic freedom is at stake, arguing that the Solomon Amendment “leaves undisturbed the institution’s right to decide who will teach, what they teach, and what will be taught.”<sup>164</sup> Finally, the government contends that the void for vagueness contentions of the appellants are incorrect, writing that the Solomon Amendment “provides meaningful legal criteria for determining whether an institution is in compliance with the law’s

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<sup>157</sup> *Id.* at 14–15 (emphasis added).

<sup>158</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (citations omitted).

<sup>159</sup> Brief of the Appellees at 22, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>160</sup> *Id.* at 18.

<sup>161</sup> *Id.* at 19.

<sup>162</sup> *Id.* at 18.

<sup>163</sup> *Id.* at 15.

<sup>164</sup> *Id.* at 16.



funding preconditions, and it minimizes the risk of arbitrary decision-making by centralizing decision-making in a single official.”<sup>165</sup>

With these summaries of the parties’ arguments in mind, the next part of this article turns to the district court’s decision in *Forum for Academic and Institutional Rights*.<sup>166</sup> That decision, as will be seen, provides partial victory on standing to the appellants, but denies them the injunctive relief that they sought against enforcement of the Solomon Amendment.

### III. THE DISTRICT COURT WEIGHS IN: STANDING TO SUE, BUT NO PRELIMINARY INJUNCTION

In his November 2003 opinion, United States District Judge John C. Lifland methodically examined the government’s threshold challenge to the plaintiffs’ lawsuit against it<sup>167</sup> — that the academic parties lacked standing to sue.<sup>168</sup> He found that FAIR — though as of yet devoid of any specific injury<sup>169</sup> — had “a sufficient stake in this controversy”<sup>170</sup> and that SALT,<sup>171</sup> along with the law-professor<sup>172</sup> and law-student plaintiffs,<sup>173</sup> alleged enough specific harm to confer standing.<sup>174</sup>

<sup>165</sup> Brief of the Appellees at 16, *Forum for Academic & Institutional Rights* (No. 03-4433).

<sup>166</sup> 291 F. Supp. 2d 269 (D. N.J. 2003).

<sup>167</sup> *Id.* at 284-96.

<sup>168</sup> Standing pertains to “[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.” *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). To have standing, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citation omitted).

<sup>169</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 286 (The court concluded that although none of the organization’s members had yet lost funding through enforcement of the Solomon Amendment, “FAIR has satisfied its burden to demonstrate that it has law school members who have abandoned their non-discrimination policies due to threatened enforcement.”).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 293 (“SALT members allege an intrusion on their right to receive, benefit from, and, in some cases, send information — the law schools’ message of non-discrimination.”).

<sup>172</sup> *Id.* at 294 (finding that, like the organization SALT, the individual law professors — USC’s Erwin Chemerinsky and NYU’s Sylvia Law — also are “beneficiaries, senders, and recipients of the message of non-discrimination sent by their schools’ non-discrimination policies”).

<sup>173</sup> *Id.* at 295 (finding that the law student association members “have alleged a legally cognizable injury sufficient to satisfy the injury-in-fact requirement of standing,” *id.*, and agreeing with the individual law student plaintiffs that they are “beneficiaries of law school policies increasing diversity and directed at inculcating values and fostering an environment in which respectful debate unfolds,” *id.* at 296).

<sup>174</sup> *Id.* at 296 (denying the government’s challenge to standing with respect to all plaintiffs).

The ride, however, was not so smooth for the plaintiffs when the court turned its attention to the First Amendment basis for their motion for a preliminary injunction.<sup>175</sup> The case hinged on the prong of the preliminary injunction test that requires a court to consider the “likelihood of success on the merits of Plaintiffs’ constitutional claims.”<sup>176</sup> The plaintiffs alleged that the Solomon Amendment lacked constitutional footing because it conflicted with law school recruiting policies — themselves “saturated with First Amendment value”<sup>177</sup> — and intersected with three “distinct First Amendment rights,” namely “academic freedom, freedom of expressive association, and free speech.”<sup>178</sup>

To assess the likelihood of success, the district court analyzed the plaintiffs’ case on the basis of three constitutional queries: (1) “whether the Solomon Amendment create[d] an unconstitutional condition by forcing law schools to abandon their First Amendment rights on pain of losing federal funding”;<sup>179</sup> (2) whether “the Solomon Amendment discriminates on the basis of viewpoint by promoting a pro-military recruiting message”;<sup>180</sup> and (3) whether the language of the Solomon Amendment is unconstitutionally vague.<sup>181</sup>

#### A. Doctrine of Unconstitutional Conditions

It is a well-established notion that the government “has the discretion to decide what activities to fund.”<sup>182</sup> Equally clear, however, “is the principle that the

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<sup>175</sup> In order to obtain a preliminary injunction in the Third Circuit, plaintiffs must show both (1) that they are likely to experience irreparable harm without an injunction and (2) that they are reasonably likely to succeed on the merits. A court may not grant this kind of injunctive relief without satisfying these requirements, regardless of what the equities seem to require.

