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# Section 1: Moot Court

Institute of Bill of Rights Law, William & Mary Law School

# I. MOOT COURT ARGUMENT: *Rumsfeld v. FAIR*

*In This Section:*

**New Case:** 04-1152 *Rumsfeld v. FAIR*

## *Rumsfeld v. Forum for Academic & Institutional Rights*

**(04-1152)**

**Ruling Below:** (*Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3rd Cir. N.J., 2004), *cert granted* 125 S. Ct. 1977 73 USLW 3648 [2005]).

The Solomon Amendment ("the Amendment"), 10 U.S.C. 983(b)(1), withholds certain federal funds from colleges and universities that deny military recruiters the same access to their campus and students that they provide for other employers. The Forum for Academic & Institutional Rights ("FAIR"), an association of law schools and faculty members, challenged the constitutionality of the Amendment on free speech grounds. After a New Jersey federal district judge denied FAIR's motion to prevent federal agencies from enforcing the Amendment, FAIR appealed to the Court of Appeals for the Third Circuit. Agreeing with FAIR, the Third Circuit held that law schools were expressive associations and that enforcing the Amendment impaired their message of non-discrimination, compelling the schools to propagate, accommodate, and subsidize ideas that they opposed. Furthermore, the Third Circuit concluded that the possibility of irreparable harms from the compelled speech justified a preliminary injunction against enforcement of the Amendment.

**Question Presented:** Whether the Solomon Amendment's requirement of equal access for military recruiters violates the First Amendment.

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**FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, et al.,**
**Plaintiffs, Appellants,**
**v.**
**Donald H. RUMSFELD, United States Secretary of Defense, et al.,**
**Defendants, Appellees**

United States Court of Appeals
for the Third Circuit

Decided November 29, 2004

[Excerpt: some footnotes and citations omitted]

AMBRO, Circuit Judge:

The Solomon Amendment, *10 U.S.C. § 983*, requires the United States Department of Defense ("DOD") to deny federal funding to institutions of higher education that prohibit military representatives access to and assistance for recruiting purposes. Last fall, the Forum for Academic and Institutional Rights, Inc. ("FAIR"), an association of law schools and law faculty, asked the United States District Court for the District of New Jersey to enjoin enforcement of the Solomon Amendment. The District Court denied FAIR's motion. *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld,* 291 F. Supp. 2d 269 (D.N.J. 2003) ("*FAIR*"). On appeal, we hold that

FAIR has demonstrated a likelihood of success on the merits of its First Amendment claims and that it is entitled to preliminary injunctive relief. Accordingly, we reverse.

I. Background Facts and Procedural Posture

A. Law Schools' Nondiscrimination Policies

[The court discussed the movement of nearly every law school to include sexual orientation as a protected category in their nondiscrimination policies with respect to prospective employers.]

* * *

B. Congress Passes the Solomon Amendment

The United States military excludes service members based on evidence of homosexual conduct and/or orientation. *See 10 U.S.C. § 654.* Citing their nondiscrimination policies, some law schools began in the 1980s refusing to provide access and assistance to military recruiters. This caught the attention of members of Congress. In 1994, Representative Gerald Solomon of New York sponsored an amendment to the annual defense appropriation bill that proposed to withhold DOD funding from any educational institution with a policy of denying or effectively preventing the military from obtaining entry to campuses (or access to students on campuses) for recruiting purposes. . . .

During debate in the House of Representatives, Representative Solomon urged the passage of his amendment "on behalf of military preparedness" because "recruiting is the key to an all-volunteer military.". . . The amendment's co-sponsor, Representative Richard Pombo of California, said Congress needed to target "policies of ambivalence or hostility to our Nation's armed services" that are "nothing less than a backhanded slap at the honor and dignity of service in our Nation's Armed Forces." . . .

Other Representatives opposed the amendment, alleging violations of academic freedom and civil rights. . . . In light of Vietnam War-era legislation, rarely invoked, that already granted the DOD discretion to withhold funding from colleges and universities that barred military recruiters, . . . the DOD itself objected to the proposed amendment as "unnecessary" and "duplicative." . . . The DOD also feared that withholding funds from universities could be potentially harmful to defense research initiatives. But the House voted for the amendment by a vote of 271 to 126. . . . Several months later the Senate approved the defense spending appropriations bill, including Representative Solomon's amendment, and the "Solomon Amendment" ultimately became law.

C. Subsequent Amendments and Regulatory Interpretations

In 1997 Congress amended the Solomon Amendment by expanding its penalty to include, in addition to DOD funds, funds administered by other federal agencies, including the Departments of Transportation, Labor, Health and Human Services, and Education. . . . DOD regulations have clarified this expansion, penalizing an offending "subelement" of a college or university (*i.e.*, a law school) that prohibits or effectively prevents military recruiting with the loss of federal funding from all of the federal agencies identified in the statute, while withholding from the offending subelement's parent institution only DOD funds. *32 C.F.R. § 216.3(b)(1).*

The 1999 amendment also codified exceptions to the Solomon Amendment's penalties for schools that (1) have ceased an offending policy or practice, or (2) have a longstanding religious-based policy of pacifism. § 549, 113 Stat. at 610(c) (codified at 10 U.S.C. § 983(c)). . . .

Following the 1999 amendment, the DOD enforced the Solomon Amendment consistent with its terms. Only schools whose policies or practices "prohibited, or in effect prevented," military representatives "from gaining entry to campuses . . . for purposes of military recruiting," were penalized.

But following the terrorist attacks in the United States in September 2001, the DOD began applying an informal policy of requiring not only access to campuses, but treatment equal to that accorded other recruiters. . . .

. . . .In light of the millions of dollars at stake, every law school that receives federal funds had, by the 2003 recruiting season, suspended its nondiscrimination policy as applied to military recruiters.

This past summer Congress amended the Solomon Amendment to codify the DOD's informal policy. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004). Now, under the terms of the statute itself, law schools and their parent institutions are penalized for preventing military representatives from gaining entry to campuses for the purpose of military recruiting "in a manner that is at least equal in quality and scope to the [degree of] access to campuses and to students that is provided to any other employer." *10 U.S.C. § 983(b).*

D. Current Litigation

In September 2003, FAIR sued the DOD and the other federal departments whose funds are restricted under the Solomon Amendment, seeking on constitutional grounds a preliminary injunction enjoining enforcement of the statute and the then-existing (now codified) informal policy. . . .

II. Jurisdiction

[The Court affirmed that it had jurisdiction over the constitutional question.]

* * *

III. Analysis

To obtain a preliminary injunction FAIR must [prove] (1) a reasonable likelihood of success on the merits, (2) irreparable harm absent the injunction, (3) that the harm to FAIR absent the injunction outweighs the harm to the Government of granting it, and (4) that the injunction serves the public interest. *Tenafly Eruv Ass'n,* 309 F.3d at 157. . . .

A. Unconstitutional Conditions Doctrine

FAIR argues that the Solomon Amendment is an unconstitutional condition. Under the unconstitutional conditions doctrine, the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann,* 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). If Congress "could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* Put another way, the Government may not propose a penalty to "produce a result which [it] could not command directly." *Speiser v. Randall,* 357 U.S. 513, 526, 2 L. Ed. 2d 1460, 78 S.

Ct. 1332 (1958). . . . Thus, if the law schools' compliance with the Solomon Amendment compromises their First Amendment rights, the statute is an unconstitutional condition.

B. First Amendment Analysis

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." *U.S. Const. amend. I.* This simple commandment plays out differently depending on the avenue of analysis. Two avenues applicable here are: (1) whether the law schools are "expressive associations" whose First Amendment right to disseminate their chosen message is impaired by the inclusion of military recruiters on their campuses; and (2) whether the law schools are insulated by free speech protections from being compelled to assist military recruiters in the expressive act of recruiting.

A violation of freedom of speech under either analytical approach draws down the curtain on Solomon Amendment enforcement unless the Government can establish that the statute withstands strict scrutiny. The levels of scrutiny applicable in the First Amendment context are crucial. A regulation that disrupts an expressive association or compels speech must be narrowly tailored to serve a compelling governmental interest, and must use the least restrictive means of promoting the Government's asserted interest (here, recruiting talented lawyers). . . . Needless to say, this is an imposing barrier.

