

## The Solomon Amendment: A War on Campus

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*The Federal Government does not insist on any predetermined level of access; rather, it simply asks what other employers receive. Likewise, the recipient schools remain free to criticize the military and its policies, and, of course, they remain free to decline Federal funds altogether.*<sup>1</sup>

### Introduction

In a decision of great significance to judge advocate recruiting and therefore to the Judge Advocate General's Corps, the United States Supreme Court unanimously upheld the constitutionality of the Solomon Amendment in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*.<sup>2</sup> The Solomon Amendment allows the Secretary of Defense to deny federal funding to colleges and universities if they prohibit or prevent military recruitment on campus.<sup>3</sup> Despite the law, several law schools limited the access of military recruiters, arguing that the military's exclusion of gay, lesbian, and bisexual students through the Department of Defense's (DOD's) policy on homosexual conduct<sup>4</sup> violates the school's nondiscrimination policy. With millions of dollars of federal funding at risk,<sup>5</sup> most schools reluctantly conceded and allowed military recruiters on campus.<sup>6</sup> Had the Court found the Solomon Amendment unconstitutional, a number of the American Bar Association (ABA) accredited schools would likely have either barred military recruiters from their campus and from access to their career placement offices or placed restrictions on military recruiters' access to their campus.<sup>7</sup> The purpose of this article is to provide background information on the Solomon Amendment and the *FAIR* case and to alert judge advocates (JAs) to the recent Court decision and its impact on the future of the Judge Advocate General's Corps.

### What Is the Solomon Amendment?

Law schools have long-standing policies promoting nondiscriminatory environments for their students.<sup>8</sup> Beginning in the 1970s, "law schools began expanding these policies to prohibit discrimination based on sexual orientation"<sup>9</sup> and extending these policies to prospective employers by prohibiting recruitment on campus or use of the school career placement services unless employers provide written assurance that they do not discriminate on the basis of any protected

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<sup>1</sup> Transcript of Oral Argument at 3, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/04-1152.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/04-1152.pdf) (statement of Solicitor General Paul D. Clement) [hereinafter Transcript of Oral Argument].

<sup>2</sup> *Rumsfeld v. Forum for Academic & Institutional Rights*, 2006 U.S. LEXIS 2025 (2006).

<sup>3</sup> See 10 U.S.C.S. § 983 (LEXIS 2005) (providing for the denial of federal funds to an "institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents" military recruiting on campus).

<sup>4</sup> See 10 U.S.C.S. § 654 (LEXIS 2005).

<sup>5</sup> Harvard University, for example, receives more than \$400 million annually from the federal government for research. See Daniel J. Hemel, *Senate Mulls Over Solomon Amendment*, HARV. CRIMSON, May 19, 2004, available at <http://www.thecrimson.com/printerfriendly.aspx?ref=502627>.

<sup>6</sup> See, e.g., Scott Johnson, *JAGS Not Welcome: America's Top Law Schools Try to Figure Out a Way Around the Solomon Amendment*, WKLY. STANDARD, Sept. 27, 2005, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/132qedpc.asp> (stating that Yale Law School has waived its nondiscrimination policy in order for the university to receive \$350 million in federal funds. "We would never put at risk the overwhelmingly large financial interests of the University in federal funding. We have a point of principle to defend, but we will not defend this—at the expense of programs vital to the University and the world at large." (quoting then-law school Dean Anthony Kronman)). Three schools, however, have denied access to military recruiters. E-mail from Lieutenant Colonel Raymond Jackson, Judge Advocate Recruiting Office, to Author (Mar. 6, 2006, 10:54 EST) (on file with author) (stating that Vermont Law School, New York Law School, and William Mitchell College of Law do not receive federal funds because they do not allow military recruiting on campus).

<sup>7</sup> Of the 188 ABA accredited schools, 168 are members of the AALS, which requires its members to abide by certain bylaws and restrictions, one of which—bylaw section 6-3b—requires law schools to ensure that employers or recruiters abide by the AALS nondiscrimination policy. See The Association of American Law Schools, Member Schools, [http://www.aals.org/about\\_memberschools.php](http://www.aals.org/about_memberschools.php) (last visited June 1, 2006); The Association of American Law Schools, AALS Handbook: Membership Requirements (Aug. 2005), [http://www.aals.org/about\\_handbook\\_requirements.php](http://www.aals.org/about_handbook_requirements.php); see also The Association of

American Law Schools Deans Memorandum 00-2, Executive Committee Policy Regarding "Solomon Amendment" (Jan. 24, 2000), <http://www.aals.org/deansmemos/00-2.html> (stating that the AALS is returning to its prior policy of requiring schools to deny the military access except in limited situations).

