

## Policy Comment

### Queer Brinksmanship: Citizenship and the Solomon Wars

In 1994, Congress passed a law commonly known as the Solomon Amendment, threatening universities and law schools with loss of federal funding if they deny or effectively prevent military recruiters from accessing campuses and directory information about students.<sup>1</sup> It was the opening salvo in what has become a voluble expressive battle between the military and law schools. This fall, under cover of war, the Department of Defense (DoD)<sup>2</sup> attempted to bring a decisive end to the conflict. Helping themselves to millions of dollars of ammunition from the coffers of their fellow agencies—with ambiguous authority at best—the military successfully forced Judge Advocate General (JAG) recruiters onto campuses around the country, upending carefully wrought compromises in favor of a show of force. This Comment takes this queer brinksmanship as its subject.<sup>3</sup>

There are numerous ways to criticize both the Solomon Amendment and the recent DoD enforcement campaign. It appears, for example, that the

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1. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994), *repealed by* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549(b)(1), 113 Stat. 512, 611 (1999).

2. I use the DoD as shorthand for the source of the policy, because it is they who enforce it, but it is worth noting that the policy—like “don’t ask, don’t tell” itself—may well have originated not with the military but with members of Congress and/or the current Administration.

3. The “brinksmanship” claim is plain: The military is using millions of dollars in federal funding to set up a game of chicken/hawk with universities. The term “queer” may be less self-evident. Derived from the Latin “to twist,” as used by queer theorists, “queer” is both a noun (marking people engaged in sexual crossings) and an adjective (marking relations of strangeness or transition). See EVE SEDGWICK, *Foreword: T Times*, in TENDENCIES, at xi, xi-xii (1993). The “queer” part of “queer brinksmanship” thus connotes two things: that this conflict is about “queers” and that the military’s brinksmanship is itself “queer” (which is to say, highly mutable and poised to backfire).

DoD is operating in violation of its own regulations,<sup>4</sup> and relying upon statutory interpretations that raise serious constitutional questions under the Spending Clause.<sup>5</sup> There are also potential First Amendment problems with the Solomon Amendment, particularly because of the special zone of speech protection that universities enjoy.<sup>6</sup> From a pragmatic point of view, Solomon and the recent escalation look like colossal cognitive error. By refusing to hire openly gay, lesbian, and bisexual individuals, and by adopting tactics that generate protests and ethical dilemmas for potential recruits, the military sharply undermines its own recruiting efforts.<sup>7</sup>

This Comment contends, however, that we cannot measure Solomon's success or failure against its pragmatic impact on military recruiting, because Solomon is not and has never been about effective military recruiting. Rather, Solomon and its recent enforcement are maneuvers in an expressive battle, fought over the role that homosexuals play in a community, the purpose of the modern university, and the meaning of good citizenship. But if Solomon is a symbolic conflict, who is winning? This Comment suggests a surprising possibility: The military may be serving the cause of homosexuals by calling attention to its discriminatory policies in their most transparently homophobic context (the JAG Corps). The military also may have done universities a favor by returning them to their heritage of dissent: Forced to relinquish the accommodations upon which they relied to manage the conflict, universities and law schools now have little choice but simply to confront it. Finally, I suggest that those of us dedicated to nondiscrimination principles that include sexual orientation should

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4. Current regulations specifically provide that the funds of a parent university will *not* be withdrawn if a law school is deemed noncompliant. 32 C.F.R. § 216.3(b)(1) (2002). When recruiters threaten universities with funding cutoffs because of the acts of their law schools, they appear to violate a basic principle of regulatory estoppel: Agencies must follow their own rules when those rules have "the force of law." *United States v. Nixon*, 418 U.S. 683, 695 (1974). The DoD may contend that the consolidated Solomon Amendment, passed in 1999, National Defense Authorization Act for Fiscal Year 2000 § 549, supercedes the regulations. It is far from self-evident, however, that the 1999 Act requires the DoD to penalize an entire university for the acts of a law school. If the Act did, it would raise serious questions under the Spending Clause. *See infra* note 5. Courts must reject agency interpretations if they raise serious constitutional questions. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 923 (1995). Thus, the DoD's recent threats appear to be unauthorized by either regulation or statute.

