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Barring Military Recruiters from College and University Campuses

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A three-judge panel of the 3rd Circuit Court of Appeals in Philadelphia voted 2-to-1 November 29, 2004, to suspend the federal law known as the Solomon Amendment (Solomon), Title 10 U.S. Code Sec. 983, as being unconstitutional. The court case in question is Forum for Academic and Institutional Rights (FAIR) Inc. v. Rumsfeld, No. 03-4433 (3rd Cir. 2004). It can be found at **www.saltlaw.org/3dcircuitnov04solomon.pdf**. It reversed the lower federal district court in New Jersey, 291 F. Supp 2d 269 (D.N.J. 2003), which had refused to issue an injunction against enforcement of Solomon. For the moment, colleges and law schools in New Jersey, Pennsylvania, Delaware, and the Virgin Islands are free to bar military recruiters, yet they are still able to receive federal funds. There are at least three similar cases challenging Solomon pending in other federal district courts in the country, two in Philadelphia and one in Connecticut. It is likely others will be filed elsewhere in the country.

BACKGROUND

Solomon stipulated that colleges and universities could only receive federal funding if the school allowed military recruiters to have the same access to students as other potential employers. In striking the law down, the 3rd Circuit reversed the decision of a federal district court judge who had found Solomon constitutional. The appeals court's rationale was schools have a First Amendment right to bar military recruiters from their campuses without risking the loss of federal education funding.

The history of the Solomon Amendment began back in the early 1990s. Over earlier decades, many colleges and universities had begun to ban military recruiters from their campuses. The main reason was the growing power at college campuses of gay rights groups, which caused many schools to add “gender orientation discrimination” to their list of prohibited practices employment recruiters had to observe. At the same time, many organizations that accredit schools added the same criteria to their standards for school admissions and campus employment recruitment. The American Association of Law Schools (AALS) and the American Bar Association (ABA) are two such accrediting groups. This is important because all federal attorneys, civilian and military, must be graduates of ABA-accredited law schools. Similar criteria apply to other professional programs that have added gender orientation to their rules.

On several occasions before Solomon, Navy recruiters came to me regarding the fact they had to sign a school's non-discrimination policy before they could recruit on campus. The policy document listed gender orientation, age, gender, and physical disability as prohibited forms of discrimination. Based on federal law, the military discriminates against all of these. My only advice to the recruiter was to write a letter to the school's career placement office saying the U.S. military complies with all federal laws in the area of discrimination.

As a result of this trend and with the military having a harder time making its recruiting goals, members of Congress acted in the interest of national defense. In 1994 Rep. Gerald Solomon (N.Y.) proposed what is now known as the Solomon Amendment. Representative Solomon argued before the House of Representatives that DoD funds should be withheld from schools that barred recruiters because “recruiting is the key to our all-volunteer military” and that the "starry-eyed idealism" of colleges and universities "comes with a price." He noted that it was hypocritical for universities to accept federal money yet deny military recruiters access to students. In 1995 the Solomon Amendment became law under President Bill Clinton.

Schools quickly tried to circumvent the law by claiming their law school or medical school was separate from the other parts of the university and thus only the school that barred recruiters should lose funding. To fix this, Congress amended Solomon in 1997 to require the withholding of all forms of federal education funds, not just those from DoD. In 2000, the Solomon Amendment was clarified to make all parts of a university financially liable if any part of it barred recruiters.

By the end of 1997, Naval Reserve recruiters were no longer having trouble getting access to college students. In the two post-Solomon cases where recruiters were barred, we wrote letters to the presidents of the colleges, explaining what had happened to the recruiter and asked for the schools' side before we forwarded our report to the secretary of Defense. Within the month an apology was received from the school and the recruiter was invited to come to the campus and recruit.

LITIGATION

In September 2003, Forum for Academic and Institutional Rights (FAIR), the lead plaintiff, sued the Department of Defense and the other federal departments whose funds are withheld under the Solomon Amendment. That same year, the U.S. District Court refused to issue an injunction halting the Solomon Amendment from being enforced. The 3rd Circuit Court of Appeals reversed the lower court and ruled in favor of FAIR, November 29, 2004.

In striking down Solomon as unconstitutional, the 3rd Circuit held that Solomon is a violation of First Amendment free speech and freedom of association rights because it unfairly mandated that the law schools helped disseminate a message with which they disagreed. Requiring schools to allow recruiters onto their campuses or lose federal funding gave the impression the schools supported a federal law that discriminates against homosexuals. Two of three judges took the view that having recruiters on campus sent a message to the students and members of the community that law schools accept employment discrimination as a legitimate form of behavior. In writing for the majority, Judge Thomas L. Ambro said the government had failed to prove a compelling need to curtail colleges' First Amendment rights. “The government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal.”

The dissenting judge, Judge Ruggero John Aldisert, stated that Congress' use of its spending power and maintaining the military under the Constitution in this area do not unreasonably burden free speech and thus do not offend the First Amendment. “No court heretofore has ever declared unconstitutional on First Amendment grounds any congressional statute specifically designed to support the military.... The interest of protecting national security outweighs the indirect and attenuated interest of the law school's speech.”

