



Feature

Supreme Court Hears Case on Law School Federal Funding

By Anne O'Dell-Rivero

For more than a decade, law schools have fought the controversial Solomon Amendment, which allows federal departments to withhold funding from institutions barring military recruiters.



The Supreme Court is hearing arguments made on behalf of the Pentagon, as well as many of the nation's leading law schools, as to whether or not upholding the Solomon Amendment violates a law student's First Amendment rights.

In *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, several departments of the federal government are appealing a lower court's ruling declaring the Solomon Amendment unconstitutional.

Since the Association of American Law Schools requires all member institutions to uphold a policy prohibiting discrimination based on sexual orientation, universities such as Harvard and Yale consistently require all recruiting organizations to sign statements affirming both parties' commitment to the nondiscrimination clause.

Such institutions have refused to allow military recruiters for the Judge Advocate General Corps equal access to their students unless recruiters can also pledge to refrain from discrimination in performing their duties. School administrators say implicit compliance with the U.S. military's "Don't Ask, Don't Tell" policy towards open homosexuals would cause them to violate their own policies and deny their students' First Amendment right to free self-expression.

The Solomon Amendment, passed by Congress in 1994 and sponsored by Rep. Gerald B. Solomon (R-NY), originally allowed the Department of Defense to deny funding to law schools that refused to give ROTC and other military recruiters access to students.

Later versions of the amendment extended the same privilege to the Departments of Labor, Transportation, Health and Human Services, Homeland Security, and even the Department of Education. Another change allowed the government to deny funding to an entire university rather

than its law school alone. By 1997, almost all federal research funding and financial aid were included in the amendment.

In the weeks and months following the terrorist attacks of Sept. 11, 2001, the Department of Defense began demanding access to law students equal to that of any school's preferred employers. Although many schools had made recruitment information available in school libraries, most still kept military recruiters out of career services offices and did not schedule interviews with recruiters.

FAIR, a collective of nine advocacy organizations, ten law student groups, and 36 law schools, 12 of which will remain anonymous, first sued the Department of Defense in the fall of 2003. Spearheaded by Boston College professor Kent Greenfield, the group focused on neutralizing the effects of the Solomon Amendment as the busy recruiting season was underway.

The Department of Defense had begun to send letters to many schools insisting on open access to law students, and administrators were afraid of losing not only funds for their law schools but also lucrative federal research contracts.

A recent statement from FAIR says, "The Solomon Amendment's requirement that schools provide assistance to military recruiters undermines the message it is trying to inculcate in its students."

"The plaintiffs specifically charge that the law schools adopted their nondiscrimination policies in order to provide a message, by word and deed, to their students."

Although FAIR did not win the first case, the Third Circuit Court of Appeals overturned the lower court's decision in late 2004. In the published opinion, the court stated, "The law schools are insulated by free speech protections from being compelled to assist military recruiters in the expressive act of recruiting...[to] propagate, accommodate, and subsidize the military's expressive message."



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In light of the appellate court's decision and in keeping with current nondiscrimination guidelines, many law schools have reverted to previous practices of explicitly banning all military recruiters from job fairs and other career services events.

In a statement issued Feb. 2, 2005, Yale Law School dean Harold Hongju Koh said, "I believe [the court's] ruling brings us closer to the day when all members of our community have an equal opportunity to serve in the nation's armed forces.

"I am notifying military recruiters that the Yale Law School will enforce its nondiscrimination policy...without exception."

Capitol Hill's reaction to the ruling was equally emphatic. The Bush administration immediately appealed the decision, and Congressional Resolution 36, which was passed Feb. 1, 2005, expressed support for allowing recruiters contact with students.

Introduced by Rep. Mike D. Rogers (R-AL), the resolution states that Congress "will explore all options necessary to maintain this commitment" to military preparedness, including the withholding of funds from institutions of higher learning.

The resolution goes on to state that schools' lack of cooperation "carries with it the harmful effect of increasing Federal spending to achieve the required outcome, while at the same time compromising military personnel readiness and performance."

However, whether or not JAG recruitment numbers have been adversely affected by schools' noncompliance is still a matter for debate.

In the recent past, the Supreme Court has shown a tendency toward 5-4 splits in free speech cases, generally favoring less restriction of expression.

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