Adams v. Freedom Forge Corp., 204 F.3d 475, 484 (3d Cir. 2000).

<sup>176</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 296. The requirements for preliminary injunctive relief are “four well-settled conditions”:

(1) a “reasonable likelihood” of success on the merits; (2) a likelihood of “irreparable harm” absent the relief sought; (3) the harm to plaintiffs by denying preliminary injunctive relief outweighs the harm to the government by granting such relief; and (4) preliminary injunctive relief would serve the public interest.

*Id.* (citations omitted).

<sup>177</sup> *Id.* at 297 (internal quotation marks omitted).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* (noting that although “Congress has wide latitude in imposing conditions on the receipt of federal funding,” it is “not without bounds”).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See CHEMERINSKY, *supra* note 44, § 7.3.1, at 535 (discussing the government’s funding decision with respect to planned parenthood clinics in *Rust v. Sullivan*, 500 U.S. 173 (1991)).

government cannot condition a benefit on the requirement that a person forgo a constitutional right.”<sup>183</sup> With respect to the Solomon Amendment, the plaintiffs argued that the government placed them in an untenable position — “requiring law schools to provide affirmative assistance to military recruiters”<sup>184</sup> — when, in fact, “Congress cannot command law schools even to admit the military to campus to ‘disseminate its recruiting message so long as that message is anathema to their mission and undermines their expressive goals.’”<sup>185</sup>

The District Court disagreed, finding that even if some assistance to the military on the part of the schools is necessary, “the alleged intrusion on Plaintiffs’ First Amendment interests still falls short of a constitutional violation.”<sup>186</sup>

The court began its analysis by looking at the Spending Clause,<sup>187</sup> which grants broad powers to the government to impose and collect taxes and use those funds for the protection and general welfare of its citizens.<sup>188</sup> First, the court observed that cases interpreting the government’s authority under the Spending Clause have uniformly found that “Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”<sup>189</sup> Second, the court noted that this principle was reaffirmed by the Supreme Court in 2003 in *United States v. American Library Association*,<sup>190</sup> a case in which Congress conditioned the receipt of a special, federally-discounted Internet rate to libraries on installation of software filtering out pornographic computer images.<sup>191</sup> Third, the court, quite simply, found it to be “evident that the Solomon Amendment furthers important policy objectives.”<sup>192</sup>

Despite these fairly clear directives, however, the court agreed with the plaintiffs’ contention “that the Spending Clause cannot categorically trump the Bill of Rights.”<sup>193</sup> Nonetheless, prior case law that balances Spending Clause powers with First Amendment rights — under the doctrine of unconstitutional conditions — fails “to provide a controlling framework for assessing the Solomon Amendment’s constitutionality”<sup>194</sup> because the Solomon Amendment “does not directly target

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<sup>183</sup> *Id.* § 11.2.4.4, at 946.

<sup>184</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 297.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 298.

<sup>187</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>188</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 298.

<sup>189</sup> *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

<sup>190</sup> *Id.* (citing *Am. Library Ass’n*, 539 U.S. 194, 203 (2003)) (“Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.”).

<sup>191</sup> *Am. Library Ass’n*, 539 U.S. 194 (2003).

<sup>192</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 298.

<sup>193</sup> *Id.* at 299 (citations omitted).

<sup>194</sup> *Id.*

speech or, as will be seen, discriminate on the basis of viewpoint.”<sup>195</sup> Accordingly, the court needed to delve further into the plaintiffs’ First Amendment claims because “the Solomon Amendment, as an exercise of the congressional spending power, will not create an unconstitutional condition unless the alleged infringement on Plaintiffs’ First Amendment interests rises to the level of a constitutional violation.”<sup>196</sup>

The first such claim by the plaintiffs focused on alleged violations of their academic freedom.<sup>197</sup> Although the very concept “eludes precise definition,”<sup>198</sup> the plaintiffs argued “that if academic freedom means anything, it means that the decision as to what to teach is the law schools’ to make, without governmental interference.”<sup>199</sup> While the court conceded that academic institutions should be afforded “a degree of deference . . . within constitutionally prescribed limits”<sup>200</sup> with respect to academic decision-making, it held to the view that “a university is not impervious to competing societal interests.”<sup>201</sup> Put slightly different, institutional decisions “must be considered in proper context and not in disregard of any controlling facts or competing interests.”<sup>202</sup>

As was the case with the doctrine of unconstitutional conditions, the court here found that prior application of the law involving academic freedom was not helpful in handling the plaintiffs’ allegation because most previous cases “dealt with direct and serious infringements on individual teachers’ speech or associational rights.”<sup>203</sup> The law faculty and students are not harmed in such fashion by the enforcement of the Solomon Amendment because “on its face, [it] does not interfere with academic discourse by condemning or silencing a particular ideology or point of view.”<sup>204</sup>

In short, the court found that “the precise contours of this First Amendment interest are somewhat unclear,”<sup>205</sup> and if there is to be any violation of the plaintiffs’ academic freedom “it is because [the Solomon Amendment] also intrudes on their rights to free speech and expressive association.”<sup>206</sup>

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<sup>195</sup> *Id.* at 299.