* * *

1. Expressive Association

FAIR argues that the Solomon Amendment impairs law schools' First Amendment rights under the doctrine of expressive association. The Supreme Court most recently addressed this doctrine in *BSA v. Dale*, 530 U.S. 640, 147 L. Ed. 2d 554, 120 S. Ct. 2446 (2000). There the Court held that a state public accommodations law that prohibited discrimination based on sexual orientation could not constitutionally be invoked to force the Boy Scouts to accept openly gay James Dale as an assistant scoutmaster. *Id.* at 659. Central to its analysis was the deference it gave to the Boy Scouts' "view of what would impair its expression," which compelled the Court's conclusion that Dale's presence would "significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'" *Id.* at 653.

Under *Dale*, the elements of an expressive association claim are (1) whether the group is an "expressive association," (2) whether the state action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the state's interest justifies the burden it imposes on the group's expressive association. *Id.* at 648-58. We apply each in turn to analyze FAIR's expressive association claim.

(a) *The law schools are expressive associations.*

A group that engages in some form of public or private expression above a *de minimis* threshold is an "expressive association." *Pi Lambda Phi,* 229 F.3d at 443. The group need not be an advocacy group or exist primarily for the purpose of expression. *Dale,* 530 U.S. at 648. The Supreme Court held that the Boy Scouts, which "seeks to transmit . . . a system of values, engages in expressive activity." *Id.* at 650.

"By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." *The Circle School,* 381 F.3d at 182. Because FAIR has shown that the law schools "possess

clear educational philosophies, missions and goals," *id.*, we agree with the District Court's conclusion that they qualify as expressive associations. *FAIR*, 291 F. Supp. 2d at 303-04. Therefore, FAIR satisfies the first element of the *Dale* analysis.

(b) *The Solomon Amendment significantly affects the law schools' ability to express their viewpoint.*

FAIR argues that the Solomon Amendment significantly affects law schools' ability to express their viewpoint, reflected in their policies, that discrimination on the basis of sexual orientation is wrong. The Solomon Amendment compels them, they contend, to disseminate the opposite message. The schools believe that, by coordinating interviews and posting and publishing recruiting notices of an employer who discriminates on the basis of sexual orientation, they impair their ability to teach an inclusive message by example. . . .

In *Dale*, the Supreme Court recognized that "the forced inclusion of an unwanted person in a group" could significantly affect the group's ability to advocate its public or private viewpoint. 530 U.S. at 648. . . .

* * *

Just as the Boy Scouts believed that "homosexual conduct is inconsistent with the Scout Oath," *id.* at 652, the law schools believe that employment discrimination is inconsistent with their commitment to justice and fairness. Just as the Boy Scouts maintained that "homosexuals do not provide a role model consistent with the expectations of Scouting families," *id.*, the law schools maintain that military recruiters engaging in exclusionary hiring "do not provide a role model consistent with the expectations of," *id.*, their students and the legal community. Just as the Boy Scouts endeavored to "inculcate [youth] with the Boy Scouts' values—both expressively and by example," *id.* at 649-50, the law schools endeavor to "inculcate" their students with their chosen values by expression and example in the promulgation and enforcement of their nondiscrimination policies. FAIR Br. at 22-25. And just as "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," *Dale,* 530 U.S. at 653, the presence of military recruiters "would, at the very least, force the law schools to send a message," both to students and the legal community, that the law schools "accept" employment discrimination "as a legitimate form of behavior." *Id.*

Notwithstanding this compelling analogy, the District Court distinguished our case from *Dale* by suggesting there was a critical difference between the forced inclusion of a gay assistant scoutmaster and the forced presence of an "unwanted periodic visitor," the military recruiter, in the context of a larger recruiting effort. *FAIR*, 291 F. Supp. 2d at 304, 305. While there was "no question" that the gay scoutmaster would "undermine the Boy Scouts' ability to . . . inculcate its values in younger members," the District Court wrote, the Solomon Amendment does not compel the law schools to accept the military recruiters as a "member" and does not "bestow upon them any semblance of authority." *Id.* at 305.

But our Court has recently held that compulsory accommodation of a government-prescribed message may violate schools' First Amendment expressive association rights, even when

that message involves our most revered affirmations of American patriotism—the Pledge of Allegiance and our National Anthem, is only minimally intrusive and lacks the schools' imprimatur. *The Circle School*, 381 F.3d at 182. . . . Certainly, the temporal duration of a burden on First Amendment rights is not determinative of whether there is a constitutional violation. . . . Similarly, the fact that the schools can issue a general disclaimer does not erase the First Amendment infringement at issue here, for the schools are still compelled to speak the [Government's] message."). . . .

Moreover, the District Court's scrutiny of the law schools' belief that the presence of military recruiters will undermine their expressive message about fairness and social justice violates the *Dale* Court's instruction to "give deference to an association's view of what would impair its expression." *530* U.S. at 653. . . . In other words, the reason why there was "no question" . . . that a gay scoutmaster would undermine the Boy Scouts' message was because the Boy Scouts *said it would. Dale,* 530 U.S. at 653. In our case, FAIR has supplied written evidence of its belief that the Solomon Amendment's forcible inclusion of and assistance to military recruiters undermines their efforts to disseminate their chosen message of nondiscrimination. Accordingly, we must give *Dale* deference to this belief, and conclude that FAIR likely satisfies the second element of an expressive association claim.

(c) *Balancing of interests*

The third step in evaluating an expressive association claim is "balancing the First Amendment interests implicated by the Solomon Amendment with competing societal interests to determine whether the statute transgresses constitutional boundaries." *FAIR,* 291 F. Supp. 2d at 310. We need not linger on this analysis. Rarely has government action been deemed so integral to the advancement of a compelling purpose as to justify the suppression or compulsion of speech. We presume that the Government has a compelling interest in attracting talented military lawyers. But "it is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989).

As we explain in the final section of our opinion . . . the Solomon Amendment could barely be tailored more broadly. Unlike a typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. And it may use sophisticated recruitment devices that are generally too expensive for use by civilian recruiters, such as television and radio advertisements. These methods do not require the assistance of law school space or personnel. And while they may be more costly, the Government has given us no reason to suspect that they are less effective than on-campus recruiting.

The availability of alternative, less speech-restrictive means of effective recruitment is sufficient to render the Solomon Amendment unconstitutional under strict scrutiny analysis. *Sable*, 492 U.S. at 126; *The Circle School,* 381 F.3d at 182. But our path in this case is even clearer. The Government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal. And not only might other methods of recruitment yield acceptable results, they

might actually fare better than the current system. In fact, it may plausibly be the case that the Solomon Amendment, which has generated much ill will toward the military on law school campuses, actually *impedes* recruitment.

* * *

FAIR likely satisfies the three elements of an expressive association claim. The law schools are expressive associations, they believe the message they choose to express is impaired by the Solomon Amendment, and no compelling governmental interest exists in the record to justify this impairment. Therefore, FAIR has a reasonable likelihood of success on the merits of its expressive association claim against the Solomon Amendment.

2. Compelled Speech

The Supreme Court has long recognized that, in addition to restricting suppression of speech, "the First Amendment may prevent the government from . . . compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001). . . . "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys, Inc. v. FCC,* 512 U.S. 622, 641, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994).

Consistent with this principle, the Supreme Court has found impermissible compelled speech in three categories of government action [that which forces a private individual to propagate a message chosen by the government, that which forces a private individual to propagate another private individual's message, and that which forces a private individual to subsidize speech which the individual opposes]. . . . FAIR argues that the Solomon Amendment forces law schools to propagate, accommodate, and subsidize the military's recruiting, and therefore implicates each of the three varieties of compelled speech cases.

. . . As we explain in the analysis that follows, the military's recruiting is expressive of a message with which the law schools disagree. To comply with the Solomon Amendment, the law schools must affirmatively assist military recruiters in the same manner they assist other recruiters, which means they must propagate, accommodate, and subsidize the military's message. In so doing, the Solomon Amendment conditions funding on a basis that violates the law schools' First Amendment rights under the compelled speech doctrine.

(a) *Recruiting is expression*

The expressive nature of recruiting is evident by the oral and written communication that recruiting entails: published and posted announcements of the recruiter's visit, published and oral descriptions of the employer and the jobs it is trying to fill, and the oral communication of an employer's recruiting reception and one-on-one interviews. The expressive nature of recruiting is also evident in its purpose—to convince prospective employees that an employer is worth working for. So understood, recruiting necessarily involves "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes"—the hallmarks of First Amendment expression. *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 632 (1980). . . .