5. The Court has suggested that to qualify as a valid condition on a spending measure, the Solomon Amendment must be related to the federal interest at stake in the spending measure. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The condition in question—access for military recruiters—bears no rational relationship to the expenditures in question (as interpreted by the DoD), which include funding for cancer and AIDS research. Even knottier questions ensue: Is it problematic that the DoD has been granted unilateral authority to cancel contracts made by fellow agencies, such as the National Institutes of Health?

6. *See infra* notes 37-38 and accompanying text.

7. *See* Kenji Yoshino, *Suspend "Don't Ask, Don't Tell,"* HARTFORD COURANT, Oct. 13, 2002, at C1; *see also* Rebecca Trounson, *Law Schools Bow to Pentagon on Recruiters*, L.A. TIMES, Oct. 12, 2002, § 2, at 1 (noting that faculty members and students at law schools believe that the military has scared away potential recruits).

welcome this opportunity for engagement—but also think seriously about what it would mean to win, and what we are willing to risk to do so.

## I

Since its inception, the Solomon Amendment has been a weapon in a fully symbolic battle. Smoking guns abound. For one thing, the first version of the Amendment was effectively redundant as a matter of law. A statute passed during the Vietnam War era already granted the DoD the power to withdraw their funding from universities that obstructed on-campus military recruitment.<sup>8</sup> If Solomon was not intended to change the law, what was it intended to do? According to one of its proponents, it was meant to “send a message over the wall of the ivory tower of higher education.”<sup>9</sup> U.S. law schools were one key addressee, because they had been banning military recruiters—along with other employers that discriminate on the basis of sexual orientation—since 1978.<sup>10</sup> In fact, it seems that the Amendment was a direct response to a court decision in Congressman Solomon’s state that required state university law schools to ban JAG recruiters from campus.<sup>11</sup>

The first version of Solomon had little effect, because law schools receive little if any DoD funding.<sup>12</sup> In 1996, Congress expanded the funds threatened by Solomon,<sup>13</sup> implicating federal student aid and dramatically increasing the stakes for law schools.<sup>14</sup> Some schools stood their ground and accepted the financial losses.<sup>15</sup> Others, facing six-digit penalties, conceded.<sup>16</sup> Many other schools chose a middle road, crafting narrow accommodations with the military, styling themselves as compliant—but barely—so as to avoid penalties without admitting expressive defeat.<sup>17</sup>

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8. Act of Sept. 26, 1972, Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1973) (denying DoD funds to any institution of higher learning that denied military recruiters access to the campus, unless the funds were being used for research that the Secretary of Defense considered important for national defense).

9. 140 CONG. REC. 11,441 (1994) (statement of Rep. Pombo).

10. Memorandum from Dean Richard Revesz to the NYU Law School Community (Sept. 12, 2002) [hereinafter Memorandum from Dean Revesz] (on file with author).

11. The legislative history of the Solomon Amendment contains extensive reference to the New York lawsuit. 140 CONG. REC. 11,439 (1994) (statement of Rep. Solomon); *id.* at 11,442 (statement of Rep. Engel). The case is *Doe v. Rosa*, 606 N.Y.S.2d 522 (Sup. Ct. 1993).

12. Frank Valdes, *Solomon’s Shames: Law as Might and Inequality*, 23 T. MARSHALL. L. REV. 351, 354 (1998).

13. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 514, 110 Stat. 3009, 3009-270 (1996), *repealed by* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549(b)(2), 113 Stat. 512, 611 (1999).

14. Funds received by some ninety percent of law schools were now threatened. Deborah L. Rhode, *Solomon Amendments Curb Academic Freedom*, NAT’L L.J., Feb. 1, 1999, at A21.

15. One example was NYU Law School. Memorandum from Dean Revesz, *supra* note 10.

16. One example was Duke Law School. Pamela B. Gann, *No-Win Amendment Traps Law Schools*, NAT’L L.J., Oct. 13, 1997, at A23.