<sup>8</sup> *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 224 (3d Cir. 2004), *rev'd*, 2006 U.S. LEXIS 2025 (2006).

<sup>9</sup> *Id.*

category.<sup>10</sup> In the 1980's, some law schools began barring military recruiters from their campuses because of the DOD's policy on homosexual conduct.<sup>11</sup> In 1990, the Association of American Law Schools (AALS) added "'sexual orientation' to the list of protected categories under the Association's nondiscrimination provisions."<sup>12</sup> These actions did not go unnoticed by the federal government, and in 1994, Representative Gerald Solomon sponsored an amendment to the annual defense appropriations bill that proposed denying funding from the DOD to schools that barred military recruiters from campus.<sup>13</sup> Despite the DOD's objection to the proposed amendment as "unnecessary and duplicative,"<sup>14</sup> Congress ultimately approved the resolution, and the Solomon Amendment became law.<sup>15</sup> Congress later expanded the law in 1997 to include funds from the Departments of Education, Labor, and Health and Human Services.<sup>16</sup> The DOD regulations further strengthened the law by requiring revocation of federal funds to an entire university if only one of the university's subelements denies access to military recruiters.<sup>17</sup> In 2004, Congress again amended the law to codify the DOD's informal policy that military recruiters must be given access equal to that provided to other recruiters.<sup>18</sup>

### **A Brief History of *Forum for Academic & Institutional Rights v. Rumsfeld***

The FAIR is an "association of thirty-six law schools and law faculties whose mission is to promote academic freedom and to support educational institutions i[n] opposing discrimination."<sup>19</sup> In its first legal challenge, FAIR filed suit against the DOD and other federal agencies seeking a preliminary injunction against the enforcement of the Solomon Amendment on the ground that it is an unconstitutional condition.<sup>20</sup> The FAIR stated "if the law schools' compliance with the Solomon Amendment compromises their First Amendment rights, the statute is unconstitutional."<sup>21</sup> The district court denied FAIR's

<sup>10</sup> See *id.* at 225.

<sup>11</sup> See *id.*; Eartha Melzer, *Supreme Court to Tackle Complex Solomon Case*, WASHINGTONBLADE.COM, May 13, 2005, available at <http://www.washblade.com/2005/5-13/news/national/supream.cfm>.

<sup>12</sup> See The Association of American Law Schools, AALS Handbook: Statement of Good Practices (Aug. 13, 1997), [http://www.aals.org/about\\_handbook\\_sgp\\_mil.php](http://www.aals.org/about_handbook_sgp_mil.php).

<sup>13</sup> See *Forum for Academic & Institutional Rights*, 390 F.3d at 225.

<sup>14</sup> See *id.* (quoting 140 Cong. Rec. H3864 (daily ed. May 23, 1994) (statement of Rep. Schroeder)) ("In light of Vietnam War-era legislation, rarely invoked, that already granted the [Department of Defense] discretion to withhold funding from colleges and universities that barred military recruiters, the [Department of Defense] itself objected to the proposed amendment as 'unnecessary' and 'duplicative.'") (citation omitted). Other representatives opposed the amendment as a violation of academic freedom and civil rights. See *id.* (statement of Rep. Dellums).

<sup>15</sup> See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).

<sup>16</sup> See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996); see also *Forum for Academic & Institutional Rights*, 390 F.3d at 226.

<sup>17</sup> See Gerald Walpin, *The Solomon Amendment Is Constitutional and Does Not Violate Academic Freedom*, 2 SETON HALL CIR. REV. 1, 7 (citing 48 C.F.R. § 209.470-1 (2000)). Although this article, the media, and the FAIR case primarily address the Solomon Amendment and its effect on law schools, it is important to note that the Solomon Amendment makes no distinction. Federal funding can be denied to any institution of higher education (or subelement of that institution), not just the law school. See 10 U.S.C.S. § 983 (LEXIS 2006). The focus on law schools is likely due, in part, to the AALS. "Membership in the AALS gives privileged access to a variety of AALS services and is a mark of prestige. . . ." Andrew P. Morriss, *The Market for Legal Education & Freedom of Association: Why the 'Solomon Amendment' Is Constitutional and Law Schools Aren't Expressive Associations*, 14 WM. & MARY BILL RTS. J. 415, 419 (2005). In addition, the AALS influences the ABA accreditation process. *Id.*

<sup>18</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004); see *Forum for Academic & Institutional Rights*, 390 F.3d at 227-28.