<sup>196</sup> *Id.* at 301.

<sup>197</sup> *Id.*

<sup>198</sup> WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 299 (3d ed. 1995) (describing how educators view the concept of academic freedom “in reference to the custom and practice, and the ideal, by which faculties may best flourish in their work as teachers and researchers” while lawyers and courts see it “as a catch-all term to describe the legal rights and responsibilities of the teaching profession”).

<sup>199</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 301.

<sup>200</sup> *Id.* at 302 (citation omitted).

<sup>201</sup> *Id.* (citation omitted).

<sup>202</sup> *Id.* (citations omitted).

<sup>203</sup> *Id.* (citations omitted).

<sup>204</sup> *Id.*

<sup>205</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 302.

<sup>206</sup> *Id.* at 303. “The freedom of expressive association is rooted in the freedom to collectively espouse beliefs and ideas,” N. Nicole Edejann, Note, *Coming Out is a Free Pass*

The district court observed that groups need to show very little to demonstrate that they engage in expressive association.<sup>207</sup> Under this “*de minimis* threshold,” it had no trouble finding that “law schools qualify as expressive associations entitled to constitutional protection.”<sup>208</sup> Nonetheless, the court was unconvinced that “the forced inclusion on their campuses of an unwanted periodic visitor would significantly affect the law schools’ ability to express their particular message or viewpoint.”<sup>209</sup>

Similarly, the court was not persuaded that having military recruiters on campus would dilute the law schools’ position on non-discrimination. In fact, the court found the situation brought on by the application of the Solomon Amendment to be quite distinguishable from the Boy Scouts’ prevailing argument in *Boy Scouts of America v. Dale*,<sup>210</sup> in which that group sought to exclude “an avowed homosexual and gay rights activist” because he did not fit the values that the organization espoused.<sup>211</sup> To the contrary, Judge Lifland found that “the Solomon Amendment does not compel the law schools to accept the military recruiters as members of their organizations, not to mention bestow upon them any semblance of authority.”<sup>212</sup> In all respects, the court concluded, the law schools remain “free to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters.”<sup>213</sup>

Moreover, the district court found the Solomon Amendment imposed no obligation on the part of the law schools to endorse, in any way, the activities of the military recruiters. Consequently, the court refused to view it as “an outright compulsion of speech,” as the plaintiffs had argued.<sup>214</sup>

Judge Lifland similarly was unmoved by the plaintiffs’ claim that, by assisting recruiters, they were being forced to impliedly endorse the military’s recruiting message. Using the well-established principle that “[c]onduct must be ‘sufficiently

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*Out: Boy Scouts of America v. Dale*, 34 AKRON L. REV. 893, 895 (2001), which may be impaired by imposing restrictions on the group’s ability to exclude those with different ideologies or philosophies. *See id.* (discussing the tension between an organization’s freedom of expression and public accommodation laws).

<sup>207</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 303.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 304.

<sup>210</sup> 530 U.S. 640 (2000).

<sup>211</sup> *Id.* at 644.

<sup>212</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 305.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 306 (dismissing the plaintiffs’ contention that the instant case is analogous to the situation in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which the Supreme Court found a parade to be “an inherently expressive activity” and thus it “violated the First Amendment to force the parade organizers to include messages they found inimical”).

imbued with elements of communication' to implicate the First Amendment,"<sup>215</sup> the court found that whatever conduct that may be associated with enabling the recruiter's visit to campus does not meet the test to compel First Amendment protection.<sup>216</sup>

Finally, the court also rejected the plaintiffs' claim that the Solomon Amendment should be subjected to strict scrutiny review, finding instead that the appropriate standard of review in a case where the government action involves conduct that has an incidental effect on free expression is the mid-level scrutiny test articulated in *United States v. O'Brien*.<sup>217</sup>

Under an *O'Brien* analysis, the government prevails, according to Judge Lifland. First, it is within the government's power "to raise and support a military."<sup>218</sup> Second, the Solomon Amendment furthers a substantial government interest because "[a]ccess to law schools and their students is an integral part of the military's effort to conduct 'intensive recruiting campaigns to obtain enlistments.'"<sup>219</sup> Third, the Amendment is "unrelated to the suppression of ideas" in that "law schools are free to take ameliorative actions to disclaim any endorsement of the military's recruiting policy."<sup>220</sup> Fourth, the statute does "not burden substantially more speech than is necessary to further the government's legitimate interests."<sup>221</sup>

In sum, the court's elaborate analysis concluded that the Solomon Amendment does not rise to the level of an unconstitutional infringement upon the plaintiffs' free speech and associational rights and thus does not present an unconstitutional condition.<sup>222</sup>

### B. Viewpoint Discrimination

The court was quick to dismiss the plaintiffs' claim that the Solomon Amendment amounted to unconstitutional viewpoint-based discrimination<sup>223</sup> because it

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<sup>215</sup> *Id.* at 309 (citations omitted).