* * *

We agree with the District Court that soliciting and proselytizing are obvious forms of expressive activity. We part, however, on the notion that efforts to raise a legal staff are "economic or functional" while efforts to raise funds and membership are not. Recruiting, soliciting and proselytizing are similarly economic and functional and, at the same time, similarly expressive. Recruiting conveys the message that "our organization is worth working for," while soliciting and proselytizing convey the similar functional message that "our charity is worth giving to" or "our cause is worth joining."

* * *

(b) *The law schools' disagreement with the speech of military recruiters.*

Military recruiters visiting law school campuses undoubtedly speak to students about the benefits of a career in the military, and the Solomon Amendment requires law schools to accept this speech. The law schools do not seem to take issue with most of the "expressions of value, opinion, or endorsement," *Hurley,* 515 U.S. at 573, made by military recruiters on campus (to the extent recruiters suggest that military careers are honorable and rewarding experiences). Nor, for the most part, do military recruiters describing careers in the military make "statements of fact the [law schools] would rather avoid." *Id.*

The law schools' lack of objection to most of the speech they are forced to accept . . . raises a key question under the compelled speech doctrine: to what extent must they disagree with the Government's message in order for strict scrutiny to apply? . . . [Supreme Court precedent on this question is unclear. At the most,] the degree of disagreement that may be required is minimal and in any event is present in this case. . . . [Consequently,] we need not determine whether such a requirement exists nor, if so, decipher its precise bounds.

* * *

Here the law schools . . . object to conveying the message that all employers are equal, and instead would rather only open their fora and use their resources to support employers who, in their eyes, do not discriminate against gays. This objection constitutes . . . a protected First Amendment interest. . . . [A]s we have indicated, the act of being forced to accept speech promoting an employer whose discriminatory policies the law schools disagree with is sufficient "disagreement" to bring the Solomon Amendment within the Supreme Court's compelled speech jurisprudence.

* * *

(c) *The law schools must propagate, accommodate, and subsidize the military's expressive message.*

* * *

. . . Having concluded above that recruiting is expression, we believe that the Solomon Amendment compels the law schools to engage in that expression in all three proscribed ways: propagation, accommodation, and subsidy. . . . By requiring law schools to help military recruiters "get [their] message out to students" by distributing newsletters and posting notices, the Solomon Amendment compels law schools to propagate the military's message. Like the forced display of an unwanted motto on one's license plate .

. . this is compelled speech. *Wooley*, 430 U.S. at 717. . . . By requiring schools to include military recruiters in the interviews and recruiting receptions the schools arrange, the Solomon Amendment compels the schools to accommodate the military's message in the recruiting-assistance programs they provide for other employers. Like the forced inclusion of a parade contingent . . . this is compelled speech. *See Hurley*, 515 U.S. at 569-81. . . . And by putting demands on the law schools' employees and resources, the schools are compelled to subsidize the military's recruiting message. . . .

(d) *The Solomon Amendment prohibits disclaimers and, even if it did not, risk of misattribution is not an element of a compelled speech violation.*

* * *

. . . [L]aw schools are expressly precluded from disclaiming or retorting the military's recruiting message by the Solomon Amendment's new requirement that their treatment of military recruiters be "equal in quality and scope" to the treatment of other recruiters. And while the Court has mentioned the danger of misattribution and the speaker's ability to disclaim in several of its compelled speech cases, it has not held to date that the presence of either factor eliminated compelled speech concerns. Therefore, the District Court was wrong to reject FAIR's compelled speech claims on the basis of its conclusion that the Solomon Amendment's requirements posed little risk of misattribution to the law schools who in any event could effectively disclaim the military's message.

(e) *The Solomon Amendment would not likely survive strict scrutiny.*

Although the Solomon Amendment impairs the law schools' First Amendment rights by compelling them to propagate, accommodate, and subsidize the military's recruiting message against their will, the statute "could still be valid if it were a narrowly tailored means of serving a compelling state interest"—*i.e.*, if it passed strict First Amendment scrutiny. *Pacific Gas*, 475 U.S. at 19. . . . But as discussed above in the context of FAIR's expressive association claim . . . the Solomon Amendment does not survive strict scrutiny because the Government has not demonstrated (or even argued) that it cannot recruit effectively by less speech-restrictive means. Therefore, the balance of interests likely tips in the law schools' favor.

* * *

To summarize, the Solomon Amendment conditions funding on the law schools' propagation, accommodation, and subsidy of the military's recruiting, which is expression. The Government has not shown that the assistance from law schools that the Solomon Amendment requires is narrowly tailored to advance its interest in recruiting. FAIR has thus established a reasonable likelihood of establishing that the Solomon Amendment unconstitutionally conditions funding on a basis that infringes law schools' constitutionally protected interests under the First Amendment doctrine of compelled speech.

3. Consideration of O'Brien

A.

[The *O'Brien* intermediate scrutiny test is used in cases involving government regulations of expressive conduct. It is inapplicable when considering compelled speech situations or restrictions on First Amendment associational rights and therefore does not fit this case. Strict

scrutiny is the proper test.]

* * *

B.

[Even if the court were to apply the *O'Brien* test instead of strict scrutiny, the Solomon Amendment would still be unconstitutional. There is no evidence that enforcing the Amendment is either necessary or effective for enhancing military recruiting efforts.]

* * *

In closing, we emphasize again that we need not enter the thicket of *O'Brien* analysis in this case. We rely on the doctrines of expressive association and compelled speech to conclude that FAIR has made the requisite showing of a likelihood of success on the merits in support of its motion for a preliminary injunction. And even under the intermediate scrutiny test of *O'Brien* the Solomon Amendment falters thus far, for the Government has chosen not to produce any evidence that it is no more than necessary to further the Government's interest. . . .

C. Other preliminary injunction factors

By establishing a likelihood of success on the merits of its unconstitutional condition claim based on a First Amendment violation, FAIR has necessarily satisfied the second element: irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") . . . On the third element, we conclude that the balance of interest tips in FAIR's favor. Without an injunction, the law schools' First Amendment rights under the expressive association doctrine and the compelled speech doctrine will be impaired during on-campus recruiting seasons. The Government, on the other hand, does not lose the opportunity, in a proceeding on the merits, to "shoulder its full constitutional burden of proof" of showing that a less restrictive alternative would not be as effective. *Ashcroft v. ACLU*, 159 L. Ed. 2d 690, 124 S. Ct. 2783, 2794 (2004). As for the final element, we believe the public is best served by enjoining a statute that unconstitutionally impairs First Amendment rights.

IV. Conclusion

The Solomon Amendment requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom. While no doubt military lawyers are critical to the efficient operation of the armed forces, mere incantation of the need for legal talent cannot override a clear First Amendment impairment. Even were the test less rigorous than a compelling governmental riposte to the schools' rights under the First Amendment, failure nonetheless is foreordained at this stage, for the military fails to provide any evidence that its restrictions on speech are no more than required to further its interest in attracting good legal counsel.

In this context, the Solomon Amendment cannot condition federal funding on law schools' compliance with it. FAIR has a reasonable likelihood of success on the merits and satisfies the other injunctive elements as well. We reverse and remand for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment.

**REVERSED.**

ALDISERT, Circuit Judge, Dissenting:

I would affirm the judgment of the district court. . . . [E]ssentially my disagreement is with the [majority's] approach that this is a case of First Amendment protection in the nude. It is not.

Rather, the issues before us are threefold. First, we must inquire whether Appellants have met the high burden of overcoming the presumption of constitutionality of a congressional statute that is not only bottomed on the Spending Clause, but on a number of other specific provisions in the Constitution that deal with Congress' obligation to support the military. This is especially relevant because, in the entire history of the United States, no court heretofore has ever declared unconstitutional on First Amendment grounds any congressional statute specifically designed to support the military.

Second, we must determine . . . whether a permissible factual inference—let alone a compellable one—may be properly drawn that the law schools' anti-discrimination policies are violated from the sole evidentiary datum that a military recruiter appears on campus for a short time.

Third, only if a proper inference may be drawn do we meet First Amendment considerations. The First Amendment is implicated if and only if, after applying the "balance-of-interests" test originally articulated by Justice Brennan in *Roberts v. United States Jaycees*, 468 U.S. 609, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), it can be concluded that the operation of the First Amendment trumps the several clauses of Articles I and II relating to the spending power and support of the military.