[F]ollowing the terrorist attacks in the United States in September 2001, the [Department of Defense] began applying an informal policy of requiring not only access to campuses, but treatment equal to that accorded other recruiters. As evidence of this informal policy, a letter from the [Department of Defense]'s Acting Deputy Undersecretary William J. Carr to Richard Levin, the President of Yale University, stated that universities are required "to provide military recruiters access to students equal in quality and scope to that provided to other recruiters."

*Id.* at 227.

<sup>19</sup> Solomon Response.org, Forum for Academic and Institutional Rights, <http://www.law.georgetown.edu/solomon/joinFAIR.html> (last visited June 1, 2006).

<sup>20</sup> *Forum for Academic & Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269, 274-275 (D.N.J. 2003) (alleging that the Solomon Amendment violates the universities' First Amendment rights), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 2006 U.S. LEXIS 2025 (2006). "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. In addition to the FAIR case, several other law school professors, students, and affiliated organizations have challenged the Solomon Amendment. See *Burbank v. Rumsfeld*, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 19, 2004); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (declaring the Solomon Amendment unconstitutional and enjoining its enforcement against Yale, currently pending before the Second Circuit).

<sup>21</sup> *Forum for Academic & Institutional Rights*, 390 F.3d at 229.

motion.<sup>22</sup> On appeal, however, the Third Circuit Court of Appeals reversed, holding 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.”<sup>23</sup> Specifically, the court found that “the Solomon Amendment’s forcible inclusion of and assistance to military recruiters undermines [the Universities’] efforts to disseminate their chosen message of nondiscrimination.”<sup>24</sup> Following a motion filed by the DOD and other federal agencies,<sup>25</sup> the Third Circuit stayed its ruling pending a petition for writ of certiorari with the Court.<sup>26</sup>

### The Third Circuit Court’s Analysis

In the *FAIR* case, the Third Circuit found that the Solomon Amendment infringed upon the universities’ First Amendment rights “by impeding the law schools’ rights of expressive association and compelling them to assist in the expressive act of recruiting.”<sup>27</sup> A law that infringes upon a constitutional right is subject to strict scrutiny.<sup>28</sup> Specifically, “[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).”<sup>29</sup> The court, after recognizing the government’s compelling interest in recruiting talented lawyers, focused on the military’s ability to recruit through alternative means and found the Solomon Amendment broadly, rather than narrowly, tailored.<sup>30</sup> “The availability of alternative, less speech-restrictive means of effective recruitment is sufficient to render the Solomon Amendment unconstitutional under strict scrutiny analysis.”<sup>31</sup>

In addition, the Third Circuit found that the Solomon Amendment violates the law schools’ First Amendment rights under the compelled speech doctrine. “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.”<sup>32</sup> The court further found that schools are essentially unable to disclaim the military’s policy because of the “at least equal in quality and scope”<sup>33</sup> language from the most recent change to the Solomon

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 224.

<sup>24</sup> *Id.* at 233.

<sup>25</sup> Appellees’ Motion to Stay the Mandate, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 03-4433 (3rd Cir. Jan. 14, 2005), available at <http://www.law.georgetown.edu/solomon/documents/DODMotionforStay.pdf>.

<sup>26</sup> Order, *Forum for Academic & Institutional Rights v. Rumsfeld*, No. 03-4433 (3rd Cir. Jan. 20, 2005), available at <http://www.law.georgetown.edu/solomon/documents/FAIR3CirStay.pdf>. The federal government filed the petition for writ of certiorari on 28 February 2005, *Petition for a Writ of Certiorari, Forum for Academic & Institutional Rights v. Rumsfeld*, No. 04-1152 (2005), available at <http://www.law.georgetown.edu/solomon/documents/SGPetition.pdf>, and the Supreme Court granted certiorari on 2 May 2005. See *Rumsfeld v. Forum for Academic & Institutional Rights*, 125 S. Ct. 1977 (2005). The issue was argued before the U.S. Supreme Court on 6 December 2005. See Supreme Court of the United States, October Term 2005, Oral Arguments for the Session Beginning November 28, 2005, available at <http://www.supremecourtus.gov/oralarguments/argumentcalendars/monthlyargumentaldecember2005.pdf>. A copy of the transcript of the oral argument is available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-1152.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1152.pdf).