<sup>216</sup> *Id.*

<sup>217</sup> 391 U.S. 367 (1968).

A regulation is justified if it 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.

*Id.* at 377.

<sup>218</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 312.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 314.

<sup>221</sup> *Id.* at 313 (citation omitted).

<sup>222</sup> *Id.* at 314.

<sup>223</sup> See SULLIVAN & GUNTHER, *supra* note 124 (observing that the Supreme Court "generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment").

promoted “only a pro-military recruiting message and by punishing only those schools that exclude the military because of a belief that the military’s recruiting policy is immoral.”<sup>224</sup> It suggested that any impact on speech caused by the statute was incidental and that there was “virtually no risk of excising specific ideas or viewpoints from the public discourse.”<sup>225</sup>

Under the Solomon Amendment, a law school would forfeit federal funding if it blocked recruiters from campus “regardless of the viewpoint that prompted the decision to deny access to such recruiters.”<sup>226</sup> The court also relied on the notion that an institution that accepts the funding and permits on-campus military recruiting can still “voice objections and take ameliorative actions to disassociate itself from the military recruiters.”<sup>227</sup> In fact, the court pointed to the record before it, which showed that where schools had complied with the law, “administrators, faculty, and students have all openly expressed their disapproval of the military’s discriminatory policy through various channels of communication.”<sup>228</sup>

As to whether targeting specific schools for exemption was indicative of viewpoint-based discrimination, the court was persuaded that the Solomon Amendment’s exclusion of institutions with “a longstanding policy of pacifism based on historical religious affiliation” was on solid legal ground.<sup>229</sup> In the court’s words, “[i]t would serve no common-sense purpose to invoke the Solomon Amendment against pacifist schools where military recruiting efforts would be futile.”<sup>230</sup>

### C. Void-for-Vagueness Argument

The plaintiffs’ argument that the Solomon Amendment must fail because it is unconstitutionally vague draws upon the statute’s specific language that denies federal funding to a school “that either prohibits, or in effect prevents”<sup>231</sup> the military’s recruiting efforts. The plaintiffs contended that the statute does not provide “clear guidance on what actions or inactions will result in a determination” that the institution has not lived up to the law.<sup>232</sup> They further contended that it is also unclear how a school can determine if it has “satisfied the exemption for

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<sup>224</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 314.

<sup>225</sup> *Id.* at 315.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* (“Some law schools have posted ameliorative statements throughout the school; law faculty and student bar resolutions have openly condemned the military’s policy; and faculty and students have held demonstrations protesting the military’s presence on campus.”).

<sup>229</sup> *Id.* at 316.

<sup>230</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 316.

<sup>231</sup> 10 U.S.C. § 983 (b) (2003).

<sup>232</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 317.

affording the military a 'degree of access . . . [that] is at least equal in quality and scope to that afforded to other employers.'"<sup>233</sup>

The court found that "[t]he operative terms of the Solomon Amendment are not complex or difficult to understand such that one of ordinary intelligence must 'necessarily guess' at their meaning."<sup>234</sup> In fact, with respect to the requirements of providing the military access, the court found the statute to be "abundantly clear."<sup>235</sup>

In summary, the plaintiffs' motion for a preliminary injunction failed because the court did not find a likelihood of success on the merits in any of its three branches of analysis. First, the Solomon Amendment did not unconstitutionally condition the receipt of federal moneys. Second, the application of the statute did not amount to viewpoint-based discrimination. Third, the language of the statute did not meet the void-for-vagueness standard. Because the likeliness-of-success part of the test for a preliminary injunction was deficient, the court denied the motion.

Whether the appellate court will agree with these conclusions remains to be seen. The next part of this article suggests a number of extrajudicial forces and factors that may play a subtle, if not unseen, role in the Third Circuit's decision later in 2004.

#### IV. PUTTING THE CASE IN PERSPECTIVE: WHY *FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC. V. RUMSFELD* IS ABOUT MORE THAN THE SOLOMON AMENDMENT

The case of *Forum for Academic and Institutional Rights* would appear, at one level, to boil down to a battle of competing interests in expressing one's message. The academics want to maintain their message that discriminatory hiring practices are morally wrong by excluding the military from campus, while the military recruiters would like to step foot on campus in order to spread their message to law school students about career opportunities with the armed forces.

But for all of the well-established principles, tests, and doctrines of First Amendment jurisprudence involved in *Forum for Academic and Institutional Rights*, the judicial outcome at the appellate court level may be influenced by the larger cultural, academic, and legal context in which the case transpires. As Justice Benjamin Cardozo wrote, the forces at play in the content of judgments "are seldom fully in consciousness."<sup>236</sup>

<sup>233</sup> *Id.* (citation omitted).

<sup>234</sup> *Id.* at 319 (citation omitted).

<sup>235</sup> *Id.*

<sup>236</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921).



