CONSTITUTIONAL LAW I (LAW 508) §E-H

FINAL EXAMINATION

PROF. DAVID B. CRUZ

SPRING 2004

May 6, 2004
9:00 a.m. (Part II starts 10:00 a.m.)

Part II (Essay)

Time: 2½ (i.e., two and one-half) hours
(75% of exam grade) (approx. 50% for Question 1 and 25% for Question 2)

OPEN BOOK

INSTRUCTIONS FOR PART II

Part II of the exam consists of two (i.e., 2) essay questions. You are to answer both questions. Recommended times are as follows: fifteen minutes to read both questions (approximately 10:00-10:15 a.m.); one hour 20 minutes (approximately 10:15 to 11:35) to outline and answer Question 1; 40 minutes (approximately 11:35 a.m.-12:15 p.m.) to outline and answer Question 2. This leaves 15 minutes (approximately 12:15-12:30 p.m.) extra for you to use as you see fit.

Be sure to complete the specific task assigned. If you believe that your answer depends on any facts or legal information not provided in the question, specify the facts or legal matters clearly and explain how they would affect your answers.

Part II is an open book, open notes examination. You may bring into the examination room and consult during Part II of the examination any written/printed matter you wish. You will not be credited for citing cases not included in the assignments or discussed in class; the Chemerinsky treatise is not to be cited as authority for the state of the law.

Write your answers to Question 1 and Question 2 in separate bluebooks or print them separately. (You may use more than one bluebook per question; label each bluebook with its sequence in your answer and the number of the question, e.g., “Question 1, 2 of 3 books” and “Question 2, 1 of 2 books.”) WRITE OR PRINT –LEGIBLY–ONLY ON ONE SIDE OF EACH PAGE AND EVERY OTHER LINE. If your writing/printing is difficult to read, write on every third line.

YOU MUST STOP WRITING WHEN INSTRUCTED TO DO SO BY THE PROCTOR. FAILURE TO DO SO WILL BE CONSIDERED A BREACH OF ACADEMIC DUTY AND WILL BE REPORTED TO THE DEAN’S OFFICE BY THE PROCTOR.

DO NOT LIFT THIS COVER SHEET UNTIL INSTRUCTED TO DO SO BY THE PROCTOR.
QUESTION 1:

In his initial election campaigning for President, Bill Clinton promised to lift the military exclusion of lesbian, gay, and bisexual (collectively, “lesbigay”) persons. Following Clinton’s inauguration, a resistant Congress instead codified what has come to be known as the “Don’t Ask, Don’t Tell” policy (§ 654). In part, Public Law 103-160 – Nov. 30, 1993 – § 546, 107 Stat. 1670 (1993) (codified at 10 U.S.C. A. § 654), which was signed by Clinton, provides as follows:

§ 654. Policy concerning homosexuals in the armed forces.
(a) Findings.-Congress makes the following findings:

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.
(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.
(8) Military life is fundamentally different from civilian life in that-
   (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
   (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
(9) The standards of conduct for members of the armed forces regulate a member’s life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.
(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.
(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.
(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces’ high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.
(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.
(b) Policy. – A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that-

(A) such conduct is a departure from the member’s usual and customary behavior;
(B) such conduct, under all the circumstances, is unlikely to recur;
(C) such conduct was not accomplished by use of force, coercion, or intimidation;
(D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(f) Definitions. – In this section:

(1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian.”

(2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term “homosexual act” means—
(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

In response to the continued, codified discrimination against lesbigay citizens, a number of colleges and graduate schools that had general nondiscrimination policies that included sexual orientation at least partly denied access to their facilities to military recruiters. In response, starting in 1995, Congress began attaching riders known as “the Solomon Amendment” (after the measure’s original congressional sponsor) to appropriations bills. The current version, codified at 10 U.S.C. § 983, reads (although a separate statutory provision provides that federal student financial aid funds are not revocable under § 983):

§ 983 Institutions of higher education that prevent ROTC access or military recruiting on campus: denial of grants and contracts from Department of Defense, Department of Education, and certain other departments and agencies.
(a) Denial of Funds for Preventing ROTC Access to Campus.— [omitted for purposes of this exam]
(b) Denial of Funds for Preventing Military Recruiting on Campus.— No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher 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 Transportation 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.

* * * *
(d) Covered Funds. –
   (1) The limitation established in subsection (a) applies to the following:
      (A) Any funds made available for the Department of Defense.
      (B) Any funds made available in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.
   (2) The limitation established in subsection (b) applies to the following:
      (A) Funds described in paragraph (1).
      (B) Any funds made available for the Department of Transportation.

* * * *
The Solomon Amendment has been authoritatively interpreted in federal regulations with the binding force of law to protect access not only by the Secretaries of military departments and Transportation themselves but also by the Secretaries’ designees or underlings who are seeking to recruit.

The law school at the University of Southern Calivada (“USC”), a private college, denied use of the law school’s classrooms to military recruiters, just as it excluded any other employers that discriminate on the basis of race, color, national origin, religion, sex, disability, or sexual orientation. In response, the United States notified USC that the university (and not just the law school) would be losing all Defense, Labor, Health & Human Services, Education, and Transportation funds (other than federal student financial aid moneys). Unsurprised but nonetheless somewhat panic-stricken, USC filed suit against the United States in the federal district court for the Central District of Calivada (one of the states in the U.S.), where it was assigned to Judge Davidson. USC’s suit asked for a declaration that the Solomon Amendment was not a permissible exercise of congressional authority as well as an injunction barring the U.S. from denying funds to USC.