<sup>27</sup> See *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 230 & 234 (3d Cir. 2004), *rev’d*, 2006 U.S. LEXIS 2025 (2006).

<sup>28</sup> *Id.* at 230.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 234.

<sup>31</sup> *Id.* at 235.

<sup>32</sup> See *id.* at 236 (referring to the “expressive nature” of recruiting, which requires the university to publish and post announcements of the recruiters visit, publish written descriptions of the employer and the available positions, and actively coordinate, through written and oral communication, the interviews and the employer’s schedule).

<sup>33</sup> 10 U.S.C.S. § 983(b) (LEXIS 2005).

Amendment.<sup>34</sup> Furthermore, even if disclaimers were permissible under the Solomon Amendment, the court found that the ability to disclaim the military's message does not eliminate or erase the First Amendment violation.<sup>35</sup>

The Third Circuit did not analyze the Solomon Amendment from the perspective of the spending clause and did not mention the five-part test from *South Dakota v. Dole*<sup>36</sup> for analyzing the constitutionality of spending clause conditions.<sup>37</sup> When determining whether the compelled speech doctrine applied, the court never analyzed the universities' right to reject federal funding and deny access to military recruiters; instead, the court stated that the Solomon Amendment "insists," "requir[es]," and "compels law schools to propagate the military's message," likening the Solomon Amendment to the "forced display of an unwanted motto on one's license plate."<sup>38</sup>

The dissent in the FAIR case "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."<sup>39</sup> Writing in dissent, Judge Ruggero Aldisert felt it unnecessary to reach a First Amendment analysis, finding that the presence of military recruiters on campus for such a limited period of time cannot "compel the inference that a law school's antidiscrimination policy is violated."<sup>40</sup> Nonetheless, the dissent analyzed the majority's First Amendment concerns using the balancing-of-interests test.<sup>41</sup> Weighing the interest in public safety through national defense and through service in the military against the universities' interest in free speech, the dissent failed to find a constitutional violation.<sup>42</sup> The dissent also noted that the military's need for competent lawyers may even be more important than "in the open society of civilian life."<sup>43</sup>

The dissent went on to address the compelled speech argument and found it unlikely that law students would perceive that a law school endorses the message of an employer simply because of the employer's on-campus activities.<sup>44</sup> Furthermore, the dissent commented on the law school's ability to make speeches and erect notices disclaiming the employer's message.<sup>45</sup>

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<sup>34</sup> *Forum for Academic & Institutional Rights*, 390 F.3d at 240-42.

[T]he Solomon Amendment, as recently amended, does not appear to permit law schools to disclaim the military's message. Its express terms require them to provide treatment to the military recruiters "equal in quality and scope" to that provided to other employers. As the law schools do not disclaim the messages of those employers, similarly they may not disclaim the message of the military.

*Id.* at 240-41.

<sup>35</sup> *See id.* at 232-33, 241.

<sup>36</sup> 483 U.S. 203 (1987) (upholding the constitutionality of a federal statute requiring the withholding of federal highway funds from any state with a drinking age below 21). In holding that Congress may impose conditions on federal spending grants to the states, the Court established the following guidelines. First, the exercise of the spending power must be in pursuit of "the general welfare." *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) and *United States v. Butler* 297 U.S. 1, 65 (1936)). Second, spending conditions must be unambiguous. *Id.* (citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Third, conditions on the receipt of federal funds must be related "to the federal interest in particular national projects or programs." *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)). Fourth, the conditions must not be in contradiction to other constitutional provisions. *Id.* at 208. Finally, conditions must not amount to coercion. *Id.* at 211.

<sup>37</sup> *See Forum for Academic & Institutional Rights*, 390 F.3d at 229 ("[T]he Solomon Amendment does not create a spending program; it merely imposes a penalty—the loss of general funds.").

<sup>38</sup> *Id.* at 240.

<sup>39</sup> *Id.* at 248 (Aldisert, J., dissenting).

<sup>40</sup> *Id.* at 252-53 (Aldisert, J., dissenting).