17. Harvard Law School, for example, banned Air Force recruiters from their official interview program, but successfully argued that they were in compliance with Solomon because

In 1999, Congress took student aid out of the Solomon equation,<sup>18</sup> and repassed the Amendment in consolidated form.<sup>19</sup> Although Congress was arguably signaling a desire to defuse the Solomon conflict, in 2000, the DoD did exactly the opposite. For the first time, they began to threaten noncompliant law schools not only with loss of their own funding, but with the loss of their entire *university's* funding. In the wake of September 11th, the DoD directly took on law schools like Harvard and Yale, issuing \$350 million threats and declaring accommodations that had been accepted for years to be now noncompliant.<sup>20</sup> Offering schools no opportunity to contest determinations of noncompliance before funding was cut off, the military successfully forced law schools like USC,<sup>21</sup> Harvard,<sup>22</sup> Yale,<sup>23</sup> and Columbia<sup>24</sup> to comply with their demands.

The accommodations the military demanded were in many cases both petty and detrimental to recruiting, providing further evidence that the conflict is first and foremost symbolic. Since 1997, for example, USC Law School had allowed JAG recruiters to interview on campus, treating them like all other employers in every way but one: The military was asked to interview in a convenient, but separate, location.<sup>25</sup> In the ensuing years, the number of USC graduates hired by the military increased, and military recruiters repeatedly agreed that the accommodation worked well.<sup>26</sup> In May 2002, USC was informed that the DoD now deemed this arrangement to be noncompliant. Recruiters insisted that they wanted to be treated “the same as any other employer”—not, that is, subject to the nondiscrimination requirement, but rather allowed to interview in the main building.<sup>27</sup> The military offered no evidence that recruiting had been unsuccessful under the old accommodation, and it was undeterred by the notion that its presence in the official building would spark protests that had been avoided so far.

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JAG was allowed to recruit on campus and was regularly invited to do so by a student organization. Press Release, Harvard Law School, Dean Robert C. Clark Announces Change to HLS Military Recruiting Policy (Aug. 26, 2002), *available at* [http://www.law.harvard.edu/news/2002/08/26\\_military.html](http://www.law.harvard.edu/news/2002/08/26_military.html).

18. Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8120, 113 Stat. 1212, 1260 (1999).

19. National Defense Authorization Act for Fiscal Year 2000, Pub. L. 106-65, § 549, 113 Stat. 512, 609 (1999).

20. Press Release, *supra* note 17; Memorandum from Dean Anthony Kronman to the Yale Law School Community (Oct. 1, 2002) (on file with author).

21. Trounson, *supra* note 7.

22. *Harvard Law School Bows to U.S. and Allows Military Recruiters*, N.Y. TIMES, Aug. 28, 2002, at A12.

23. *Yale Will Allow Military at Law School Career Day*, WASH. POST, Oct. 2, 2002, at A15.

24. Karen W. Arenson, *Military Recruiters Are Allowed*, N.Y. TIMES, Oct. 16, 2002, at B1.

25. Open Letter from Dean Matthew L. Spitzer to the USC Law School Community (Aug. 19, 2002) [hereinafter USC Open Letter] (on file with author); *see also* Trounson, *supra* note 7 (citing a student who suggested that the special location was in fact *more* convenient).

26. USC Open Letter, *supra* note 25.

27. *Id.*

According to Dean Matthew Spitzer, the military simply was not influenced by the data about recruiting.<sup>28</sup>

It is hard to see such demands as anything but maneuvers in an ideological battle. Universities, of course, are also waging a symbolic war. How else can we understand the tremendous effort that they put into constructing and defending accommodations that do not practically obstruct recruiting—indeed, that arguably *help* the military to recruit effectively on campus? Law schools have clung to their accommodations not because they obstruct recruiting, but because they have salutary expressive effects: They mark the military as a discriminatory institution, and they allow law schools to feel that they are defending their communities and principles.

What, though, are those principles—what is this symbolic conflict about? In part, it concerns the role that homosexuality plays in a community.<sup>29</sup> “Don’t ask, don’t tell” (DADT) is predicated on the idea that self-avowed homosexuality is fundamentally incompatible with military community, and with the particularly honored kind of citizenship that we associate with military service. It presumes that “open” homosexuals threaten (heterosexual) community and call forth discriminatory and violent impulses in their comrades.<sup>30</sup> Law schools’ nondiscrimination policies, in contrast, are premised on the idea that *discrimination*, not homosexuality, disrupts and causes offense to a community.