At roughly the same time, the Army discharged Private First Class Estrada and Private First Class Lopez, who informed the army chaplain at Fort Pendulous in southern Calivada (where they
were based) that they were lesbians. They denied engaging in sexual activity with anyone while they had been in the service, but believed that they could not in good conscience lie about their identity. The Army promptly discharged them pursuant to Don’t Ask, Don’t Tell. They equally promptly filed suit in federal court in the Central District of California, where the case was also assigned to Judge Davidson. They argued that the military exclusion violated their constitutional equal protection rights and sought a declaration that the policy was unconstitutional as well as an injunction ordering their reinstatement in the Army.

For whatever reason, Judge Davidson consolidated the two cases. In USC’s case, he held that the Solomon Amendment was not a proper exercise of the federal government’s conditional spending power. Applying South Dakota v. Dole, Judge Davidson decided that the restrictions contained in the Solomon Amendment did not serve the general welfare, were not germane, and were coercive. In Estrada’s and Lopez’s suit, Davidson held that the Don’t Ask, Don’t Tell policy did not violate their equal protection rights. He determined that sexual orientation discrimination is subject only to rational basis review, that reinforcing the ban on sodomy (by servicemembers at all times, on duty or off, and in all places, on base or off, by all couples, same-sex or different-sex) contained in the Uniform Code of Military Justice (“UCMJ”) and enhancing military effectiveness were legitimate governmental interests, and that § 654 was rationally related to those interests.

On appeal to the Nineteenth Circuit, counsel for the United States argued, among other things, that the limitations of Dole should not even apply to grants of federal funds to private colleges. In the alternative, the U.S. argued in part that either Solomon did serve the general welfare, or the general welfare restriction was a political question not judicially enforceable; that the regulations were indeed germane; and that they were not unconstitutionally coercive, even though USC was one of only four law schools out of approximately 200 to refuse to provide military recruiters full and equal access.

In their appeal, Estrada and Lopez argued, among other things, that sexual orientation discrimination should be subject to strict or at least intermediate scrutiny; that the UCMJ sodomy ban was unconstitutional under Lawrence v. Texas and so “reinforcing” it cannot constitute a legitimate governmental interest; and that the presence of openly lesbigay persons in the armed forces could not constitutionally be deemed detrimental to unit cohesion (or that even if it could, there were less discriminatory means of addressing any problems).

The Nineteenth Circuit agreed with both appellants. The court reversed the judgments against the United States in the USC case, holding that the general welfare restriction was not judicially enforceable, that the Solomon Amendment was germane, and that it was not coercive. The Court also reversed the judgment in favor of the U.S. in the Estrada & Lopez case, holding that sexual orientation discrimination should be subject to intermediate scrutiny; that the policy was not substantially related to reinforcing the UCMJ sodomy ban; and that the policy was not substantially related to preserving unit cohesion.

Following your successful law school career and graduation, and in recognition of your excellent command of the law, you were hired to clerk for Justice Robert Sanders of the U.S. Supreme Court. Your co-clerks and the Justice have already determined that the Solomon Amendment was properly
applied here (and not misinterpreted by the U.S.), and that the only possible basis for congressional power to enact it is the spending power. The issues for you to consider, then, are whether the Solomon Amendment is a permissible exercise of the spending power, and whether the military exclusion of lesbigay persons is consistent with would-be servicemembers’s equal protection rights. Please write a memo to Justice Sanders advising, in your view, (1) whether the Solomon Amendment (§ 983) properly falls within Congress’s conditional spending power; and (2) whether the “Don’t Ask, Don’t Tell” policy (§ 654) violates the Constitution’s equal protection guarantees. Be sure your memo takes and argues a position on these issues and that it addresses reasonable arguments that oppose your position.

QUESTION 2:

[A]t a dinner Tuesday sponsored by the Atlanta-based Southern Center for International Studies[,] [Justice Sandra Day] O’Connor told the audience [that] the U.S. judicial system generally gives a favorable impression worldwide, “but when it comes to the impression created by the treatment of foreign and international law and the United States court[s], the jury is still out.”

She cited two recent Supreme Court cases that illustrate the increased willingness of U.S. courts to take international law into account in its decisions. [In] 2002, she said, the high court regarded world opinion when it ruled executing the mentally retarded to be unconstitutional. . . . More recently, the Supreme Court relied partly on European Court decisions in its decision to overturn [Texas’s] anti-sodomy law.

[In] his dissent in [Lawrence v. Texas], Scalia said: “The court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . meaningless dicta. Dangerous dicta, however, since this court . . . should not impose foreign moods, fads, or fashions on Americans,” he said . . . .

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Drawing upon material from the course (assigned readings and/or class discussion), write a brief commentary evaluating the views expressed by the Justices in the above passage and the proper role, if any, of international legal developments in constitutional interpretation (sometimes called “comparative” analysis).

END OF PART II (ESSAYS)

END OF EXAM