<sup>41</sup> *Id.* at 253 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984)).

<sup>42</sup> *Id.* at 248 (Aldisert, J., dissenting).

<sup>43</sup> *See id.* at 255-56 ("It scarcely can be an exaggeration to suggest that in many respects the need for specially competent lawyers and exceptionally qualified judges may be more important in a settled environment dominated by the strictures of discipline than in the open society of civilian life.").

<sup>44</sup> *See id.* at 257.

<sup>45</sup> *See id.* at 257, 262.

## The Battle of Amici

Faculty members and students at numerous law schools demonstrated their support by submitting legal briefs either supporting or challenging the Solomon Amendment. Other groups and organizations also offered their opinions on behalf of the FAIR or the government. Twenty-seven amicus curiae briefs were filed with the Court.<sup>46</sup>

The American Association of University Professors (AAUP), the National Association for Law Placement, Syracuse University, and individual law school professors and administrators at Cornell Law School,<sup>47</sup> Harvard Law School, Columbia Law School, and several other major universities were just some of the groups that filed briefs opposing the Solomon Amendment. The AAUP amicus brief<sup>48</sup> argues that the forced inclusion of military recruiters on campus interferes with academic freedom and violates the First Amendment.<sup>49</sup> In addition, AAUP argues that the government's requirement for equal treatment, rather than adequate access for recruiters, suppresses academic freedom of speech by replacing the law's schools nondiscrimination message with the federal government's policy.<sup>50</sup> An amicus brief submitted by a group of Harvard professors took a somewhat different approach, arguing that the government's aggressive implementation of the Solomon Amendment proves that the government is asking for a "special exemption from even-handed antidiscrimination policies" and not simple "equality of treatment."<sup>51</sup>

A group of law school professors, students, and law school student organizations from across the nation also submitted a consolidated amicus brief in support of the Solomon Amendment.<sup>52</sup> In addition, several non-profit organizations and other groups including law students, law school faculty and professors, and military servicemembers submitted amicus briefs in support of the federal government. A group of law professors and law students from universities across the United States argued that law students, and not the federal government or the schools, are the group whose interests are "most severely compromised"<sup>53</sup> if the Solomon Amendment is found unconstitutional because the law students would be denied the "information necessary to evaluate a legal career in the military."<sup>54</sup>

While most of the amicus briefs in support of the government were concerned with university freedoms and recruiter access, some of the briefs primarily focused on other constitutional concerns. The Boy Scouts of America, concerned that the appeals court's decision may impact the Court's ruling in *Boy Scouts of America v. Dale*, which protected the Boy Scouts' selection of volunteer leadership from state nondiscrimination policies, submitted an amicus brief.<sup>55</sup> The attorneys general in eleven states—Alabama, Colorado, Delaware, Florida, Indiana, Kansas, Michigan, South Dakota, Texas, Utah, and West Virginia—concerned that an adverse decision would jeopardize an assortment of state laws placing requirements on the receipt of higher education funds, also filed a brief.<sup>56</sup>

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<sup>46</sup> See Solomon Response.org, Documents Related to *FAIR v. Rumsfeld*, <http://www.law.georgetown.edu/solomon/FAIRvRumsfeld.html> (last visited Feb. 1, 2006).

<sup>47</sup> Brief for National Association for Law Placement, Syracuse University, and individual law school professors and administrators as Amici Curiae in Support of the Respondents, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at [http://www.nalp.org/assets/194\\_amicusbriefnalpetal.pdf](http://www.nalp.org/assets/194_amicusbriefnalpetal.pdf).

<sup>48</sup> Brief for American Association of University Professors as Amici Curiae in Support of the Respondents, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at <http://www.aaup.org/Legal/cases/SolomonAmendmentAmicusBrief.pdf>.

<sup>49</sup> *Id.* at 8-14 (stating that academic freedom is "fundamental to the functioning of our society." (quoting *Rust v. Sullivan*, 500 U.S. 173, 200 (1991)).

<sup>50</sup> See *id.* at 18.

<sup>51</sup> Brief for Professors William Alford et al. as Amici Curiae in Support of the Respondents, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at <http://www.law.georgetown.edu/solomon/documents/FAIRamicusHarvard.pdf>.

<sup>52</sup> Brief for Law Professors and Law Students as Amici Curiae in Support of the Petitioners, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at <http://www.law.georgetown.edu/solomon/documents/amicusLawProfs.pdf> [hereinafter Law Professors and Law Students Brief].