* * *

I would hold that Congress' use of the spending power and fulfillment of the requirements to maintain the military under Articles I and II do not unreasonably burden speech and, therefore, do not offend the First Amendment. [Applying] the balance-of-interests test . . . the interest of protecting the national security of the United States outweighs the indirect and attenuated interest in the law schools' speech, expressive association and academic freedom rights. The Solomon Amendment survives the constitutional attack because its provisions, the 2004 amendments thereto and related regulations, govern conduct while only incidentally affecting speech. In serving its compelling interest in recruiting military lawyers, the statute does not require the government to engage in unconstitutional conduct. Accordingly, with respect, I dissent.

* * *

[After discussing the precept that congressional statutes are presumed constitutional, the dissent lectured the majority for failing to discuss several important provisions of the Constitution that provide for the support of the military and that antedate the promulgation of the amendments contained in the Bill of Rights.]

* * *

Before we address the application of First Amendment precepts, I am unwilling to accept that there is a permissible inference, let alone a compellable one, that a military presence on campus to recruit, in and of itself, conjures up an immediate impression of a discriminatory institution. Throughout our history, especially in times of war, like the present conflicts in Afghanistan and Iraq, and the military campaign against the Al Qaeda, a completely different impression

is evoked. The men and women in uniform are almost universally considered as heroes, sacrificing not only their lives and well-being, but living separate from all the comforts of stateside living. Again in the current era, almost every day, a candidate for President emphasized his four months as a swift boat commander in the Vietnam conflict. As masters of public opinion, the political apparatus on both sides of the aisle certainly would not put a premium on military service if the inference of the discrimination advanced by Appellants here was attached thereto. Indeed, the respect to the man and woman in uniform is so profound that in the same Presidential campaign, the other candidate was criticized for serving at home in a National Guard unit during the Vietnam conflict instead of going overseas.

This view of service in the armed forces is at the farthest polar extreme from the Appellants' position that the mere presence of military recruiters conjures up the image of an institution that discriminates. That the military does so in fact, does not, in and of itself, generate the direct and universal feeling of loathing and abomination to the extent that their presence on campus a few days a year deprives law school institutions of rights inferred from the First Amendment.

* * *

A participant in a military operation cannot be ipso facto denigrated as a member of a discriminatory institution. And conjuring up such an image is the cornerstone of Appellant's First Amendment argument.
In my view it is not necessary to meet any First Amendment argument because given the evidentiary datum of a military recruiter on campus for a few days, a proper inference may not be drawn that this, in and of itself, supports a factual inference that the law school is violating its anti-discrimination policy. I think that this alone is sufficient to affirm the judgment of the district court.

Nevertheless, I go further and assume that Appellants' suggested inference may properly be drawn as a fact, and now turn to a discussion of whether First Amendment concerns trump the demands placed on Congress and the President under Articles I and II to support the military.

Our beginning point in approaching a First Amendment analysis is the balancing-of-interests test set forth in Justice Brennan's important opinion in *Roberts*:

> Determining the limits of state authorities over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. . . . We need not mark the potentially significant points on this terrain with any precision.

468 U.S. at 620 (emphasis added). Moreover, important for our immediate purposes is the recognition that "the right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623.

* * *

What is perceived to be the flash point of controversy here is whether the general interest in public safety has been trumped by the interests embodied in the First Amendment. Supporting the government's position are the line of cases emphasizing the Supreme Court's deference to Congress' support of the military. Arrayed against this is Appellant's insistence that the national defense interest is trumped by the teachings of *BSA v. Dale* and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston.*

The Court has consistently deferred to congressional decisions relating to the military. "The case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference." *Rostker v. Goldberg*, 453 U.S. 57, (1981).

* * *

The Solomon Amendment reflects Congress' judgment about the requirements of military recruiting, and "the validity of such regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

What disturbs me personally and as a judge is that the law schools seem to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought of the effect of their action on the supply of military lawyers and military judges in the operation of the Uniform Code of Military Justice. . . . Much of Appellants' brief takes the form of conclusory statements that the military is able to attract top of the line or high quality students without stepping foot on campus. . . .

* * *

[The dissent argues that this is not a compelled speech case. Recruiting is an economic activity, not an expressive undertaking. Any expression involved in recruiting is not central to the process, and would not be attributed to law schools hosting the recruiters.]

* * *

[The majority invokes the Supreme Court's compelled speech cases for the proposition that the Solomon Amendment impermissibly obligates them to "subsidize" military recruiting. In all these cases the challenged statutes obligated individuals to make direct payments of money to finance private speech with which they disagreed. Here, in contrast, the recruiting activities of military recruiters are paid for exclusively with federal tax revenues; the Solomon Amendment does not obligate educational institutions to pay one red cent to the government or to a private organization. Although Appellants complain of having to provide "scarce interview space" and "make appointments," this kind of physical accommodation simply does not present the constitutional concern underlying the Supreme Court's compelled speech cases.]

* * *

In challenging the district court's reasoning, Appellants also seek to analogize this case to the teachings of *Dale*. . . .

* * *

Let me now count the two ways the Solomon Amendment differs from the state statute in Dale, both of which are critical to the law's impact vel non on associational interests. First, the Solomon Amendment simply does not impinge on the right of

educational institutions to determine their membership. See 10 U.S.C. § 983. It does not purport to tell colleges and universities whom to admit as students or whom to hire as professors or administrators. It merely requires them to allow the transient presence of recruiters, who are not a part of the law school and do not become members through their mere presence. . . .

Second, recruiting is an economic activity whose expressive content is strictly secondary to its instrumental goals. . . .

* * *

In this case, the law schools portray their efforts to keep military recruiters off their campuses as "quintessential expression." But when an institution excludes military recruiters from its campuses or otherwise restricts their access to students, it is engaging in something different from "quintessential expression." It is engaging in a course of conduct which contains both nonspeech and speech elements. The acts which the law schools claim they are compelled to do by virtue of the military's post-2001 "unwritten policy"—disseminating and posting military recruitment literature, making appointments for military recruiters to meet with students and providing military recruiters a place to meet with students—also contain both nonspeech and speech elements.

The constitutional framework for evaluating such laws is provided by *O'Brien.* Regulation of conduct that imposes incidental burdens on expression is constitutional 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." *391 U.S. at 377.* . . . Regulations of conduct that place incidental burdens on expression are not subject to a least-restrictive-alternative requirement "so long as the means chosen are not substantially broader than necessary to achieve the government's interest" . . . *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

The Solomon Amendment readily passes constitutional muster under these constitutional standards. The Appellants themselves do not dispute that the government has a substantial interest—indeed, a compelling one—in recruiting talented men and women for the nation's armed forces. As the Court recognized in *O'Brien*, "the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency . . ." *391 U.S. at 381.* Effective military recruiting is the linchpin of that system. . . .

* * *

The Appellants argue that because the Solomon Amendment is intended to facilitate military recruiting, and because recruiters speak to students, the governmental interest underlying the Solomon Amendment "is not unrelated to expression." But the question posed by *O'Brien* is not whether the governmental interest is "unrelated to expression," but instead whether the interest "is unrelated to the suppression of free expression." *391 U.S. at 377* (emphasis added). The Appellants' argument deliberately omits the touchstone of suppression from the constitutional test. Once it is recognized that suppression of expression is the focus of *O'Brien*, the Appellants' argument falls apart, for the governmental interests served by the Solomon Amendment are manifestly

unrelated to the suppression of anyone's expression.

It bears constant emphasis that the First Amendment test involves a balancing-of-interests as repeatedly emphasized above. The *O'Brien* measure is quintessentially correct because this case involves a weighing of the government's interest in national defense and Appellants' interest in First Amendment protections. . . . [I]t is difficult to conjure a case that is a more perfect fit for . . . *O'Brien*.

For the foregoing reasons, I respectfully dissent.

## "Court to Review Military Recruiting at Colleges"

*Washington Post*
May 3, 2005
Charles Lane

The Supreme Court announced yesterday that it will decide whether some law schools may curb military recruiters' access to their students in protest of the U.S. armed forces' ban on openly gay members.

On its face, the case is a struggle between Congress's power of the purse and academic freedom; the court is being asked to rule on the constitutionality of the Solomon Amendment, a federal law that requires universities to give military recruiters equal access, or risk millions of dollars in federal funding.