They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.<sup>237</sup>

For Cardozo, a “judge’s opinion is really a ‘brew.’ The judge mixes into the brew many elements: precedents, logical consistency, customs, morality.”<sup>238</sup> Legal realist Karl Llewellyn, writing nearly seventy-five years ago, suggested that there are facts and factors not revealed in judicial opinions and that “even an appellate court officially concerned with rules alone, has been known repeatedly to strain itself and to strain the rules that it laid down in order to produce what seemed a just result in the case in hand.”<sup>239</sup> What external contextual facts and factors might the judges at the appellate court level take into account when ruling on the constitutionality of the Solomon Amendment?

The difficulties of such prognostication and prediction are immense, but there would appear to be many extrajudicial facts and factors, including issues of “morality”<sup>240</sup> and the forces of “predilections and the prejudices,”<sup>241</sup> that might come into play in *Forum for Academic and Institutional Rights*, as well as in the other cases now pending that challenge the Solomon Amendment. As the Introduction contends, the *Forum for Academic and Institutional Rights* case is inextricably bound up in the context of a controversial war and the equally controversial ongoing gay rights battle — an issue about which some judges surely may possess their own predilections and prejudices — and it plays out, as a classic clash, on a field comprised of the conservative quarters of the military and the liberal confines of elite academe.<sup>242</sup>

This last contextual factor — that of a battle between conservative and liberal forces — may seem stereotyped, but it definitely is rooted in reality in this case. The rhetoric in question makes this clear. For instance, Scott D. Gerber, a law professor at Ohio Northern University, wrote in December 2003 in the *National Law Journal* that the current lawsuits against the Solomon Amendment are united by

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<sup>237</sup> *Id.*

<sup>238</sup> BERYL HAROLD LEVY, *ANGLO-AMERICAN PHILOSOPHY OF LAW* 94 (1991).

<sup>239</sup> KARL N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 31 (1930).

<sup>240</sup> LEVY, *supra* note 238, at 94.

<sup>241</sup> CARDOZO, *supra* note 236, at 167.

<sup>242</sup> *Supra* notes 27–31 and accompanying text.

“promotion of a left-wing political agenda.”<sup>243</sup> Contending that “[i]t’s no secret that the vast majority of legal academics are on the far left of the political spectrum,”<sup>244</sup> Gerber points out that “[i]t’s easy for law professors and law students at elite law schools like Yale and Penn to want to ban the military from recruiting on their campuses. The world is their oyster, as the saying goes.”<sup>245</sup> In an opinion piece in the *Washington Post* in support of the Solomon Amendment, a resident scholar at the American Enterprise Institute claimed that “[a]t some of our top-ranked universities, patriotism itself is disdained.”<sup>246</sup> Even a recent National Public Radio report on the Solomon Amendment implied the conservative-liberal tension when a reporter observed that “[s]ince the Vietnam War, many American universities have had an ambivalent relationship with the military.”<sup>247</sup>

The plaintiffs-appellants in *Forum for Academic and Institutional Rights* are quick to point out in their briefs that when the Solomon Amendment was proposed, it was intended to “send a message over the wall of the ivory tower of higher education.”<sup>248</sup> Kent Greenfield, the founder of FAIR, made the conservative-versus-liberal, military-versus-academia frame clear when he told a reporter for the *Boston Globe*, “[t]he Solomon Amendment was passed to send the message that academic institutions were being too liberal. They are using this law to reach into the core of our educational philosophy and change it, and that’s contrary to the First Amendment.”<sup>249</sup>

The battle over the Solomon Amendment thus is being framed<sup>250</sup> in the media — be it the *National Law Journal*, *Washington Post*, or *Boston Globe* — and in the briefs filed in the case<sup>251</sup> as a battle with distinct political overtones between conservatives and liberals and between the military and academia. One *New York Times* editorial drew those lines, bluntly opining that “[r]ather than blackmailing its way onto campuses, the military should make itself truly welcome by not discrimi-

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<sup>243</sup> Scott D. Gerber, *Allow Military Recruitment*, NAT’L L.J., Dec. 15, 2003, at 34.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Christina Hoff Sommers, *Repressing ROTC*, WASH. POST, Aug. 10, 2003, at B7.

<sup>247</sup> *Weekend Edition Sunday: Law Schools File Suit to Challenge the Pentagon’s View of a Law Regarding Access by Military Recruiters to Universities and Colleges* (National Public Radio broadcast, Sept. 21, 2003), LEXIS, News library, NPR file.

<sup>248</sup> Brief for Appellants at 8, *Forum for Academic & Institutional Rights* (No. 03–4433).

<sup>249</sup> Bombardieri, *supra* note 9.

<sup>250</sup> “Framing” is used here to refer to the rhetorical strategies, including choice of words and facts, that are used to describe an event, highlighting some issues while suppressing others, which, in turn, impacts how we think about, understand, and process the event in question. See generally JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* 38–48 (1997) (discussing the concept of framing within the field of journalism).

