



## The Solomon Amendment: **Does Syracuse University Respect the Rule of Law, the Military, or Academic Freedom?**

The Solomon Amendment, “. . . as amended by the Ronald Reagan Defense Authorization Act for fiscal year 2005 (Pub. L. 108-375) . . . withholds specific federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers.” Petr.’s Br. I.

### **THE PARTIES**

#### **Petitioners**

- Donald Rumsfeld, U.S. Secretary of Defense
- Margaret Spellings, U.S. Secretary of Education
- Elaine Chao, U.S. Secretary of Labor
- Michael O. Leavitt, U.S. Secretary of Health and Human Services
- Normal Y. Mineta, U.S. Secretary of Transportation
- Michael Chertoff, U.S. Secretary of Homeland Security

#### **Respondents**

- Forum for Academic and Institutional Rights, Inc. (FAIR)
- Society of American Law Teachers, Inc. (SALT)
- Coalition for Equality
- Rutgers Gay and Lesbian Caucus
- Pam Nickisher; Leslie Fischer; Michael Blauschild; Erwin Chemerinsky; Sylvia Law

### **THE QUESTIONS PRESENTED**

Petitioners: “. . .whether the court of appeals erred in holding that the Solomon Amendment likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.” (Petr.’s Br. I)

Respondents: “. . .was the court of appeals correct that the Solomon Amendment unconstitutionally conditions funds on schools’ relinquishment of their First Amendment rights?” (Respt.’s Br. i).

### **BACKGROUND**

#### **1. History Behind the Solomon Amendment**

Article I, Section 8, Clauses 12 and 13 authorize Congress to raise and support military forces to defend the United States. Congress relies on voluntary enlistment and requires

the military to “conduct intensive recruiting campaigns” to encourage enlistments. 10 U.S.C. 503(a)(1). Congress is also empowered to “provide for the common Defense and general Welfare of the United States” and it has authority to enact all laws that are “necessary and proper” to effectuate its spending

power. Article I, Section 8, Clauses 1 & 18.

Congress has passed laws to encourage universities to open their campuses to military recruiters. For example, in 1968 Congress directed NASA to withhold grants from nonprofit universities that barred military

recruiters from campus. Pub. L. 90-373, § (h). Nevertheless, by 1994, some institutions still barred military recruiters.

Congress reacted with the Solomon Amendment, which provided that “[n]o funds available to the Department of Defense may be provided by grant or contract to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campus or access to students on campus.” Pub. L. No. 103-337, Div. A, Tit. V. Subtit. E, § 558. The Solomon Amendment removes from the Secretary of Defense any discretion to waive the funding condition.

Congress has expanded the Solomon Amendment to cover more funding agencies. In 2004, the Congress further clarified the Amendment: “In its current form, the Solomon Amendment now provides that specified federal funds may not be provided to an ‘institution of higher education,’ or a ‘subelement’ of such an institution, if the institution or subelement ‘has a policy or practice’ that ‘either prohibits, or in effect prevents’ military recruiters from ‘gaining access’ to campuses or students ‘in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.’” Brief for Petitioners, at 6.

## 2. The Solomon Amendment Applied

Under 10 U.S.C. 654, a person may be deemed

unqualified to serve in the armed forces if he or she engages in a homosexual act, makes a declaration, or marries or attempts to marry a person of the same biological gender. The “SAM” policy, short for “statements, acts, or marriage,” is known commonly as “don’t ask, don’t tell.”

The policy has stood up against multiple attacks in the courts. *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); see also *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

The American Association of Law Schools (AALS) is a non-profit association with a membership of 160 law schools. Since 1990, the AALS has required its members to withhold “any form of placement assistance or use of the school’s facilities” from employers who discriminate on the basis of sexual orientation or other specified criteria. Petr.’s Br. 7 (*citing* J.A. 251-252 (AALS Bylaws §§ 6-4(b), 6.19)).

Many law schools subsequently adopted policies that denying employers access to career services unless the “employers certify that they do not discriminate on the basis of sexual orientation.” Petr.’s Br. 7. When the Solomon Amendment was passed, the AALS responded by permitting recruiters to access students via career services as long as law schools took steps to “ameliorate” the impact on the student body. Petr.’s Br. 7. The

proposed amelioration includes a disclaimer that “the military discriminates on a basis not permitted by the school’s rules and that the military is being permitted to interview only because of the loss of funds that would otherwise be imposed under the Solomon Amendment . . .” Petr.’s Br. 7.

Syracuse, like most law schools, posts a long disclaimer expressing its disapproval with the military’s restriction on open homosexuals whenever JAG interviews are advertised. Even though the AALS authorized law schools to make exceptions for the military, many schools continued to deny recruiters equal access to career services. Petr.’s Br. 8.