In a larger sense, however, the case is a battle within the larger culture wars, a clash between the Bush administration, which is deeply committed to its support base among social conservatives, and its perennial critics on the nation's law school faculties, many of whom are no less committed to gay rights.

Thirty-one law schools, grouped under the banner of the Forum for Academic and Institutional Rights (FAIR), say that the Solomon Amendment is inconsistent with their constitutional right to free speech. They say they should be free to shun a policy they consider discriminatory.

But supporters of the law say that those who want the government's money often have to take it on the government's terms, with strings attached.

As currently enforced, the Solomon Amendment could result in the cutoff of federal money to an entire university because of the actions of any of its undergraduate or graduate programs.

So far, though, no university has lost federal money.

In September 2003, FAIR, along with other law teachers and students, sued to block enforcement of the amendment but lost in federal district court in New Jersey.

Last year, however, the Philadelphia-based U.S. Court of Appeals for the 3rd Circuit granted FAIR an injunction against enforcement of the Solomon Amendment, saying it "requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom."

That is the judgment the Bush administration seeks to reverse at the Supreme Court.

"Effective recruitment is essential to sustain an all-volunteer military, particularly in a time of war," Acting Solicitor General Paul D. Clement told the court in a brief. "The Solomon Amendment reflects Congress's judgment that a crucial component of an effective military recruitment program is equal access to college and university campuses."

The roots of the Solomon Amendment, named for its House sponsor, former representative Gerald B.H. Solomon (R-N.Y.), lie in the 1980s, when some law schools began denying access and assistance to military recruiters, citing the armed services' ban on openly gay

members.

The 1993 promulgation of the current "don't ask, don't tell" policy, which permits gay men and lesbians to serve in the armed forces as long as they do not openly discuss their sexual orientation, did little to settle the controversy.

Billed as a compromise alternative to President Bill Clinton's proposed lifting of the ban on gays in the military, "don't ask, don't tell" was immediately decried by supporters of gay rights, and the military has continued to investigate and expel gay personnel.

The first version of the Solomon Amendment, adopted in 1994, threatened schools only with a loss of Pentagon funding. In 1997, Congress expanded the amendment's scope to include money from other agencies.

Under Clinton, the Defense Department permitted schools to refuse to help military recruiters, as long as they let them at least visit campus.

Harvard Law School, for example, allowed military recruiters to interview students at the offices of its Veterans Association, but did not use its own personnel to set up the interviews.

This approach allowed universities to retain federal funding without violating their antidiscrimination policies.

After the Sept. 11, 2001, attacks, the Bush administration concluded that the law schools must provide the same services to military recruiters as they offer to others.

Among the schools told that they might be in danger of losing federal money was Yale, whose law school had been letting recruiters use a room to meet with students, but had not been helping arrange interviews.

Last year, Congress enacted this new Pentagon policy into law, requiring access "that is at least equal in quality and scope" as that offered other employers.

The membership of FAIR includes New York University, Georgetown and George Washington University law schools. But 13 of the group's 31 members chose not to identify themselves publicly "for fear of retribution" by Congress or donors, said E. Joshua Rosenkranz, a lawyer who represents FAIR.

The case is ***Rumsfeld v. FAIR,*** No.04-1152. Oral arguments will take place in the fall, and a decision is expected by July 2006.

# "Law Schools' Case vs. Gov't off to High Court"

*Herald-Sun* (Durham, NC)
May 9, 2005
Kris Kitto

WASHINGTON—When a military recruiter visited Duke University's law school this year to conduct on-campus interviews, student Teresa Sakash didn't drop off a résumé. Instead, she submitted a petition.

Sakash, president of Outlaw, Duke's gay-student organization, and the approximately 200 other students who signed the grievance, were protesting the Solomon Amendment, which requires law schools to allow military recruiting on campus even though the Pentagon's "Don't Ask, Don't Tell" policy on homosexuality violates the schools' nondiscrimination guidelines.

Under the law, universities could risk all federal funding if they bar the military from distributing employment information and wooing top law students to their ranks alongside the other on-campus recruiters.

While peer institutions around the country have had Solomon Amendment run-ins much more strident than the one at Duke, final word on the issue could be handed down by year's end. The Supreme Court announced last week it will hear ***Rumsfeld v. Forum for Academic and Institutional Rights,*** the case that pits the government against a group of 30 law schools that claim the amendment is unconstitutional.

At the core of the debate is this question: Do law schools have a First Amendment right to avoid associating with groups that don't share their nondiscrimination views?

Both Sakash, 28, and her classmate Jeffrey Filipink, 22, think so.

"Our opinion essentially is asking the military to overturn the 'Don't Ask, Don't Tell' policy if they wish to recruit," he said. "It isn't an anti-military standpoint. It's an anti-discrimination standpoint."

The case has a specific tie to Duke: Professor Erwin Chemerinsky is one of the named plaintiffs.

He and the other professors and student organizations who make up FAIR filed a lawsuit in a New Jersey district court two years ago to stop enforcement of the Solomon Amendment. FAIR lost and appealed to the U.S. Court of Appeals for the Third District, which reversed the ruling and allowed law schools to exclude the military from recruiting on campus.

"I think it's about law schools having the First Amendment right . . . to not be compelled to convey the military's message," Chemerinsky said.

Though all institutions have the option of declining federal funds if they don't agree with government policy, he said that no college can afford to do that.

"The reality is that, for most major universities, they depend greatly on federal funds," he said. "It's not a realistic option. It's pure coercion."

But Chemerinsky's colleague at Duke, Scott Silliman, sees the case differently.

Silliman, who spent 25 years as a military attorney, said Congress has final say on how the country's money is spent.

"The law schools can't demand federal funding," he said. "So, somewhere the balance needs to be struck. This case has been cast as the law schools' right to choose who can come into the building and the campuses against the military's 'Don't Ask, Don't Tell' policy," he said. "It's a little bit more complex than that."

He said since the military's policy on homosexuality is the law, military officials can't just stop enforcing it. "This isn't something the military can just turn off and say, 'Okay, this is something we're not going to do any more,' " he said.

Chemerinsky, on the other hand, said he sees the case as a way to eventually overturn "Don't Ask, Don't Tell," which has been the official government policy since early in the Clinton administration.

"My hope is that if law schools enforce their anti-discrimination policy," he said, "that over time that will put the pressure on Congress to change the statute."

Pentagon spokesman Lt. Col. Joe Richard said because Congress enacted the "Don't Ask, Don't Tell" policy, the military must abide by it. The discrimination issue then, he said, is out of the question.

"They can protest the policies all they want," he said, "provided that military recruiters are given equal access."

The Solomon Amendment was passed in 1995, initially withholding Department of Defense funds to noncompliant universities. Revised several times since, the law now requires the withdrawal of all federal funding to schools that bar military recruiters. And Silliman said the amendment's interpretation changed in 2001 after President Bush took office.

Officials at both Duke and the law school at the University of North Carolina at Chapel Hill said they post signs notifying students of the military's policy on homosexuality when military recruiters come to campus.

Spokespersons at the two schools said they have a few students every year who join the military's Judge Advocate General, or JAG, corps after graduation.

The military's "Don't Ask, Don't Tell," policy became law in 1993 and forbids homosexual members of the military to either engage in homosexual sex acts or disclose their sexual orientation. Under this policy, gay law students could enter the JAG Corps if they kept their sexual orientation private and abstained from homosexual sex.

Even though Duke law student Sakash, who is a lesbian and said she had military career aspirations at one time, would not be able to interview openly for such a position, Silliman said this case is more about presenting all career-related information to law students and less about the military's discrimination practices.

"I think that what is lost in this battle is the right of individual law school students to find out information about employment in the military regardless of whether they seek to join the military or not," he said.

But on the other side of campus, Chemerinsky sees the students' position in another light.

"We should never have a situation where facilities are available to some students but not others," he said.

## "U.S. Defense Dept. Sued on College Recruitment"

*Boston Globe*
September 20, 2003
Marcella Bombardieri

A nationwide group of law professors, law schools, and students filed suit yesterday against the US Department of Defense and other government agencies, charging them with violating the First Amendment by forcing law schools to allow military recruiters on campus.

