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Military Recruiting and the Solomon Amendment: The Supreme Court Ruling in *Rumsfeld v. FAIR*

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Summary

In recent years, many academic institutions have enacted rules that protect homosexuals from discrimination on campus. As a result, colleges, universities, and even high schools have sought to bar military recruiters from their campuses and/or to eliminate Reserve Officer Training Corps (ROTC) programs on campus because of "Don't Ask, Don't Tell," the DOD policy excluding known or admitted homosexuals from military service. At the same time, federal legislation has been enacted to prevent the government from funding higher educational institutions that block military recruiters from campus. On March 6, 2006, the Supreme Court reversed a federal appeals court ruling in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR).* In so doing, eight Justices upheld the constitutionality of the Solomon Amendment, which forbids most forms of federal aid to higher educational institutions that deny military recruiters access to students equal to that provided other employers.

The Solomon Amendment

Under the Solomon Amendment, as amended, specified federal funds may not be provided to an "institution of higher education," or "subelement" of such an institution, if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."[1] The Solomon Amendment applies to all institutions of higher education except ones with "a longstanding policy of pacifism based on historical religious affiliation."[2] The act governs all funds made available through the DOD, the Department of Homeland Security, the Department of Health and Human

[1] 10 U.S.C. § 983(b)(1).

[2] Id. at § 983(c)(2).

Services, the Central Intelligence Agency, and other enumerated agencies.[3] It does not apply to funds provided to educational institutions or individuals "solely for student financial assistance, related administrative costs, or costs associated with attendance."[4]

Constitutional Challenge to the Solomon Amendment

On March 6, 2006 the U.S. Supreme Court reversed a Third Circuit Court of Appeals decision in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR).*[5] By an 8 to 0 vote, the High Court unanimously rejected arguments by the Forum for Academic and Individual Rights, an association of law schools and professors, that it was unconstitutional for the federal government to condition university funding on compliance with the Solomon Amendment. The universities objected that because of the military's "don't ask, don't tell" policy, permitting recruiters on campus would undermine their policies against discrimination and that the federal law therefore violated their free speech rights. A divided Third Circuit panel agreed that the Solomon Amendment had compelled the law schools to convey messages of support for the military's policy of discriminatory exclusion. In addition, the appellate panel relied on a 2000 Supreme Court decision, *Dale v. Boy Scouts of America*[6] — which held that the Boy Scouts have an expressive right to exclude gay scoutmasters — for the converse proposition that the nation's universities have a right to "expressive association" in opposing military recruiters where there is a conflict between the DOD stance on sexual orientation and academic nondiscrimination policies.

DOD appealed the Third Circuit's decision to the Supreme Court. FAIR's core argument was that the Solomon Amendment amounts to an "unconstitutional condition" because it exacts a penalty for the law schools' engaging in First Amendment expressive conduct. While the government may impose reasonable conditions on the receipt of federal largesse, respondents contended, it "cannot attach strings to a benefit to 'produce a result which [it] could not command directly.'"[7] When a law school violates the equal access rule, the government threatens loss of funding not only to the law school but to the entire university. Thus, they claimed, requiring equal access forces laws schools to "propagate, accommodate, [or] subsidize an unwanted message."[8] The government countered by pointing to the plenary powers of Congress to "raise and support armies" and to "provide for the common Defence."[9] The Third Circuit decision could "undermine military recruitment in a time of war," it argued, while neither the law schools' right to free speech nor to expressive association were infringed by allowing

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[3] Id. at § 983(d)(1).

[4] Id. at § 983(d)(2).

[5] 390 F.3d 219 (3d Cir.), reversed and remanded, No. 04-1152, 2006 WL 521237..

[6] 530 U.S. 640 (2000).

[7] Brief for Respondents, at p. 36, Rumsfeld v. FAIR, No. 04-1152 (filed 9-21-2005).

[8] Id. at pp 11-13.

[9] U.S. Const., Art. I, § 8, Cls 1, 12 and 13.

military recruiters to conduct on campus interviews.[10] In particular, the Solicitor General distinguished the *Boy Scouts* case in that "recruiters are not a part of the institution itself and do not become members through their recruiting activities."[11] Recruiters speak for their employers, the brief claims, not the schools, unlike the scoutmaster who represented the Boy Scouts in the earlier case. Moreover, the government emphasized that the law schools remain free to protest the military's message as long as they give recruiters equal access. If the schools choose not to allow equal access, it was argued, they simply forego funding.