After law schools received notice that the Solomon Amendment conditions all federal funding on equal access, most schools came under compliance with the law.

## 3. Procedural History

The Forum for Academic and Institutional Rights, Inc. (FAIR) is an group of select law schools and faculties who filed suit against the Secretary of Defense in September 2003. FAIR alleges that “the Solomon Amendment violates the First Amendment rights of law schools.” Petr.’s Br. 8.

District Court of New Jersey denied FAIR’s motions for a temporary restraining order and a preliminary injunction. The Court held that the Solomon Amendment did not violate the law schools’ First Amendment rights of expressive conduct under *United States v. O’Brien*, 391 U.S. 367 (1968). The Court determined that military

recruitment was an important governmental interest and that the volunteer force would be harmed if recruiters were denied access to campuses. Moreover, the Solomon Amendment did not operate to “suppress ideas.” Petr.’s Br. 9.

The Third Circuit reversed. A divided panel held that the Solomon Amendment likely violates the First Amendment. The Third Circuit then directed the District Court to enforce the preliminary injunction. The court determined that FAIR has standing to represent participating law schools.

The Third Circuit Court also held that the Solomon Amendment’s condition on federal funds was the equivalent

of a direct regulatory requirement. In essence, law schools were forced to provide equal access to military recruiters.

The Court determined that the Solomon Amendment burdens law schools by forcing them to engage in expressive association with the military. Furthermore, the Court concluded that the Solomon Amendment compels the expressive speech of law schools’ by forcing them to spread, embrace, and fund a military message with which they disagree. By associating with military recruiters, law schools would send a message that they approve of selective discrimination against homosexuals. As such, strict scrutiny was applied.

Even without strict scrutiny, the Third Circuit found that the

denial of access to military recruiters constituted expressive conduct, and was thus protected under the *O’Brien* standard. The Court demanded that the government show specific evidence that the Solomon Amendment “enhances the military’s recruitment effort” Petr.’s Br. 10.

The Court of Appeals granted the government’s motion for a stay pending its filing for certiorari. FAIR moved to have the stay reconsidered, but the Court denied this motion on February 2, 2005.

Oral argument was heard in *FAIR v. Rumsfeld* on December 6, 2005. An opinion is expected very shortly.

## **SUMMARY of the GOVERNMENT’S ARGUMENT**

Just like other employers, the military must recruit on university campuses in order to attract America’s most talented men and women. Some universities have barred access to military recruiters. Congress responded by conditioning the “furnishing of federal funds to institutions of higher education on the institutions’ agreement to grant military recruiters the same access to students that they provide to the recruiters of other employers.” Petr.’s Br. 11. This approach advances the government’s compelling interest in attracting America’s best and brightest and respects the interests of some institutions who wish to continue to deny access for military recruiters.

First, the withholding of funds is conditional, not a

mandate. Universities are free to determine the level of access for military recruiters. The government merely provides that in exchange for supporting the university’s students, the government will have equal access to recruit those same students as any other employer. Institutions of higher education remain free to openly criticize the military as much as they wish.

Irrespective of this fact, the court of appeals held that the Solomon Amendment “likely violates the right to associate, the compelled speech doctrine, the *O’Brien* standard, and the doctrine of unconstitutional conditions.” Petr.’s Br. 12. These holdings are incorrect for the following reasons:

Second, the freedom of association does not give law schools a right to associate with the government’s money but then dissociate itself with the government. In *Boy Scouts of America v. Dale*, 530 U.S. 640

(2000), the state law interfered with the BSA’s right to determine its internal membership. The state law also forced the Boy Scout troop to convey a message contrary to its values by retaining a gay scoutmaster. The Solomon Amendment does neither of these things. First, the Amendment does direct law schools how to compose its internal membership. Recruiters do not join the law school; “their presence on campus is temporary and episodic.” Petr.’s Br. 12. Second, the presence of military recruiters on campus does not communicate a message that law schools support the restriction on open homosexuality in the military. When private employers visit campus, they represent the policies of their parent organizations, not the policies of the university.

The Solomon Amendment is also distinguished

from *Dale* because it provides only a condition on funding, not a direct mandate. “A party may not voluntarily accept federal money and then claim that a condition on the receipt of that money violates its right to associate.” See *Grove City College v. Bell*, 465 U.S. 555 (1984).