The suit, led by Kent Greenfield, a Boston College law professor, marks the first widespread effort to challenge the Defense Department, which last year began threatening to yank virtually all federal funds from colleges whose law schools continued to bar military recruiters from on-campus job interviews.

Many law schools, including Harvard, Boston College, and Boston University, had previously barred recruiters from campus because the ban on gays serving openly in the military conflicted with their nondiscrimination rules.

Faced with the possibility of losing hundreds of millions of dollars, almost all American law schools backed down from their bans, including Harvard, BU, BC, Yale, Columbia, and New York University. Several university leaders said they regretted the switch, but had no choice if they wanted to preserve their federal research funding.

The plaintiffs in the lawsuit say that the legislation underlying the Defense Department's crackdown, a law passed in 1994 called the Solomon Amendment, is riddled with flaws.

"It's not the American way to condition government benefits on whether you agree with the government," said Greenfield, who founded the organization leading the suit. "The 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."

Boston College itself is not a party to the suit.

In order to take up this fight, Greenfield recently formed the Forum for Academic and Institutional Rights, an organization of law schools and other academic institutions. It filed the suit along with the Society of American Law Teachers, a liberal association of some 800 law professors. Also named are two student groups—one at Boston College Law School, the other at Rutgers University School of Law—and three Rutgers law students.

Greenfield's group, FAIR, is not releasing the names of member schools, which he describes as nationwide and "not in the hundreds, but not tiny either." He said anonymity is important to protect law schools from retribution.

Other members of the group's board are legal scholars from such schools as Yale, Stanford, Georgetown, NYU, and the University of Southern California. Local law schools contacted said that they were not involved in the suit.

* * *

## "Pentagon, Colleges Duel on Gay Policy"

*Hartford Courant* (Connecticut)
October 8, 2003
Kim Martineau

Far from Afghanistan and Iraq, the Pentagon has been fighting a much different kind of battle: the campaign for public acceptance of its policy against gays.

The Pentagon has taken the fight to some of the nation's most prestigious universities—including Yale University, President Bush's alma mater—where it has sought the right to sit with other employers recruiting the nation's top law students.

For more than two decades, Yale Law School had refused to let military recruiters participate in its job placement program as a protest against the military's ban on gays.

Frustrated by the open dissent toward its policy and years of stalemate, the Pentagon reached into its arsenal and dropped the equivalent of a nuclear bomb—threatening to slash billions in federal aid to schools that continue to restrict military recruiters. For Yale, the cost of defending its principles would have exceeded $300 million a year.

Last fall, Yale and other universities nationwide retreated.

But the war is not over. A group of unnamed law schools has filed a lawsuit in federal court challenging the 1995 Solomon Amendment, the law that allows the Pentagon to cut federal aid to universities that limit the military's access. The Pentagon says the military's strength depends on its ability to attract the most qualified candidates—although its most recent campus offensive, launched in the aftermath of Sept. 11, comes at a time of solid enlistment and renewed patriotism.

Critics say there's more to the military's campaign than just recruiting.

"It's not about military recruiting. It's about this symbolic clash over values," says Aaron Belkin, a political science professor at the University of California at Santa Barbara. "They don't want to be branded by civil society as discriminators. Branding them as discriminators undermines their honor and integrity."

The Pentagon has cast the issue of gays in the military as one of national security, adopting its "don't ask, don't tell" policy a decade ago. Allowing gays to serve openly would threaten troop cohesion, violate the privacy rights of heterosexuals and hurt recruiting, the military has long argued.

The law schools call it something else: discrimination. "Their policy of excluding gays and lesbians from the military is morally offensive and is not appropriate for a democracy that believes in equality," Yale Professor Robert Burt said.

Army and Navy recruiters will hold interviews on Thursday and Friday at a hotel near the Yale campus where all recruiters conduct interviews. But Adam Sofen, a *Yale Law Journal* editor and Harvard graduate who comes from a family of Navy men, won't be among those interviewed. Nor will any other gay and lesbian students who refuse to lie about their identity.

"I don't want to be put in a situation where I have to choose between serving my country and respecting myself," Sofen said.

Students have passed out rainbow stickers to recruiters who have signed Yale's nondiscrimination policy, to voice their criticism of "don't ask, don't tell." Students are also planning a protest. Last fall, some students wore camouflage gags in protest of the policy.

By the end of the month, a group of Yale professors intends to file a separate lawsuit challenging the Defense Department's interpretation of the Solomon Amendment. Yale has argued repeatedly that it's not obligated to treat the military the same way it treats employers who pledge not to discriminate. The professors say Yale has accommodated military recruiters, providing them with student contact information and classrooms to use for interviews.

Students and professors at the University of Pennsylvania Law School filed a similar suit last week.

"They're insisting on special treatment—the right to have an openly discriminatory policy and yet have access to the law school," said Arthur Leonard, a professor at New York Law School. "The government is really holding the universities hostage here."

In an indication of what's at stake, the law schools seeking to overturn Solomon have refused to reveal themselves, fearing retaliation. They recently incorporated in New Jersey as the Forum for Academic and Institutional Rights and filed their lawsuit in U.S. District Court in Newark. The suit claims the amendment violates academic freedom by forcing universities to give up free speech rights in order to receive federal funding.

A spokesman for the Department of Defense referred questions to the Department of Justice, which declined comment.

In legal papers, the Defense Department has questioned whether the law schools have standing if their identities remain secret. The department said it has no desire to restrict academic freedom and pointed out that Congress has long attached conditions to federal aid as a way of pushing policy objectives.

In 1999, an Air Force captain signed Yale's non-discrimination policy, only after inserting the word "unlawful" before "discrimination," reflecting lower court rulings that have upheld "don't ask, don't tell." The letter was one of two dozen included in the lawsuit, revealing an exasperated exchange between Yale and military officials.

Yale sent the form back, declaring its policy "not subject to modification by prospective employers."

Capt. Wayne Gordon wrote back: "I understand your concerns regarding discrimination on the part of prospective employers. However, the U.S. Air Force does not unlawfully discriminate in its hiring practices, and my correction to your form reflected that policy."

Congress passed "don't ask, don't tell" in 1993, as a compromise to President Clinton's proposal to open the military to gays. A year later, U.S. Rep. Gerald Solomon, R-N.Y., demanded that universities give the military more respect. He proposed cutting off defense funding to schools that bar recruiters from campus to "send a message over the wall of the ivory tower."

That policy was later expanded to include

funding from other federal agencies, including the Department of Health and Human Services, which awards $12 billion a year to universities for research on cancer, AIDS and other deadly diseases.

Yale was one of the first law schools in the country to include gays in its nondiscrimination policy in 1978. Even then, it was a bold move.

"The universal feeling among gay students I knew (or came to know later) was that you could not have a successful legal career if you were professionally open about your minority sexual orientation," William Eskridge Jr., a 1978 graduate who now teaches law at Yale, wrote in a legal document in the Solomon lawsuit. "So no one was."

Eskridge credits Yale's action for influencing landmark legal victories for gays. In June, the U.S. Supreme Court struck down Texas' ban on private consensual sex between gays. Ruth Harlow, a 1986 Yale Law School graduate, masterminded the legal brief seeking to overturn that ban; Paul Smith, a 1979 graduate, argued the case before the court. In his dissenting opinion, Justice Antonin Scalia cited Eskridge's 1999 book, *Gaylaw: Challenging the Apartheid of the Closet.*

By 1990, all accredited law schools included gays in their nondiscrimination policies. The Defense Department—the nation's largest employer—was not the only one to be banned from career service programs at those schools. At Yale, the Christian Legal Society was barred in the 1990s because it planned to screen job applicants by religious affiliation and orientation.

By its own admission, the military has had no trouble attracting talent. In a letter to New York University Law School last year, an Army official noted: "Competition has become very keen in the past few years. Unfortunately, that means some very qualified applicants will not be selected for the position."

Nearly 9,000 gays have been discharged since the "don't ask, don't tell" policy took effect, according to the Servicemembers Legal Defense Network, a watchdog group in Washington. The policy was questioned last year when a group of Arabic-linguists who were gay were fired.

Historically, military discharges drop during times of war and climb when soldiers return home, said Steve Ralls, spokesman for the legal defense network.

"It's a vivid example of the hypocrisy of the policy," he said. "If a gay service member is qualified to serve in a time of war, then he or she is qualified to serve in a time of peace."