<sup>53</sup> *Id.*

<sup>54</sup> Law Professors and Law Students Brief, *supra* note 52, at 5.

<sup>55</sup> See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); Brief for Boy Scouts of America as Amici Curiae in Support of the Petitioners at 1-2, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at <http://www.law.georgetown.edu/solomon/documents/amicusBoyScouts.pdf>.

<sup>56</sup> Brief for Texas et al. as Amici Curiae in Support of the Petitioners, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at <http://www.law.georgetown.edu/solomon/documents/amicusStates.pdf>.

## Did the Supreme Court Show Their Hand?

Predicting Supreme Court decisions is “risky business,” but if the questions and overall content of the oral argument are indicators of the Justices’ positions,<sup>57</sup> it is no surprise that the Court upheld the Solomon Amendment. The Court heard oral argument on the case on 6 December 2005. The government argued that the Solomon Amendment was constitutional under both the Spending Clause and Congress’s power to raise and support armies.<sup>58</sup> The FAIR argued that the Solomon Amendment was unconstitutional on three First Amendment grounds—“the right to be free from compelled speech; the right to speak; and the freedom to associate.”<sup>59</sup>

At times, the Court seemed to focus on the government’s right to free speech as opposed to the universities’ right to free speech. “[T]he speech is on [the law schools’] side. The Government just says, ‘Let our recruiters in.’”<sup>60</sup> As an extreme example, Justice Stephen Breyer asked FAIR’s attorney, Mr. E. Joshua Rosenkranz, whether the First Amendment right would allow universities to exclude employers who have policies promoting affirmative action or racial diversity when the university does not agree with such policies.<sup>61</sup> Justice Breyer, repeating an oft used phrase in First Amendment litigation,<sup>62</sup> went on to ask Mr. Rosenkranz, “What’s wrong with the Government saying, University, you disapprove of what we do. The remedy for such a situation is not *less speech*, it is *more speech*[?]”<sup>63</sup> In addition, several other justices asked the attorney for the government, Solicitor General Paul D. Clement, whether the Solomon Amendment would allow universities to disclaim the military’s message by voicing their objections to the policy while still allowing military recruiters on campus.<sup>64</sup> For example, Justice Anthony Kennedy asked whether the university “could organize a student protest at the hiring interview rooms, so that everybody jeers when the applicant comes in the door?”<sup>65</sup> Solicitor General Clement accepted the notion of counterspeech and stated that the Solomon Amendment has to accommodate for free speech.<sup>66</sup>

Mr. Rosenkranz argued that “the speech is on both sides because the schools are being forced to host the Government’s message.”<sup>67</sup> Also, when addressing the compelled speech doctrine, he stated that “the ability to protest the forced message is never a cure for a compelled-speech violation. . . .”<sup>68</sup> Chief Justice John G. Roberts, Jr., did not accept Mr. Rosenkranz’s arguments. Chief Justice Roberts plainly stated that this case is about conduct, not speech<sup>69</sup> and later stated that “nobody thinks that [the] law school is speaking through these employers who come onto its campus for recruitment. . . . Nobody thinks the law school believes everything that the employers are doing or saying.”<sup>70</sup>

Mr. Rosenkranz also argued the unconstitutional-conditions doctrine—the government cannot enact laws that restrict speech as a condition for receiving federal benefits.<sup>71</sup> Chief Justice Roberts, however, was particularly critical of this argument, stating that the Solomon Amendment “doesn’t insist that [the law schools] do anything. It says that, ‘If you want our money, you have to let our recruiters on campus’”<sup>72</sup> and later stating that the law schools are perfectly free to reject

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<sup>57</sup> See Doug Lederman, *The Supremes Scrutinize Solomon*, INSIDE HIGHER EDUC., Dec. 2005 (providing an interesting analysis of the oral argument and quoting FAIR’s attorney, Mr. E. Joshua Rosenkranz, as saying “I never count noses” after being asked “how many votes were likely to go FAIRs way.”).

<sup>58</sup> See Brief for the Petitioners at 2, 12, 15, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at <http://www.law.georgetown.edu/solomon/documents/GovernmentPartyBrief.pdf>; Transcript of Oral Argument, *supra* note 1, at 13 (referring to the spending power of congress, U.S. CONST. art. I, § 8, cl. 1, and U.S. CONST. art. I, § 8, cl. 12.).