Third, the “compelled speech doctrine applies only when a party ‘is obliged personally to express a message he disagrees with.’ *Johanns v. Livestock Mktg. Ass’n*, 125 S. Ct. 2055, 2060 (2005).” Petr.’s Br. 13. Here, the compelled speech doctrine is not violated because universities and law schools are not forced to utter any words in support for or against the military’s “don’t ask don’t tell” policy. Schools need only provide equal access. The speech of military recruiters “remains the speech of the government and the military – not the institution.” Petr.’s Br. 13. Institutions are not compelled to say anything.

Fourth, the regulation of expressive conduct established in *United States v. O’Brien*, 391 U.S. 367 (1968) does not apply to the Solomon Amendment. First Amendment expressive conduct does not include the denial of equal access to recruiters. Access for recruiters is easily distinguished from activities such as flag burning, wearing a black armband, or conducting a sit-in protest. Moreover, an advanced statement about its reasons for barring recruiters does not transform its subsequent behavior into speech. “Such prefatory and explanatory comments would give any conduct expressive content...” Petr.’s Br. 14.

Even if the Solomon Amendment is applied to the *O’Brien* test, it still passes constitutional muster. When it passed the Amendment, Congress understood that on-campus recruiting furthers the nation’s interest in attracting the finest candidates to the military. Employers in both the private and public sector are well aware of the effectiveness of on-campus recruiting; otherwise they would not dedicate so much time and effort into doing it. Further proof on the effectiveness of on-campus recruiting is not required.

Finally, the argument that the Solomon Amendment violates the rule of unconstitutional conditions fails at the premise. “Congress’s authority under the Spending Clause is exceeded only when Congress aims at the suppression of ideas. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998). The Solomon Amendment is aimed at an institution’s conduct in denying equal access; it is not aimed at the suppression of ideas.” Petr.’s Br. 15.

#### **SUMMARY OF F.A.I.R.’s ARGUMENT**

The military engages in speech when it recruits. Law schools engage in speech when they refuse to provide help to employers that discriminate on the basis of sexual orientation. Under the Solomon Amendment, law schools are required to provide services to the military that are “equal in quality and in scope,” which includes posting, printing, and distributing military literature. This practice violates the doctrine of compelled speech because private speakers are forced by the

government to convey a message against its will.

Second, the Solomon Amendment also requires law schools to make an exception to their anti-discrimination policies. Law schools do more than merely teach students how to write briefs; they teach students that assisting discrimination is immoral. The First Amendment protects the law schools’ right to convey this message.

Third, the Solomon Amendment requires law schools to collaborate with military recruiters in spreading their discriminatory message. This requirement violates the law schools’ freedom to disassociate themselves with employers that discriminate. The freedom of association is not limited to interference with a group’s internal matters. This freedom extends to a broad range of expressive activities.

A condition on federal funds is tantamount to a command in this case. Since 1958, the Supreme Court has maintained that “[t]o deny [a benefit] to claimants who engage in certain forms of speech is in effect to penalize them for such speech.” (*Speiser v. Randall*, 357 U.S. 513, 518 (1958)). The only exception to this rule occurs when the government establishes a program and conditions funds in order to ensure that its money is spent to further that program. (*Rust v. Sullivan*, 500 U.S. 173, 196 (1991)).

Strict scrutiny must be applied in this case because free expression is being infringed. Furthermore, the Amendment promotes one viewpoint over another. Even though recruitment is a compelling

interest, the Solomon Amendment fails even intermediate scrutiny because the means chosen by the government do not fit the “disease sought to be cured.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). First, there is no evidence that the military needs help from law schools in order to meet its recruiting demands. Second, there is no justification for requiring law schools to provide identical communications services to military recruiters that are provided to other employers where the benefit to recruitment success cannot be measured.

## **STUDENT OPINIONS:**

### **Is Criticism of the Solomon Amendment Really about Protecting Free Speech?** *by Catrina Sveum*

The Forum for Academic and Institutional Rights, Inc. (FAIR) asserts that the Solomon Amendment infringes on free speech rights and forces the government’s agenda on independent institutions. But those independent institutions are receiving money and aid from the same government that they are working so hard to exclude from their campuses. Proponents of FAIR say that they are demonstrating criticism of the military’s “don’t ask, don’t tell” policy by denying the military access to its students. If that is true, does it follow that they would

be promoting the military’s policies by simply allowing recruiters on campus?

Law schools underestimate the intelligence of their students if they think that allowing military recruiters on campus will be equated to supporting discrimination against homosexuality. Law school is about learning to think logically and independently. Law students are intelligent, thoughtful creatures. Surely they can see that allowing military recruiters on campus does not mean that the school is endorsing discrimination. That would be similar to saying because you live in the United States and enjoy the protection of the armed forces, you agree with everything that they do. We know that this is simply not the case, nor is the government trying to make it so.