<sup>251</sup> Brief for Appellants at 8, *Forum for Academic & Institutional Rights* (No. 03–4433).

nating.”<sup>252</sup> It is as if the military were literally waging an actual armed battle or incursion into the ivory towers of non-discriminatory academia.

Such political overtones in the framing of the case cloud the First Amendment issues and turn, however subtle or unsubtle it may be, the dispute into one between the conservative right and the liberal left. Placed inside this framework is another combustible issue that often divides conservatives and liberals — namely, gay rights. The purported rationale for attacking the Solomon Amendment is that the military’s discriminatory policy against gays and lesbians conflicts with the law schools’ policies of non-discrimination.<sup>253</sup> But the timing of the case suggests another wrinkle — another external factor that heightens or ratchets up the importance of the issue. In particular, *Forum for Academic and Institutional Rights* will be decided in the context of an election year in which the Commander-in-Chief of the military has deeply stepped into the so-called culture wars<sup>254</sup> on another issue involving gay rights — same-sex marriages.<sup>255</sup> The Solomon Amendment case will play out in this larger cultural context, and it is one that would be impossible for any judge to ignore as it is mixed into the Cardozo “brew” described above.<sup>256</sup> A *New York Times* story observed that, in February 2004, the “culture war seemed to be waxing again.”<sup>257</sup>

[S]cholars say these cultural divisions could be heightened by a tough, close election. The parties are increasingly polarized, and many of their core constituents are in an uncompromising mood. The courts have been pushing the envelope on issues like gay rights, just as they did on abortion. Social and religious conservatives feel under siege, furious over what they see as judicial tyranny that is removing traditional values, one by one, from the public square.<sup>258</sup>

If the emphasized observation is true, and given that the Solomon Amendment is about, in no small degree, a battle over gay rights, one cannot reject out of hand either the notion that *Forum for Academic and Institutional Rights* is about more

<sup>252</sup> *Law Schools, Gays and the Military*, N.Y. TIMES, Oct. 5, 2003, at D12.

<sup>253</sup> *Supra* note 18 and accompanying text.

<sup>254</sup> See Frank Rich, *The Joy of Gay Marriage*, N.Y. TIMES, Feb. 29, 2004, at B1 (describing same-sex marriage as the “fulcrum of a culture war in a presidential campaign year”).

<sup>255</sup> See Jonah Goldberg, *Raising the Volume: Candidates of Both Parties Want to Sit Out the Culture Wars, but That’s Not Possible*, L.A. TIMES, Feb. 29, 2004, at M1 (discussing the connection among President Bush, the culture wars, and gay marriage).

<sup>256</sup> *Supra* note 238 and accompanying text.

<sup>257</sup> Robin Toner, *The Nation: To the Barricades; The Culture Wars, Part II*, N.Y. TIMES, Feb. 29, 2004, at D1 (emphasis added).

<sup>258</sup> *Id.*

than just the constitutionality of a single federal statute, or that some judges may take into account the metaphorical big picture when ruling in the case. For all the legal arguments and First Amendment doctrines discussed in Part III,<sup>259</sup> the work of Llewellyn and Brandeis suggests that other influences may play a role in the fate of the Solomon Amendment.

One also must add to the extrajudicial context the ongoing war in Iraq. The division of support for the war among conservatives and liberals<sup>260</sup> parallels the framing of the case as one of conservative military forces against the liberal professorial ranks. A January 2004 poll conducted by the Pew Research Center for the People and the Press led to the following conclusions:

The partisan gap over the war in Iraq, which briefly narrowed following Hussein's capture, has again widened. Only about four-in-ten Democrats (42%) feel the war was the right decision, down from 56% in December. By comparison, independents have become somewhat more supportive of the war — 66% now, 60% then — while Republicans overwhelmingly believe the war was the right decision.<sup>261</sup>

Any military war effort obviously is affected by the recruitment of individuals into the armed services, and therefore the battle over the Solomon Amendment, which directly affects military recruiting, may reasonably be perceived by some as a surrogate referendum on the war in Iraq. Indeed, it has been observed in the *Yale Law Journal* that “[s]ince its inception, the Solomon Amendment has been a weapon in a fully symbolic battle.”<sup>262</sup>

Finally, the dispute over the Solomon Amendment transpires at the appellate court level less than one full year after the Supreme Court handed down its decision in *Grutter v. Bollinger*.<sup>263</sup> In that case, the Court held that the use of race as a factor in law school admissions decisions, in order to further a compelling interest in the educational benefits of a diverse student body, does not violate the Fourteenth Amendment's Equal Protection Clause.<sup>264</sup> That victory for academia may infuriate

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<sup>259</sup> *Supra* notes 164–235 and accompanying text.

<sup>260</sup> For instance, a poll conducted in January 2004 by the Pew Research Center for the People and the Press found that “four-in-ten Democrats rate progress in Iraq negatively, compared with just one-in-ten Republicans.” *Iraq Support Stable, Bush Not Seen as Unilateralist*, PEW RES. CENTER FOR PEOPLE & PRESS, Jan. 22, 2004, at <http://peoplepress.org/reports/display.php3?ReportID=202.html>.