Another way to style this conflict is as an argument over what it means to be a good citizen, and whether or not homosexuality is compatible with that citizenship. It is commonplace to view the military as a privileged site for the articulation of what it means to be a virtuous citizen.<sup>31</sup> Education is another such site. In fact, as *Brown v. Board of Education* suggested, it may have become an even more important crucible for modern citizenship than the military, because today education “is required in the performance of our most basic public responsibilities, *even service in the armed forces*. It is the very foundation of good citizenship.”<sup>32</sup>

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28. *Id.*

29. Part of what marks Solomon as an expressive conflict about homosexuality is the fact that it could be, but never has been, the source of a conflict over the military’s discriminatory policies regarding sex and disability.

30. See JUDITH BUTLER, *EXCITABLE SPEECH* 103-26 (1997); Kendall Thomas, *Shower/Closet*, 20 *ASSEMBLAGE* 80, 80 (1993).

31. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. REV.* 499, 499 (1991). The right to serve in the military is often characterized as a political right akin to the right to vote. See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 *HARV. L. REV.* 26, 128 (2000) (suggesting that within the Bill of Rights, military service and voting are “paired political rights”). Like the jury, the military is seen as a foundational democratic institution, because it fosters good citizenship. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1132 (1991) (arguing that the Bill of Rights protects “various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate”).

32. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

*Brown* was concerned with primary and secondary school education, but the university has a similar, although more indirect, role in forging modern notions of citizenship.<sup>33</sup> As the founder of the modern university, Wilhelm von Humboldt, understood them, universities should have “indirect utility [and] direct uselessness for the state.”<sup>34</sup> Humboldt and the German idealists thought universities fulfilled this mandate by producing “not servants but *subjects*” of the state,<sup>35</sup> and by serving “as the site of critique.”<sup>36</sup> By rejecting employers who discriminate on grounds of sexual orientation—indeed, by rejecting the military as one of those employers—universities are serving precisely the function that we want them to serve. Universities are fundamental to our democracy, because they provide space for the articulation of critique and the development of alternative modes of citizenship. Thus, we ought to be concerned when expression at universities is curtailed in favor of expression on behalf of the state.

This sensibility, of course, is the foundation of the special speech protection that universities enjoy.<sup>37</sup> If the Solomon conflict is at its heart a symbolic one, and if the recent enforcement bears no rational relationship to the government’s interest in recruiting, the conflict seems to raise serious First Amendment questions.<sup>38</sup> But as commentators like Lawrence Lessig have pointed out, the more likely a law is to violate the First Amendment, the more likely it is also to be self-defeating.<sup>39</sup> Solomon, I suggest, may be an unexpected example of this paradox.

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33. As the Supreme Court itself has noted, universities are “vital centers for the Nation’s intellectual life” that operate “at the center of our intellectual and philosophic tradition.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835-36 (1995).

34. BILL READINGS, *THE UNIVERSITY IN RUINS* 124 (1996).

35. *Id.* at 67 (discussing the views of Friedrich Schleiermacher).

36. *Id.* at 6.

37. The Court has “long recognized the constitutional importance of academic freedom,” *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 n.3 (2000) (Souter, J., concurring) (citation omitted), and recently affirmed that universities enjoy special constitutional protection from spending measures that impact their speech rights, *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (noting that universities are “a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment” (citing *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603, 605-06 (1967))).

38. For example, is the recent enforcement of Solomon so unlikely to further the government interest unrelated to the expression of speech (recruiting), or so excessively burdensome upon universities’ expression, that it fails under the *O’Brien* test? *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

39. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1041-42 (1995).

## II

Have law schools lost the battle—and who will win the war? The military has successfully inserted its recruiters into interview programs around the country, but it is far from clear that it has done its recruiters any favors. But if the point is not recruiting, but rather expression—as I have argued—is the military likely to make its point (roughly, consolidating the military as fully heterosexual and putting universities in their place)? Not necessarily. Consider the deep liabilities that its current position carries: The military can hardly occupy the high ground of patriotism and unity if it is seen as using the cover of war to further discriminatory and divisive ends. It is also entirely unclear how the military would defend DADT as applied to JAG, if it were pressed on the issue. As a last resort, it can appeal to homophobia itself, but the more DADT appears to be rooted in “a bare . . . desire to harm a politically unpopular group,” the less likely it is to satisfy equal protection standards.<sup>40</sup> Finally, the military has chosen a weapon it must desperately wish not to use. To threaten funding for cancer and bioterrorism research is to use a human shield—not something that the good soldier is supposed to do, regardless of the rationale.