So far, 24 countries have lifted their bans on gays in the military, including Australia, Britain, Israel and Canada.

In the United States, a retired judge advocate general for the Navy, Rear Adm. John Hutson, called for lifting the ban in an article published in the *National Law Journal* in August. Initially, Hutson supported the ban. Since then, "Queer Eye for the Straight Guy" has won a wide following on cable television and New Hampshire has an openly gay Episcopal bishop.

"It's not the admirals and generals who have to worry about taking showers and sleeping in berthing areas with people of a different orientation," Hutson said. "It's the young people, 18, 19, 20 years old—and they don't

have the same hang-ups."

The Pentagon charges that the law schools are blocking its recruiting efforts at a time of national need. But Yale law student Matt Alsdorf wondered why the military insists on narrowing the applicant pool.

"It's really a shame," Alsdorf said, "for our country, at this point, not to take the most qualified people for the job.

# "Challenge to Military-Recruiter Law Heats Up in Newark's Federal Court"

*New Jersey Law Journal*
October 13, 2003
Mary P. Gallagher

The controversy over the military's "don't ask, don't tell" policy moved to a new battleground last Friday, as a federal judge in Newark heard a challenge to a U.S. law that cuts off funds to schools that bar military recruiters.

The plaintiffs in ***Forum for Academic and Institutional Rights v. Rumsfeld,*** 03 Civ. 4433, asked for a preliminary injunction against enforcement of the law. They argued that immediate relief is necessary in light of the imminent fall recruiting season.

The defense argued for dismissal on the ground that the plaintiffs lack standing. The Forum for Academic and Institutional Rights is an association of unnamed law schools. While the plaintiffs say free speech is at issue, the defendants say it is an exercise of spending power.

U.S. District Judge John Lifland said he would decide the motions soon.

At the heart of the dispute is the 1995 Solomon amendment, *10 U.S.C. 983*[b]. It forbids the Departments of Defense, Education, Labor, Transportation, Health and Human Services, and Homeland Security from providing funds to an institution of higher learning "with a policy or practice . . . that prohibits, or in effect prevents" military recruiters from gaining access to the campus or students.

Student aid under the federal work-study program, supplemental educational opportunity grant program and Perkins loans fall under the law.

E. Joshua Rosenkranz, who represents the plaintiffs, tried to counter the government's argument that FAIR could not assert the rights of its unnamed member law schools, who refuse to be identified for fear of retaliation.

He announced that Golden Gate University Law School in San Francisco agreed to be identified as a forum member. Golden Gate is one of two dozen law schools threatened with loss of funds if it did not suspend its nondiscrimination policy to allow access to military recruiters. The school was prepared to state it would reactivate its policy of not discriminating based on sexual orientation if the threat were lifted, said Rosenkranz, a partner with Heller Ehrman White & McAuliffe in New York.

Still, Mark Quinlivan, senior trial counsel with the Department of Justice and attorney for Secretary of Defense Donald Rumsfeld and the other defendants, insisted that FAIR must identify its members.

Rosenkranz responded that FAIR was formed because "law schools did not feel they could jeopardize their own funding." At the close of argument, he offered to provide a list of members for in camera review, and Lifland took him up on it.

Rosenkranz urged that faculty and students have standing because, as a result of

government intervention, they have been deprived of the open academic environment promised by school policy. He cited the 1981 decision by the Third U.S. Circuit Court of Appeals in *N.J.-Phila. Presbytery v. N.J. State Board,* 654 F.2d 868.

Quinlivan told Lifland it was the plaintiffs' burden to establish standing based on "concrete, individualized harm." Only educational institutions, not professors or students or groups of them, can claim harm from loss of federal funding, he said.

Quinlivan also raised questions about whether a law school that is part of a larger university can raise the challenge alone when the entire university stands to lose funding.

The complaint alleges that the decision by the Department of Defense in 2000 to deny funds to an entire university, rather than just a law school that refuses to comply, is a misapplication of the law. The plaintiffs also contend that the military's recent insistence on not just access but parity of treatment with employers who do not discriminate exceeds the law's requirements.

Schools that resorted to compromises, like using non-law school personnel to arrange interviews at off campus locations, have recently come under fire for not providing parity, even though, plaintiffs allege, the different treatment did not impair hiring efforts.

Rosenkranz argued that free speech is implicated. The threat of Solomon enforcement not only interferes with schools' freedom to express their own anti-bias views but also compels them to endorse the military's message—"we want you only if you're not gay"—by hosting its recruiters, arranging their interviews and disseminating their literature, he said.

"This case is ultimately about whether law schools have the ability to shape their own environment and to teach by word and deed."

Quinlivan disagreed. The case involves the spending clause case, not speech, he argued. Law schools retain the right "to decide whether they want to accept federal funds or whether to discriminate against military recruiters is more important to their core mission," he argued.

Quinlivan said there is a "panoply of First Amendment activity in opposition" to military recruiting at law schools—including student protests, official statements and sit-ins—that show speech is not being suppressed.

Rosenkranz answered that the legislative history makes it clear the law was aimed at dissenting campuses. He describes an incident where, though not a single student signed up to interview, interviewers showed up anyway and sat in an empty room all day, showing that their intent was to make a statement, not to hire, said Rosenkranz.

The government has a compelling interest in ensuring able candidates for the military, contended Quinlivan. He also argued that threats of enforcement against schools by military recruiters, who lack the power of the purse, do not amount to official action subject to court challenge when no law school has yet been denied funding.

The "power of the threat has been enough" and schools are not required to incur a penalty before they can assert free speech, responded Rosenkranz.

The other plaintiffs in FAIR are the 900-member Society of Law Teachers, the Rutgers Gay & Lesbian Caucus, Professor Erwin Chemerinsky of University of the

Southern California Law School, Professor Sylvia Law of New York University Law School, the Coalition for Equality, a student group at Boston College Law School, and Rutgers Law-Newark students Pam Nickisher, Leslie Fischer and Michael Blauschild.

The FAIR case is not the only challenge to the Solomon amendment. On Oct. 1, 21 professors, six students and a student association at University of Pennsylvania Law School filed *Burbank v. Rumsfeld,* 03 Civ. 5497, in the Eastern District of Pennsylvania.

That case raises similar constitutional and statutory arguments. It alleges that since 1998 the military was allowed to interview at on-campus but non-law school locations and arrangements were made through the University's Office of Career Services, rather than by the law school placement office. That changed after the university at large was threatened in January with a loss of at least $500 million in federal funds for research, teaching and student aid.

The 165-member Association of American Law Schools, which declined to be part of the FAIR suit, requires members to condition employer access on a written agreement not to discriminate on various grounds, including sexual orientation. Most law schools, including those in New Jersey and the University of Pennsylvania, have policies condemning such discrimination.

The AALS requires a member school that allows military recruiters to post a notice of its disagreement with "don't ask, don't tell" at minimum and urges other forms of "amelioration."

Rutgers-Newark Dean Stuart Deutsch says that a few years ago, after the military threatened funding for the entire university, the law school felt compelled to open its doors.

The school posts notice on the interview-room door explaining it is letting in the recruiters to avoid losing student aid and calling discrimination against homosexuals "completely unacceptable" and the Solomon amendment "morally wrong."

"The military's using a sledgehammer to solve a small problem," says Deutsch. "I personally support the law suits. I hope they succeed and I hope they succeed fairly quickly."

Rutgers-Camden also posts notice, says Dean Ray Solomon. The school has not tried to exclude military recruiters, however. "We have a number of students who go into JAG every year, and it's important for us to allow them the opportunity," he explains.

"At very elite schools where no one goes into JAG, it's very easy to take a symbolic position," he adds. "I would like the Solomon amendment to go away—if it did, we might do things very differently."

Seton Hall Law Dean Patrick Hobbs did not return calls seeking comment.

"Don't ask, don't tell," adopted in 1993, lifted the outright ban on homosexuals serving in the armed forces, but barred them from discussing their sexual orientation and forbade supervisors from inquiring into it.

The Department of Defense says 9,414 service members were discharged under the policy as of Sept. 30, 2002, the last year for which figures were available.

Former Judge Advocate General John Hutson, who helped formulate "don't ask, don't tell," called for its repeal in an Aug. 11 opinion piece published in the *National Law*

*Journal,* a publication affiliated with the *New Jersey Law Journal.* He described it as "well-intentioned" but "badly flawed" and "virtually unworkable."