One of FAIR’s arguments is that they are sending a message that discrimination is immoral. But a university should not decide what is moral or correct for every one of its students. The average age of entering first-year law students is 22 and one can only hope that these students are already equipped with the knowledge and intuition to make their own conclusions about morality.

Blocking recruiters from campus is not the way to send a message that students should be thinking independently. Allowing military recruiters the same access that hundreds of employers enjoy on law school campuses does not amount to

enforcing the military – or its policies – on students. No student is forced to talk to a recruiter. Recruiters are simply asking for the same access that other employers already enjoy. Administration and students are free to voice whatever concerns or opinions they have about the military and its policies, so long as they allow them in the schools to begin with.

Law students are at a disadvantage if military recruiters are not on campus. In a job market that is highly competitive, employment opportunities can be hard to come by. Most schools seem eager to increase their employment rates at graduation, yet schools are restricting possible employers from making contact with their students in the venue that is most convenient for students.

This alludes to a larger, more dangerous problem. At a time when our national security has been tested like never before, military recruitment is at some of its lowest levels in history. By barring the military access to schools, administrations are sending a message that academia is somehow removed, or even worse, superior to the military in this country. There already exists a great divide between these two parts of American society. This was not the intent of our nation’s founders, many of whom served in the

Revolutionary War. The military today seeks to attract the best and brightest from around the country. The parties harmed when the military is denied access to law schools are not the schools themselves. With or without federal funding, schools will still charge their students \$30,000 a year and enjoy donations from alumni. But the military will be deprived of bright, young lawyers and students will have one less option after graduation.

### **My Two Cents**

*by Peter J. Gioello, Jr.*

The United States Congress, in requiring conditional acceptance of federal funds to benefit the US Military, has not exceeded its constitutional power under Article 1, Section 8 of the United States Constitution. The Solomon Amendment does nothing but require that higher learning institutions, in order to receive federal funds, allow recruiters access to its student body. Opponents of the Solomon Amendment claim that this condition impedes their first amendment rights. It must be noted that no one is forced to allow military recruiting on its campus and every private university has the implicit right to disassociate itself from the military and from federal government funding. The United States Government,

through the elected members of Congress, is not forcing law schools or private universities to take federal funds or advertise for the military.

The military wishes to do nothing more than recruit American men and women from college campuses. Although the United States military is homophobic, challenging the Solomon Amendment should not be used as a means to protest against such policies. The practice of recruiting on campuses should be looked at in light of the overall needs of our nation. In other words, opposition to anti-discriminatory practices by law schools is outweighed by the need to provide for the common defense.

In all honesty, individual law students have the right to embrace the military's "Don't ask, don't tell" policy. Many individuals oppose homosexuality as a result of their own religious beliefs or sense of morality. Adversity is what makes America diverse. As long as current legislation does not rob an American's rights and liberties, there is no legal basis for anyone to tell another American that homosexuality is a moral or immoral practice. Law schools, therefore, might also consider that the desires of homophobic or less progressive students might be equally as valid as the desires of students who seek employment with firms that do not discriminate on the basis of sexual orientation..

It is up to each law school to decide whether or not to accept federal money. Each school must weigh the competing interests; accept the money and compromise school policy, or deny the money on principle and forgo federal subsistence. The presence of military recruiters on campus does not affect my personal or professional life, and I would welcome the military if it were my personal choice. I have friends who are interested to learn about the Judge Advocate General (JAG) and I would find it frustrating if these students were denied access to what might be a fulfilling career choice.

### **Law Schools, Military Recruiters, and Academic Freedom**

*by Kris Miller*

Why are Syracuse University and the College of Law so passionate about denying the military access to SU students? Is it because University policy demands that employers who openly discriminate on distinctions such as race, gender, or sexual orientation are categorically denied access?

This cannot be. If this were true – that the College of Law is committed to the elimination of all distinctions – then it would not permit Latham & Watkins to advertise a \$10,000

scholarship that is only available for minority students. Color blindness means just what it says – blind to color.

I think it is clear that the law school is selective when it chooses which employers to associate with. But is this choice legal or constitutional? The answer is no and maybe, respectively.

First, the Solomon Amendment is federal law drafted, debated, and signed into existence by the two elected branches of government. We honor the rule of law in this country, and we expect our citizens and institutions to follow it. Law schools, ironically, see things differently.

Law schools focus on an all together different policy – the “don’t ask, don’t tell” policy – as an affront to their values that justifies the current assault on the military in *FAIR v. Rumsfeld*. Just like the Solomon Amendment, the policy concerning homosexuality in the armed forces was passed by Congress and President Clinton. “Don’t ask, don’t tell” has been challenged, but it has consistently survived judicial scrutiny.