<sup>59</sup> See Brief for the Respondents at 16, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), available at <http://www.law.georgetown.edu/solomon/documents/briefFAIR.pdf>.

<sup>60</sup> See Transcript of Oral Argument, *supra* note 1, at 56.

<sup>61</sup> See *id.* at 42-43.

<sup>62</sup> See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>63</sup> See Transcript of Oral Argument, *supra* note 1, at 45 (emphasis added); see also *id.* at 43.

<sup>64</sup> See *id.* at 21, 25.

<sup>65</sup> See *id.* at 25.

<sup>66</sup> See *id.* at 5, 26-27.

<sup>67</sup> *Id.* at 56.

<sup>68</sup> *Id.* at 37.

<sup>69</sup> *Id.* at 29.

<sup>70</sup> See *id.* at 38.

<sup>71</sup> See *id.* at 32, 33, 39.

<sup>72</sup> *Id.* at 32.

federal funding.<sup>73</sup> Mr. Rozenkranz argued that conditioning federal funds on the law schools' agreement to allow access to military recruiters amounts to coercion, forcing law schools to send mixed messages by accepting federal funds and allowing military recruiters on the one hand, while broadcasting policies prohibiting discrimination based on sexual orientation on the other.<sup>74</sup> Again, Chief Justice Roberts criticized the argument stating the schools choose to accept the money and choose to send the message—"we believe in [nondiscrimination of homosexuals] strongly, but we don't believe in it, to the tune of \$100 million."<sup>75</sup>

The justices were also critical of the government's positions. Justice David Souter characterized the government as forcing the universities to underwrite the government's speech and "forcing [the universities] into hypocrisy."<sup>76</sup> In addition, Justice Sandra Day O'Connor suggested that perhaps the Solomon Amendment demands preferential treatment by requiring equal access despite the military's inability to comply with the law schools' nondiscrimination policy. "I thought [the Solomon Amendment] says that the military must have equal access with any other employer. Now, every other employer is subject to the same policy, presumably, of the law school."<sup>77</sup>

Solicitor General Clement concluded the argument by summing up the government's position and stating that FAIR's argument is limitless. "Even if Congress changed 'don't ask, don't tell' tomorrow, . . . presumably, the law schools would still be here protesting the military's position on gender, or perhaps the war in Iraq, or perhaps the war in Afghanistan."<sup>78</sup>

### The Decision

The Court unanimously ruled on 6 March 2006<sup>79</sup> to uphold the constitutionality of the Solomon Amendment. The opinion, by Chief Justice Roberts, was presented to a group of lawyers newly admitted to practice before the Court. The Court ruled that "military recruiters must be given the same access as recruiters who comply with the [nondiscrimination] policy."<sup>80</sup>

The opinion left little doubt as to Congress's power to raise and support armies. "[T]here is no dispute in this case that it includes the authority to require campus access for military recruiters."<sup>81</sup> The Court recognized that Congress "chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds."<sup>82</sup> After finding that Congress was free to directly require universities to provide military recruiters equal access, the Court stated that "it is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly."<sup>83</sup>

The Court rejected all of FAIR's First Amendment arguments and the Third Circuit Court of Appeals' findings that the Solomon Amendment violates law schools' freedom of speech and noted that FAIR "attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect."<sup>84</sup> Recognizing that the Solomon

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<sup>73</sup> See *id.* at 57.

<sup>74</sup> See *id.* at 38-39.

<sup>75</sup> See *id.* at 39.

<sup>76</sup> See *id.* at 16.

<sup>77</sup> See *id.* at 4.

<sup>78</sup> See *id.* at 64.

<sup>79</sup> *Rumsfeld v. Forum for Academic & Institutional Rights*, 2006 U.S. LEXIS 2025 (2006).

<sup>80</sup> *Id.* at \*19.

<sup>81</sup> *Id.* at \*20; see also *id.* at \*35.

Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces -- an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers. The Court of Appeals' proposed alternative methods of recruiting are beside the point. The issue is not whether other means of raising an army and providing for a navy might be adequate.

*Id.* at \*35-36.

<sup>82</sup> *Id.* at \*20-21.

<sup>83</sup> *Id.* at \*22.

<sup>84</sup> *Id.* at \*40.