<sup>261</sup> *Id.*

<sup>262</sup> Amy Kapczynski, Policy Comment, *Queer Brinkmanship: Citizenship and the Solomon Wars*, 112 YALE L.J. 673, 675 (2002).

<sup>263</sup> 539 U.S. 306 (2003).

<sup>264</sup> *Id.* at 343.

some of the more conservative appellate court judges. What's more, the Supreme Court emphasized in *Grutter* the "expansive freedoms of speech and thought associated with the university environment."<sup>265</sup> This fact may add strength to the First Amendment-based arguments of the academicians now challenging the Solomon Amendment.

In addition, Justice O'Connor in *Grutter* favorably cited Justice Powell's language from *Regents of the University of California v. Bakke*<sup>266</sup> that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."<sup>267</sup> Taken to its extreme and as applied to the dispute over the Solomon Amendment, the logical extension is that the freedom of a university to make its own judgments as to education includes the selection of which recruiters to allow (and not to allow) on campus.

The irony of this contextual factor is not lost on one professor at Yale Law School. In particular, Peter H. Schuck wrote the following in January 2004:

Consider how the schools define merit. Only a few months before suing Defense on the ground that Solomon prescribes an alien, illiberal conception of merit, the schools advanced a different view. In *Grutter v. Bollinger*, they persuaded the Supreme Court that the very same attributes that the schools now say bear no relation to merit can be used to discriminate against white and Asian applicants. It seems odd for the schools to insist that they may define merit in a way that disadvantages white, Asian, and indeed straight applicants (if schools deem other minorities or gays "diversity-enhancing") but that the military may not define merit in a way that disadvantages gays.<sup>268</sup>

The ultimate impact and effect of all of the extrajudicial factors — gay rights, the war in Iraq, the military versus academia, conservatives versus liberals, affirmative action — that are swirling around and engulfing the issues of statutory analysis and constitutional law now before the Court of Appeals for the Third Circuit remains to be seen. Obviously, there are extrajudicial concerns that may influence judges' opinions in any case, but in the battle over the Solomon Amendment, they seem particularly acute. The authors of this article suggest that they are extremely difficult to ignore and, indeed, may not be ignored by some judges in reaching their decisions.

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<sup>265</sup> *Id.* at 330.

<sup>266</sup> 438 U.S. 265 (1978).

<sup>267</sup> *Grutter*, 539 U.S. at 330 (quoting Justice Powell from *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

<sup>268</sup> Schuck, *supra* note 60, at 58.

## V. CONCLUSION

As constitutional scholar Erwin Chemerinsky, one of the individual parties in *Forum for Academic and Institutional Rights*,<sup>269</sup> wrote in his constitutional law treatise, "Conditioning a benefit on a requirement that individuals give up their First Amendment rights obviously pressures individuals to forgo constitutionally protected speech."<sup>270</sup> The response to the Solomon Amendment seems to support his claim, as several colleges and universities have capitulated to the terms that Congress imposed upon them in this statute rather than risk a loss of federal funding.<sup>271</sup> Such conditioning provides the legal peg upon which the academic parties in this case ultimately should prevail.

Chemerinsky, in his book, wrote more broadly about the legal doctrine of unconstitutional conditions,<sup>272</sup> a principle — it turns out — that is anything but settled in the law.<sup>273</sup> The lack of consistency in how courts — particularly the Supreme Court — have applied this doctrine contributes to the difficulty in coming to an agreement on specific guidelines for its deployment.<sup>274</sup> Consequently, even those whose livelihood is drawn from the study or application of constitutional law are left wondering if the doctrine calls for "an implicit balancing . . . weighing the burden on speech imposed by a condition against the government's justification for the requirement,"<sup>275</sup> or whether the application is more a product of judicial folly and thus elusive of any concrete rationale.<sup>276</sup> Stanford University Law Professor and Dean Kathleen M. Sullivan aptly summed up the controversial nature of the doctrine more than a decade ago in her comprehensive law review article on the topic:<sup>277</sup>

The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph

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<sup>269</sup> *Supra* note 69.

<sup>270</sup> CHEMERINSKY, *supra* note 44, § 11.2.4.4, at 946.

<sup>271</sup> See *New England in Brief/Cambridge; Harvard to Allow Military Recruiters*, *supra* note 67.

<sup>272</sup> *Supra* note 270 and accompanying text.

<sup>273</sup> See CHEMERINSKY, *supra* note 44, § 11.2.4.4, at 947 (noting that even the Supreme Court "has not consistently applied the unconstitutional conditions doctrine").

<sup>274</sup> *Id.* at 950 (concluding that "it is very difficult to reconcile the cases concerning the unconstitutional conditions doctrine").

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* (questioning whether the inconsistency in rulings can ever be reconciled or whether "the decisions simply turn on the views of the Justices in particular cases").