Judge Aldisert went on to say that one cannot conclude that merely letting uniformed recruiters on a campus permits or compels the inference that a law school's anti-discrimination policies are being violated. “The subjective idiosyncratic impressions of some law students, some professors, or some anti-war protestors are not the test. What we know as men and women we cannot forget as judges.” He was disturbed that law schools would ignore the consequences a recruiting ban would have on the military's ability to compete with well-heeled law firms for young legal talent: “The schools 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.”

DISCUSSION

Rep. Richard Pombo (R-Calif.), one of the co-sponsors of the Solomon Amendment, has urged DoD and the attorney general to appeal the recent Court of Appeals decision. Representative Pombo said, “It is the military that ensures the freedom of college faculty and students to voice their opinions in our open and free society.... This is a case in which two misguided judges have made a mockery of our judicial system by exerting their personal political agendas into their ruling.”

The main reason these schools object to military recruiters having access to their students is the federal law known as “Don't Ask, Don't Tell” regarding gender orientation. The plaintiffs and the 3d Circuit repeatedly call it the “military's policy,” when in fact it is federal law, passed by Congress. It was also signed into law, not vetoed, by President Bill Clinton. FAIR and the other plaintiffs act as if the military can pick and choose which federal laws to obey.

The guidelines the schools have in place in addition to gender/sexual orientation discrimination also forbid employers from recruiting students on campus if they discriminate based on age, gender, or disability, which the military also does under federal law. Thus, even if Congress removed gender orientation-the “Don't Ask, Don't Tell” Policy-as a military recruiting criterion, colleges would still be able to bar recruiters due to the “other” forms of discrimination the military must practice under current federal law.

THE DON'T ASK, DON'T TELL POLICY

Because the Solomon litigation has been driven mainly by Congress' Don't Ask, Don't Tell policy, I would be remiss if I did not comment on it. In passing the legislation, Congress noted that the military lifestyle is incompatible with a homosexual one. Technically, under the current

policy, the military is forbidden from discriminating against gays because military officials are forbidden to ask a person's sexual orientation. In fact, applicants are told that they will not be asked their orientation. They are further advised not to give their orientation and if they do announce that they are gay, they will either not be allowed to join the military or will be discharged. Thus complying with the federal law does not discriminate against gays. How can you discriminate if you do not ask recruits if they are gay? Granted, the federal law requires discharge if a person announces he or she is gay or engages in homosexual acts. Again that is Congress speaking.

Some recruiters, when they do go to a university campus, often face protestors or others questioning the military's policies. In many cases, the recruiters' visits have been a waste of time. Congress thus should consider mandating that schools protect recruiters from abuse and ensure that those attending workshops and interviews are not agitators but serious job candidates.

When schools bar military recruiters, they are, in effect, censoring views with which they disagree. Instead of having an open dialogue, colleges are limiting what their students get to hear. One may disagree with the Don't Ask, Don't Tell Policy, but it is federal law. It appears there is a vocal minority restricting the freedom of expression of either another minority view, or maybe a majority view. Is this academic freedom? Why not let the marketplace of ideas decide?

Through 2001, gay rights groups claimed that the military discharged more gays after the Don't Ask, Don't Tell policy came out. They created the impression the military was violating the law and still searching out gays. The truth was that more than 95 percent of the gays being discharged were self referrals-they went to their commanding officers and told them they were gay, knowing they would be discharged with fully honorable discharges. The remaining five percent being forced out usually were discovered because of some allegation of sexual assault, sexual harassment, or for having sex in the barracks or on a ship, which is forbidden for everyone.

CONCLUSION

The Solomon Amendment requirements are thus not limited to "gay rights" issues. Unless the appellate court is reversed on further appeal, the military is now "held hostage" to virtually any alleged free speech or association issue schools want to espouse that involve a government policy or military action with which they disagree. The court's ruling also has the same ramifications for schools of medicine, nursing, and engineering-all of which are essential to our national defense.

Hopefully the Justice Department will successfully appeal the 3rd Circuit's decision. Regardless of the outcome, however, Congress should consider putting Solomon-type language in every education-funding bill, noting that this funding is in part to enhance military preparedness. Perhaps a law should be considered that prohibits any accrediting organization from having

criteria that conflict with federal law, specifically anything that deals with lawful discrimination practices that the military must follow.

Our colleges today would not be half as large as they are today had it not been for the post-World War II GI Bill. For schools to bar recruiters during our current world situation is the height of arrogance and an insult to all veterans, both dead and alive.

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* Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. Commander Johnson resides in Alexandria, Va. He received the Juris Doctor from Mercer University, Macon, Ga., and a Master of Laws from Tulane University School of Law, New Orleans. He is a member of the State Bar of Georgia. He became a member of the Navy's Judge Advocate General's Corps in 1983. Commander Johnson served as the Special Assistant for Legal Affairs, Naval Reserve Recruiting Command, New Orleans, from 1989 to 1999 and dealt regularly with schools barring military recruiters and the enforcement of the Solomon Amendment.

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