Amendment does not restrict the law schools' freedom to express their disapproval of military policies, the Court found that "the Solomon Amendment regulated conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not say."<sup>85</sup> In addition, the Court stated that "[a] military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."<sup>86</sup>

Finding that the Court of Appeals erred in holding that the Solomon Amendment violates the First Amendment, the Court reversed the judgment of the Third Circuit and remanded the case for further proceedings consistent with their opinion.

### Conclusion

Congress's power to raise and support armies is predictably broad.<sup>87</sup> Government regulations or conditions in the academic setting, however, are often highly controversial.<sup>88</sup> In this case, universities view their choice as sticking to their moral guns and risk losing millions of dollars in federal funding or compromising their beliefs to subsidize their schools and often important research projects. With a competing interest, the military seeks highly qualified and competent lawyers. These lawyers, as JAs, play an important role in today's armed forces. Not only are JAs responsible for administering military justice and providing legal support to military combat operations and humanitarian assistance missions, but they also uphold individual Soldiers' legal rights through the services' legal assistance programs and ensure the legality of multi-million dollar contracts with outside corporations. The importance of this opinion to judge advocate recruiting and the military services is clear. Had the Court found the Solomon Amendment unconstitutional, numerous law schools would have likely barred military recruiters from their campus or placed other restrictions on military recruiters' access to their campus, such as requiring military recruiters to conduct interviews in inconvenient locations or remote buildings or refusing to announce recruiters' planned visits or schedule interviews for the recruiters. Instead, as a result of the ruling, "[l]aw schools must ensure that their recruiting policy operates in such a way that military recruiters are given access to students at least equal to that 'provided to any other employer.'" <sup>89</sup>Despite the Court's ruling, FAIR certainly succeeded in bringing more attention to the DOD's policy on homosexual conduct. Judge advocates must be prepared to contend with continued hostility towards the DOD's policy on homosexual conduct and yet still be able to maintain their military bearing and professional courtesy at all times. Several lawsuits against the Solomon Amendment may continue, and law school protests should be expected.<sup>90</sup> "The Supreme Court's opinion in *Rumsfeld v. FAIR* is a call to arms to law school administrations across the country to vocally demonstrate their opposition to the military's 'Don't Ask, Don't Tell' policy."<sup>91</sup>

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<sup>85</sup> *Id.* at \*23.

<sup>86</sup> *Id.* at \*39-40.

<sup>87</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (stating "[T]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."); *see also* U.S. . art. I, § 8, cl. 12.

<sup>88</sup> "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265, 312 (1978). The FAIR not only argues for academic freedom, but it also argues that their nondiscrimination policy and rationale for denying access to military recruiters is morally driven, which may further intensify the controversial nature of this dispute. *See* Transcript of Oral Argument, *supra* note 1, at 42-43. For example, in a recent interview with *National Review Online*, Mr. Rosenkranz stated: "If the first amendment gives bigots the right to discriminate against gays then certainly it gives the right to right-minded academic institutions to discriminate against bigots." Anthony Paletta, *The Wisdom of Solomon? The Right to Bear Arms*, NAT'L REV. ONLINE, July 22, 2005, available at <http://www.nationalreview.com/comment/paletta200507220822.asp>.

<sup>89</sup> *Forum for Academic & Institutional Rights*, 2006 U.S. LEXIS at \*18.

<sup>90</sup> Rudy Kleysteuber, co-chair of the Yale Student/Faculty Alliance for Military Equality and a leader behind *SAME v. Rumsfeld*, Ruling on Plaintiffs' Motion for Summary Judgement and Defendant's Motion to Dismiss, *SAME v. Rumsfeld*, No. 3:03-cv-1867 (D. Conn. Mar. 31, 2005), available at <http://www.law.georgetown.edu/solomon/documents/SAMEdecision.pdf>, which was dismissed in light of *Burt v. Rumsfeld*, 354 F.Supp.2d 156, 189-90 (D.Conn. 2005), "said they may file their lawsuit again if the faculty lose on appeal." Andrew Mangino, *Supreme Court Rules Against Law Schools*, YALE DAILY NEWS, Mar. 6, 2006, available at <http://www.yaledailynews.com/article.asp?AID=32185>.

<sup>91</sup> *See* SolomonResponse.Org, Welcome to SolomonResponse.Org, <http://www.law.georgetown.edu/solomon/> (last visited Apr. 5, 2006).