"'Don't ask, don't tell' bought us some time to mature, but having endured a decade of this policy and having been given a prod by the Supreme Court [in *Lawrence v. Texas*], the time for re-examination has come," he said. Lawrence held in June that Texas' same-sex-only anti-sodomy law violated due process.

Hutson, now dean of Franklin Pierce Law Center in New Hampshire, calls himself "ambivalent" on the Solomon amendment, however. Recalling his time in the JAG Corps, he says, "when my recruiters would come back and say they were down in the furnace room figuratively, but almost literally, I think that was a mistake."

FAIR's local counsel is Andrew Dwyer, a partner with Newark's Dwyer & Dunnigan.

# "3rd Circuit Voids Law School Funding Restriction"

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Shannon P. Duffy

In a major victory for gay rights advocates, the 3rd U.S. Circuit Court of Appeals has ruled that Congress cannot force law schools to allow U.S. armed forces recruiters on campus—by threatening a cut-off of all federal funding—since the military's policy of excluding gays and lesbians conflicts with the anti-discrimination policies enforced by most law schools.

The 102-page decision in ***Forum for Academic and Institutional Rights v. Rumsfeld*** is the first federal appellate decision to address the constitutionality of the Solomon Amendment, a 1994 law that requires universities to provide access to military recruiters on campus or forfeit federal funding.

By a 2-1 vote, the court found that FAIR—a coalition of law schools and law professors—is likely to succeed in its claim that the Solomon Amendment violates the law schools' First Amendment rights by compelling them to engage in speech they disagree with.

"The Solomon Amendment requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom," U.S. Circuit Judge Thomas L. Ambro wrote in an opinion joined by Senior U.S. Circuit Judge Walter K. Stapleton.

As a result, Ambro found that U.S. District Judge John C. Lifland of the District of New Jersey erred in refusing to issue a preliminary injunction barring enforcement of the Solomon Amendment because the plaintiffs had shown that the law violates their free speech rights while the military had failed to show that it had a "compelling" need to conduct its recruiting on campus.

"The government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal. And not only might other methods of recruitment yield acceptable results, they might actually fare better than the current system," Ambro wrote.

"While no doubt military lawyers are critical to the efficient operation of the armed forces, mere incantation of the need for legal talent cannot override a clear First Amendment impairment," Ambro wrote.

The reality, Ambro found, is that the controversy surrounding the law could be harming the military's recruiting efforts.

"It may plausibly be the case that the Solomon Amendment, which has generated much ill will toward the military on law school campuses, actually impedes recruitment," Ambro wrote.

But in a lengthy dissenting opinion, Senior U.S. Circuit Judge Ruggero J. Aldisert said he would have upheld the lower court's decision to uphold the law.

"I apply the balance-of-interests test and decide that the interest of protecting the national security of the United States outweighs the indirect and attenuated interest in the law schools' speech,

expressive association and academic freedom rights," Aldisert wrote.

Aldisert said he believes the Solomon Amendment passes constitutional muster because its provisions "govern conduct while only incidentally affecting speech."

In the suit, FAIR was joined by the Society for Law Teachers Inc., the Coalition for Equality, the Rutgers Gay and Lesbian Caucus, two law professors and three law students.

Soon after FAIR's suit was filed in New Jersey, similar challenges to the Solomon Amendment were brought by law professors and students at the University of Pennsylvania Law School and Yale Law School. But district courts handling the Penn and Yale cases have not yet ruled on the constitutionality of the law.

In his opening paragraphs, Ambro traced the history of the conflict between law schools and military.

Ambro noted that law schools have "long maintained formal policies of non-discrimination that withhold career placement services from employers who exclude employees and applicants based on such factors as race, gender and religion."

In the 1970s, Ambro found, law schools began expanding those policies to prohibit discrimination based on sexual orientation. That trend, he said, culminated in the 1990 decision by the American Association of Law Schools to include sexual orientation as a protected category.

Today, Ambro found, "virtually every law school" now has a comprehensive non-discrimination policy that includes sexual orientation.

By contrast, Ambro said, the U.S. military "excludes service members based on evidence of homosexual conduct and/or orientation."

Beginning in the 1980s, Ambro said, some law schools began refusing to provide access and assistance to military recruiters.

In 1994, Rep. Gerald Solomon, R-N.Y., sponsored an amendment to the annual defense appropriation bill that proposed to withhold Defense Department funding from any educational institution with a policy of denying or effectively preventing the military from obtaining entry to campuses, or access to students on campuses, for recruiting purposes.

But the law was amended in 1999 to apply only to those schools that "prohibited" or "prevented" military recruiters from gaining access to students.

As a result of that change, Ambro found that "many law schools avoided the Solomon Amendment's penalty" by "merely allowing military recruiters to gain access to campuses."

In doing so, Ambro said, the law schools were able to reaffirm their opposition to the military's exclusionary employment policy by not providing them "affirmative assistance" in the manner provided to other recruiters.

But after the September 2001 terrorist attacks, Ambro found that the Department of Defense began applying "an informal policy of requiring not only access to campuses, but treatment equal to that accorded other recruiters."

In letters to university presidents, the DOD said the law required schools "to provide

military recruiters access to students equal in quality and scope to that provided to other recruiters."

Earlier this year, Ambro found, Congress amended law again to incorporate the Defense Department's informal policy.

"Now, under the terms of the statute itself, law schools and their parent institutions are penalized for preventing military representatives from gaining entry to campuses for the purpose of military recruiting 'in a manner that is at least equal in quality and scope to the [degree of] access to campuses and to students that is provided to any other employer,'" Ambro wrote.

In the suit, FAIR argued that the Solomon Amendment impairs law schools' First Amendment rights under the doctrine of "expressive association."

Ambro agreed, finding that the law forced schools to participate in government speech.

Ironically, Ambro found that the law schools' position was supported by the U.S. Supreme Court's 2000 decision in *Boy Scouts of America v. Dale* in which the justices held that the Boy Scouts could not be forced to accept an openly gay scoutmaster.

"Just as the Boy Scouts believed that 'homosexual conduct is inconsistent with the Scout Oath,' the law schools believe that employment discrimination is inconsistent with their commitment to justice and fairness," Ambro wrote.

"Just as the Boy Scouts maintained that 'homosexuals do not provide a role model consistent with the expectations of scouting families,' the law schools maintain that military recruiters engaging in exclusionary hiring 'do not provide a role model consistent with the expectations of,' their students and the legal community," Ambro wrote.

Likewise, Ambro said, while the Boy Scouts argued that they were aiming to "inculcate [youth] with the Boy Scouts' values—both expressively and by example," the law schools, too, say they are aiming to "inculcate their students with their chosen values by expression and example in the promulgation and enforcement of their nondiscrimination policies."

Ambro noted that, in Dale, the justices held that an openly gay man's presence in the Boy Scouts "would, at the very least, force the organization to send a message, both to youth members and the world, that the Boy Scouts accept homosexual conduct as a legitimate form of behavior."

Likewise, Ambro said, "the presence of military recruiters would, at the very least, force the law schools to send a message, both to students and the legal community, that the law schools 'accept' employment discrimination 'as a legitimate form of behavior.'"

In a strongly worded dissent, Aldisert said he was personally disturbed that law schools would, "as an academic exercise," ignore the consequences that a recruiting ban would have on the military's ability to compete with well-heeled law firms for young talent.

"They obviously do not desire that our men and women in the armed services, all members of a closed society, obtain optimum justice in military courts with the best-trained lawyers and judges," Aldisert wrote.

Aldisert said he rejected the plaintiffs' argument that the schools were being asked to violate their own anti-discrimination policies by welcoming recruiters who won't take openly gay men and women.

"We cannot conclude that the mere presence of a uniformed military recruiter permits or compels the inference that a law school's anti-discrimination policy is violated," Aldisert wrote. "The subjective idiosyncratic impressions of some law students, some professors, or some anti-war protesters are not the test. What we know as men and women we cannot forget as judges."

The Justice Department, which represented the government in the case, said it was examining the decision and reviewing its appeal options.

"The United States continues to believe that the Solomon Amendment is constitutional. As we argued in our brief, we believe that Congress may deny federal funds to universities which discriminate and may act to protect the men and women of our armed forces in their ability to recruit Americans who wish to join them in serving our country," the agency said in a statement, The Associated Press reported.