<sup>277</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt. Consensus that the better view won, however, has not put an end to confusion about its application. To the contrary, recent Supreme Court decisions on challenges to unconstitutional conditions seem a minefield to be traversed gingerly. Just when the doctrine appears secure, new decisions arise to explode it.<sup>278</sup>

Judge Lifland's opinion reflected a similar sense of uneasiness with the doctrine, which appeared to lead him ultimately to conclude that the principle did not fit the circumstances at hand.<sup>279</sup> In his analysis, he noted that "[p]rior cases discussing the doctrine of unconstitutional conditions fail to provide a controlling framework for assessing the Solomon Amendment's constitutionality."<sup>280</sup> Perhaps the opinion represents his best efforts to walk "gingerly" through the constitutional "minefield."<sup>281</sup> Unfortunately for the plaintiffs, Judge Lifland was not disposed to expanding the reach of the doctrine and — as he suggested — the previous cases were "too fact-specific to provide an easy or appropriate avenue for analyzing the novel constitutional issues raised by the Solomon Amendment."<sup>282</sup>

This general uncertainty provides a propitious opportunity for the Court of Appeals for the Third Circuit to design an approach that is more consistent with the principles underlying the doctrine of unconstitutional conditions — one that would return to the basics of why such a legal mechanism was needed in the first instance. The initiation of such an approach undoubtedly would benefit the plaintiffs.

As Dean Sullivan has observed, "[d]irectly and through metaphors of duress or penalty, the Court has repeatedly suggested that the problem with unconstitutional conditions is their coercive effect."<sup>283</sup> *Black's Law Dictionary* defines "coerce" as "[t]o compel by force or threat."<sup>284</sup> Without question, the effect of the Solomon Amendment is to compel universities to comply with its terms.

Moreover, the legislative history of the statute itself provides ample proof that Congress intended a coercive effect. As mentioned earlier in this article, while promoting his companion measure to the House version of the bill, Oklahoma Senator Don Nickles informed his colleagues that "more than 100 colleges and universities across the country prohibit military recruiters on campus. Yet many are

<sup>278</sup> *Id.* at 1415–16 (footnote omitted).

<sup>279</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 314.

<sup>280</sup> *Id.* at 299.

<sup>281</sup> See Sullivan, *supra* note 277, at 1415–16.

<sup>282</sup> *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 301.

<sup>283</sup> Sullivan, *supra* note 277, at 1428 (suggesting, however, that "the Court's unconstitutional conditions rulings display serious inconsistencies in their account of coercion").

<sup>284</sup> BLACK'S LAW DICTIONARY 252 (7th ed. 1999).

quite receptive when it comes to taking research grants from the Pentagon. *This bill will correct that situation.*"<sup>285</sup>

Based on the language Senator Nickles used, there can be little doubt that the lawmakers wanted to compel schools to comply with the government's military recruitment efforts. The loss of federal funding is an enormous incentive for educational institutions to toe the government line. In essence, what these institutions give up in exchange is their right to symbolically express — a right protected by the First Amendment<sup>286</sup> — their distaste for a governmental policy that discriminates on the basis of sexual preference.

As Dean Sullivan suggests, "[t]he Court has often invoked coercion as the reason to strike down conditions that affect rights to freedom of speech, religion, and association, but without a consistent or satisfying theory."<sup>287</sup> The Court of Appeals for the Third Circuit now has the chance to firm up the doctrine of unconstitutional conditions, particularly in this instance where the government's clear intention is to coerce institutions into complying with the terms of its own self-enhancing policy. While there is no clear guidance from the Supreme Court on the use of the coercion rationale,<sup>288</sup> it is axiomatic that the doctrine of unconstitutional conditions fully contemplates the practice of the government using federal appropriations as a metaphorical club against its citizens in a deliberate effort to stop them from exercising an expressive right.

If the Third Circuit accepts that reasoning — and finds that the Solomon Amendment imposes an unconstitutional condition — then it logically follows that the plaintiffs would have demonstrated a likelihood of success on the merits and should prevail on the appellate level.

Yet, as Part IV makes clear, the factors that ultimately could inform the Third Circuit's judgment may be extrajudicial in nature. The judges of the Third Circuit have received this case against a background of a sharply divided populace.<sup>289</sup> The external forces coming to bear — the battle over gay rights, affirmative action, and ongoing military campaigns — are potential influences in a politically-charged environment. The question remains whether the jurists assigned this appeal will be able to extricate themselves from the hot-button political issues of the day, or will those outside factors become the main ingredients in what Justice Cardozo astutely labeled a judicial "brew."<sup>290</sup>

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<sup>285</sup> *Supra* note 39 and accompanying text (emphasis added).

<sup>286</sup> See *TRIBE*, *supra* note 140, § 12–7, at 825–32 (examining the speech-conduct dichotomy and how certain acts are protected by the First Amendment).

<sup>287</sup> Sullivan, *supra* note 277, at 1433.

<sup>288</sup> *Id.*

<sup>289</sup> See *supra* notes 254–55 and accompanying text.

<sup>290</sup> See *supra* note 238 and accompanying text.