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Legal Sidebar

The Army Clause, Part 4: Role in Individual Rights Cases

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This Legal Sidebar post is the fourth in a five-part series that discusses the Constitution's Army Clause, which authorizes the federal government to raise and support armies while also allowing for congressional control through the appropriations process. Because the Army Clause provides Congress with an essential element of the United States' suite of war powers, understanding the Army Clause may assist Congress in its legislative activities.

This Sidebar post analyzes the relationship between the Army Clause and individual rights guaranteed under the Constitution. Other Sidebars in this series discuss the clause's historical backdrop; drafting and ratification history; relationship with appropriations, conscription, and war materials; and connection with principles of federalism. Additional information on this and related topics is available at the Constitution Annotated.

Congressional power under the Army Clause has sometimes come into tension with individual rights afforded under the Constitution. For instance, Congress has provided accommodations for individuals with religious objections from being subject to armed forces' combatant training and service through a statute exempting those "conscientiously opposed to participation in war in any form" from the draft. Although the conscientious objector statute states that it only applies to objections derived from "religious training and belief" and not those based upon "political, sociological, or philosophical views," the Supreme Court has interpreted the exemption to apply to both theistic and nontheistic opposition.

In the context of freedom of speech and expression, the Supreme Court addressed an antiwar protestor's First Amendment challenge to his conviction for violating a federal statute that prohibited the knowing destruction of draft cards in the 1968 case *United States v. O'Brien*. Observing that Congress's power to "classify and conscript manpower for military service is 'beyond question[,]'" the Court in *O'Brien* concluded that the government's interest in insuring the continuing availability of draft cards was sufficiently substantial to overcome the First Amendment objections of the protestor who burned his draft card during an antiwar demonstration, and that the statute was narrowly tailored to meet that interest.

In *Rostker v. Goldberg*, decided in 1981, the Supreme Court rejected a suit contending the requirement that males but not females register for potential military service violated the Constitution's Equal Protection principles. The Court reasoned that the judicial branch should defer to Congress's choices on which portions of the population should be subject to military service because "[n]ot only is the scope of

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Congress'[s] constitutional power in this area broad, but the lack of competence on the part of the courts is marked."

In another case implicating congressional power to raise armies through conscription, the Supreme Court addressed a provision in the Military Selective Service Act that denied certain federal financial assistance for higher education to students who failed to register for the draft. In *Selective Service System v. Minnesota Public Interest Research Group*, a 1984 case, a group of students contended that the law violated their Fifth Amendment right against self-incrimination and was an unconstitutional bill of attainder. The Supreme Court rejected the Fifth Amendment argument based upon the reasoning that the students were "under no compulsion to seek financial aid" and could have avoided self-incrimination issues by declining to apply for aid that required certification about draft registration. The Court likewise rejected the bill of attainder claim on the grounds that bills of attainder punish individuals without a judicial trial, but the purpose of the Military Selective Service Act provision was to encourage registration for the draft, not punish nonregistrants.

The Supreme Court addressed another federal funding restriction in a 2006 case, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* *Rumsfeld* concerned a federal law that denies certain funding to higher education institutions that do not provide military recruiters the same access to recruitment events as other potential employers. An association of law schools and faculties challenged the law, arguing that the funding restriction violated its members' First Amendment freedoms of speech and association because some members wished to bar on-campus military recruiters due to objections over the government's now-repealed "don't ask, don't tell" policy on homosexual servicemembers in the military. Observing that judicial deference is at a high point when Congress enacts legislation using its Army Clause authority, the *Rumsfeld* Court held that Congress could require law schools to provide equal access to military recruiters without infringing on First Amendment freedoms.

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