Congress found that “[t]here is no constitutional right to serve in the armed forces.”<sup>1</sup> Furthermore, “[s]uccess in combat requires military units that are

characterized by high morale, good order and discipline, and unit cohesion.” Congress concluded that openly homosexual soldiers within the ranks have a detrimental effect on morale, discipline, and cohesion. Agree or disagree, that is the current state of the law, and courts have upheld it.

Second, the Solomon Amendment is constitutional because it does not limit the law schools’ freedom to associate. Law schools are free to *disassociate* themselves with military recruiters whenever they wish. But all decisions have consequences, and the effect here is that disassociating school must forgo federal financial support.

Law schools want to have cake and ice cream, but they can’t have both. These funds are not an entitlement. American tax payers do not owe law schools this money.

Moreover, the current issue before the court does not concern speech primarily. In its *amicus* brief in *Rumsfeld v. FAIR*, Syracuse confuses speech with what is actually a business transaction. The primary focus and purpose of any office of careers services is to find employment for students, not to engage in constitutionally protected speech. Attracting prospective employers to campus and finding jobs for students are matters of economics. Through these transactions, students and employers are economically benefited, and subsequently the law schools are economically

benefited. What would be the point of having a career services if its chief purpose was to speak?

Additionally, the supporters of *FAIR* misapply *Boy Scouts of America v. Dale* by ignoring important facts. In *Dale*, the Boy Scouts of America (BSA) were forced by state law to retain an avowed homosexual man and gay right advocate as a scout master. The law demanded that Mr. Dale could lead a scout troop even though the BSA wanted desperately to disassociate itself with him and his values. The Supreme Court found for the BSA because Dale’s *leadership* was deemed to be an expressive statement that homosexuality complied with BSA values.

In the present circumstance, the Solomon Amendment does not force law schools to accept military recruiters as *leaders* within the school (although some of us wish it did – perhaps some military efficiency would speed up the final exam grade turn-around). Recruiters visit law schools infrequently. They stay for a matter of minutes or hours, and then they are gone. They are not leaders, and they do not communicate values on behalf of the schools they visit.

I personally fail to see how someone is so egregiously harmed by hearing what a military employer has to offer. The military is one of

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<sup>1</sup> 10 U.S.C. § 653 (a)(2).

the few institutions where men and women are paid equally, where people of color have a greater chance at promotion and advancement, and where intolerance and bigotry are sternly and swiftly punished. Each soldier must complete mandatory training *quarterly* on topics such as equal opportunity, the prevention of sexual harassment, and the consideration of others.

By the way, did you know that *full tuition scholarships* with monthly stipends of \$450 to \$500 are available for 1L's? I didn't think so. How much scholarship money are you currently receiving from the College of Law? If you were interested in the JAG Corps, wouldn't it be nice to know that these scholarships are out there?

FAIR would have us believe that it is impossible to be gay and be a soldier. This is false, and I can confirm this from personal experience. I have served with gay soldiers, both male and female. They performed their duties honorably and with distinction, and I would gladly serve with them again in a similar capacity. The only liberty they gave up was the right to vocalize or demonstrate their sexual orientation. They could live with it, and so could I.

As 10 U.S.C. § 654 states, “[m]ilitary life is fundamentally different from

civilian life ... military society is characterized by its own laws, rules, customs, and traditions ... that would not be acceptable in civilian society.”<sup>2</sup> In the military, you can be criminally prosecuted for showing up late, for being insubordinate to your boss, or for making provoking speeches or gestures. Under Article 101 of the Uniform Code of Military Justice, you can be put to death for improperly using a countersign (i.e. giving your unit password to an unauthorized person).

Finally, Syracuse and like minded law schools misunderstand academic freedom. Law schools may not dictate to their students what messages are “correct” and what messages are “wrongful.” That is a decision for students to make. When a law school denies its students access to a message that those students want to hear, the school violates the law and the core principles of academic freedom. The Supreme Court was unambiguous in *Tinker v. Des Moines Independent Community School District*: “In our system, students may not be regarded as closed-circuit recipients of only that which the [school] chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.”

In sum, *FAIR v. Rumsfeld* is a poor vehicle for affecting change of the “don't ask, don't tell” policy. Congress and the

President created that doctrine, not the military, and it has withstood judicial scrutiny. Only the elected branches should create and change the law. Within the next few weeks the Supreme Court will order a resounding reversal of the Third Circuit. It will uphold the rule of law - something our College of Law seems to take issue with.

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<sup>2</sup> 10 U.S.C. § 653 (a)(8) and (8)(B).