Supreme Court Ruling in Rumsfeld v. FAIR

Chief Justice Roberts wrote the High Court opinion, joined by all other members except Justice Alito, who did not participate in the proceedings. The Court was generally receptive to each of the arguments proffered by the government's briefs and oral arguments in *FAIR*. First, the Chief Justice was unmoved by FAIR's theory of unconstitutional conditions, largely because of fatal flaws he found in the law schools' First Amendment analysis. This unsettled area of the law, however, may be further obscured by his observation that indirect compulsion by Congress *via* "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." Whether this implies that Congress may even legislate access for military recruiters (to college campuses and elsewhere), regardless of federal funding or federal policy with respect to all other recruiters, may be a fertile subject for future legal debates. In addition, broader questions could conceivably arise as to the legislative authority of Congress to enact, within constitutional bounds, rules regarding military personnel and support that may incidentally impinge upon civilian affairs and the rights of private citizens in a variety of other ways.

On the question of whether the Solomon Amendment impairs the First Amendment rights of the objecting institutions, the Court's opinion rejected all three arguments put forward by the *FAIR* respondents. First, the Chief Justice observed, while expressive conduct may be subject to First Amendment scrutiny,

> there is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse . . . [and] . . . 'it has never been deemed an abridgement of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language.'[12]

Otherwise, practices having nothing to do with government dictating the content of speech – expressing disapproval of the Internal Revenue Service by refusing to pay taxes, for example – would enjoy First Amendment protection. Requiring law schools to facilitate recruiters' access by sending out e-mails and scheduling military visits were

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[10] Brief for the Petitioners, at 2, Rumsfeld v. FAIR, No. 04-1152 (filed July 2005).

[11] Id. at 19.

[12] No. 04-1152 (slip op) at 12 (citing West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943)(voiding state law requiring school children to recite Pledge of Allegiance and to salute the flag); Wooley v. Maynard, 430 U.S. 705, 717 (1977)(holding unconstitutional New Hampshire law requiring state motorist to display state motto – "Live Free or Die" – on their license plates).

deemed "a far cry from the compelled speech" found in earlier cases. "Accommodating the military's message does not affect the law school's speech, because the schools are not speaking when they host interviews and recruiting receptions."[13] Nor, the opinion finds, would they be endorsing, or be seen as endorsing, the military policies to which they object. "A law school's decision to allow recruiters on campus is not inherently expressive."[14]

Secondly, the Court distinguished the doctrine of "expressive association," as applied in *Dale v. Boy Scouts of America*.[15] "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect."[16] Such was not the situation here, however, according to the Chief Justice. Merely allowing recruiters on campus and providing them with the same services as other recruiters did not require the schools to "associate" with them. Nor did it prevent their expressing opposition to military policies in other ways. They could put up signs, they could picket, they could make speeches, and they could hold forums of protest. Moreover, unlike the *Boy Scouts* case, no group membership practices or affiliations were implicated by the Solomon Amendment. Recruiters do not become components of the law schools – like the Scout leaders there – but "are, by definition, outsiders who come onto campus for [a] limited purpose" and "not to become members of the school's expressive association."

Finally, the Court recognized as "[beyond] dispute" that Congress has "broad and sweeping" powers over military manpower and personnel matters – "includ[ing] the authority to require campus access for military recruiters" – the exercise of which is generally entitled to judicial "deference." Accordingly, in rejecting FAIR's position, the Court concluded:

> The issue is not whether other means of raising an army and providing for a Navy might be adequate . . .(regulations are not 'invalid' simply because there is some other imaginable alternative that might be less burdensome on speech). That is a judgment for Congress, not the courts . . . It suffices that the means chosen by Congress add to the effectiveness of military recruitment.[17]

Conclusion

The *FAIR* decision may be less important for its First Amendment teachings than for what the Chief Justice's opinion implies regarding the scope of Congress' authority to prescribe rules in support of the armed forces and national defense. Concededly, such suggestions are plainly *dicta* to its holding on FAIR's free speech claims, which ultimately foundered on the shoals of the First Amendment. Nonetheless, they do evidence an emerging judicial consensus favoring deference to the Congress where military manpower needs – and possibly other national defense matters – are concerned,

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[13] Id. at 14.

[14] No. 04-1152 (slip op.) at p.19.

[15] Supra n. 115.

[16] No. 04-1152 (slip op.) at 18.

[17] Id.

even if alternatives with lesser impact on civilian populations and individual freedoms may be available. Nor arguably would it be necessary to couch coverage as a "condition" to receipt of federal subsidies, as does the Solomon Amendment, since the Chief Justice's opinion seems to conflate direct and indirect regulation in this context and to treat them as constitutionally equivalent. Suffice it to say that any fuller appraisal of the potential implications of the Court's opinion in *FAIR* for questions of congressional power may have to await the outcome of litigation of any future issues that may arise.