For their part, faced with choices that can only be called Solomonic, law schools ceded to almost every recruiting demand. According to newspaper headlines, this was clear defeat.<sup>41</sup> When compared to the mobilization that surrounded them, however, the concessions made seem inconsequential. Students and faculty protested,<sup>42</sup> and deans expressed solidarity with gay, lesbian, and bisexual students.<sup>43</sup> Some schools—like Yale—announced that they will pursue legal vindication, contending that their previous policies complied with the Solomon Amendment.<sup>44</sup>

Where does this leave the expressive battle? Here is one ironic reading: The military, by forcing the issue, has broken the silence that typifies their approach to homosexuality in the armed forces, and thus has acted in the interests of gay rights campaigners. They may have also helped return universities to their rightful heritage as institutions committed to critique by pressing them to concede or defend their principles. We might say that

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40. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 543 (1973).

41. See, e.g., *Harvard Law School Bows to U.S. and Allows Military Recruiters*, *supra* note 22; Trounson, *supra* note 7.

42. See, e.g., *Students Protest Pentagon Recruiters; Military Ban on Gays Conflicts with Georgetown's Antidiscrimination Policy*, WASH. POST, Oct. 5, 2002, at B2.

43. *Id.*; see also Memorandum from Dean Richard Revesz to the NYU Law School Community, *supra* note 10.

44. Trounson, *supra* note 7. However, the McCain Amendment, Defense Department Appropriations Act Fiscal Year 2003, S. 2514, 107th Cong. (2002), waits in the wings, prepared to remove nearly all of the flexibility upon which law schools rely to defend their accommodations. Constitutional challenges to the McCain Amendment could, of course, be levied. See, e.g., *supra* notes 5, 38.

universities were playing their own version of “don’t ask, don’t tell” by (understandably—even laudably) attempting to avoid the Solomonic choices put to them, accommodating recruiters while scoring a (local) expressive point against the military. Pressed to the wall and denied access to the markers of resistance upon which they had relied previously, law schools have been forced to confront their commitment to the principles at stake. The response has been seismic: Coalitions have sprung up within and across law schools, dedicating themselves to making not local but *national* points about the Solomon Amendment—and not only about Solomon, but also about DADT itself. It is possible, then, that the military is headed the way of the Boy Scouts, poised to fall victim to its own success.<sup>45</sup>

### III

Important questions, of course, remain: What would it mean to “win” this symbolic battle for any of those implicated by it, including the military; law schools; and gay, lesbian, and bisexual individuals? What ought students, faculty, and school administrators be doing with the discursive opening offered by the military’s queer brinksmanship? Should universities seek the narrowest possible compliance with Solomon, e.g., by bringing lawsuits defending their right to relegate the military to separate buildings? (What does that express, and to whom?) Should they band together and call the military’s bluff? Should they concede the practical matter and allow the military to recruit, but wage a more aggressive expressive campaign? That is, rather than insist that they are “committed to complying with the law,”<sup>46</sup> should universities announce that they are complying with Solomon only under overwhelming duress, and that they believe DADT to be a violently discriminatory policy? Should they oppose Solomon in the name of generally palatable values like “nondiscrimination,” or should they use this as an opportunity to express public solidarity with gay, lesbian, and bisexual individuals specifically? The latter course no doubt would occasion painful consequences for some schools (particularly those with antigay alumni and donors)—but might such painful consequences be in some way expressively important? If we complicate our understanding of what the Solomon Amendment is, and what it would mean to comply with or resist it, we can begin to ask questions such as these. Answers may be hard to come by, but there is no better time, or place, to begin to ask them.

—Amy Kapczynski

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45. Much has been made of the dramatic decline in support for the Boy Scouts of America following their victory in the Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). See, e.g., Kate Zernike, *Scouts’ Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1.

46. *Yale Will Allow Military at Law School Career Day*, *supra* note 23.