



EVADING THE CONSTITUTION: THE SOLOMON AMENDMENT'S VIOLATION OF FREE SPEECH AND THE MILITARY AS WARRIOR IN THE KULTURKAMPF

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I. Introduction

In recent years, the Supreme Court has increasingly allowed Congress to justify conservative social policy with claims of military necessity. Next term, the Supreme Court faces a decision on the Solomon Amendment, which could either reverse or further that trend, in the form of *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*. Through an examination of relevant cases and the Solomon Amendment itself, we will see that, although the Solomon Amendment may well be unconstitutional, it is likely to be upheld by the Supreme Court.

In 1993, Congress passed the so-called "Don't Ask, Don't Tell" policy, forbidding gay and lesbian Americans from serving openly in their nation's military. Since 1990, however, the vast majority of American law schools have forbidden discrimination based on sexual orientation, and as part of that non-discrimination policy, they have refused to allow discriminatory employers – including the United States military – to recruit on campus. In doing so, law schools are exercising their First Amendment rights of expression and free association; by their actions, they declare that anti-gay discrimination is wrong and should not be tolerated. Congress, however, seems to disagree with that message and has threatened to withhold all federal funding from any university where the enforcement of the law school's non-discrimination policy includes barring military recruiter. Claiming that "military discretion" allows the legislature to take any action it deems appropriate in support of military recruitment, Congress has unconstitutionally burdened the First Amendment rights of American law schools, not only by disallowing them to communicate the messages they wish to send, but also, as we shall see, by forcing them to communicate messages they do not endorse. Several law schools are attempting to protect their rights in court, but they are ultimately unlikely to succeed. The Third Circuit's decision in this case is likely to be overturned on appeal, not because the Judges' interpretation of the law was incorrect, but because of the Supreme Court's increasing tendency to uphold conservative social policy under the guise of "military discretion," beyond even the limitations normally imposed by the Constitution.

II. Law Schools Take a Stand and Congress Responds

American law schools have consistently been at the vanguard of society in terms of the protection of the civil rights

of minority groups. Since 1951, the Association of American Law Schools (AALS) – an organization to which the vast majority of American Bar Association recognized law schools belong – has required its member schools "to prohibit discrimination on the basis of race or color."¹ Since 1970, the AALS has required its member schools to prohibit discrimination on the basis of sex.² According to the AALS, "these requirements promote not only diverse student bodies, but also non-discriminatory placement and career opportunities at AALS member schools."³

Beginning in the 1970s, law schools began to recognize that sexual minorities were equally in need of this protection. In 1978, the School of Law at New York University became the first American law school "to deny its career services to employers that discriminated on the basis of sexuality."⁴ Other law schools followed suit in sufficient numbers to ensure that, in 1990, the AALS House of Representatives voted unanimously to require AALS member schools "to include sexual orientation in [their] non-discrimination" policies.⁵ This non-discrimination policy applies not only to hiring and admissions, but also to the annual recruitment process. AALS Regulation 6.19 declares that "A member school... shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity," including equal opportunity regardless of sexual orientation.

Pursuant to United States Code § 10, Clause 654, however, "A member of the [United States] armed forces shall be separated from the armed forces" if "that the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," if "the member has stated that he or she is a homosexual or bisexual, or words to that effect," or if "the member has married or attempted to marry a person known to be of the same biological sex."⁶ Under this so-called "Don't Ask, Don't Tell" policy, gay men and lesbians may not serve openly in the United States armed forces. Because the Armed Forces explicitly discriminate "on the basis of sexual orientation, the military was unable to furnish the requisite certification that it did not discriminate."⁷ In order to fully enforce their non-discrimination policies, therefore, some law schools began to refuse military recruiters assistance in their recruiting efforts, or even access to campus.⁸

In 1994, Representative Gerald Solomon of New York reacted to the proliferation of this non-discrimination policy –

and the associated consequences for military recruiters – by introducing an amendment to the annual defense appropriation bill. The Solomon Amendment was designed, in the words of co-sponsoring Representative Richard Pombo, to “send a message over the wall of the ivory tower of higher education.”⁹ Representative Solomon demanded that Congress “tell recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment rights [sic]. But do not expect Federal Dollars [sic] to support your interference with our military recruiters.”¹⁰

That original version of the Solomon Amendment restricted only Defense Department funds and affected only “the particular school, within the larger university, that declined to assist the military.”¹¹ Even after this version of the amendment became law, however, law schools continued to bar military recruiters from their campuses.¹² Representative Solomon therefore introduced a new version of the Amendment, expanding the funding restrictions to the Departments of Health and Human Services, Labor, Education, and the Department of Transportation.¹³ This version of the Amendment was reaffirmed in 1999, with the addition that Department of Defense funds, in particular, were to be withheld not only from the offending “subelement” of an institution (i.e. the offending school or program within a larger university – in the cases under discussion, the law school) but from the university as a whole.¹⁴

Following the 1999 amendment, law schools avoided these financial consequences by “merely allowing military recruiters to gain access to campuses” while continuing to withhold the various forms of support available to other employers – such as the assistance of career services personnel. Until the fall of 2001, in other words, only those schools who “prohibited, or in effect prevented, military representatives from gaining entry to campuses or access to students on campuses for purposes of military recruiting were penalized.”¹⁵

Following September 11th, 2001, however, the Department of Defense began to reinterpret the Solomon Amendment. Yale University, for example, was informed that it would now have to provide military recruiters not only with access, but with access “equal in quality and scope to that provided to other recruiters.” It was further threatened that, should the university fail to comply, Yale as a whole would forfeit not only “DOD funds, but...all federal funds.”¹⁶ The prospect of losing so many millions of dollars forced law schools to acquiesce. “[E]very law school that receives federal funds had, by the 2003 recruiting season, suspended its nondiscrimination policy as applied to military recruiters.”¹⁷ In 2004, the DOD’s policy was codified as part of a new version of the Solomon Amendment. By law, if any school within a university fails to provide assistance to military recruiters “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,” then the university as a whole forfeits all federal funding.¹⁸

In response to this increasingly burdensome enforcement, several law schools have, in the past several years, filed suit on First Amendment grounds. In *Burbank v. Rumsfeld* (2004), faculty and students of the University of Pennsylvania filed suit in the Eastern District of Pennsylvania, seeking an injunction against enforcement of the Solomon Amendment.¹⁹

In *Burt v. Rumsfeld* (2005), members of the faculty of Yale Law School sought a similar injunction in the US District Court for the District of Connecticut.²⁰ On the 31st of January, 2005, the District Court found in favor of Yale and enjoined the government from enforcing the Solomon Amendment against Yale Law School.²¹ That decision, however, has been appealed to the Second Circuit. Thus far, the only suit to be successful at the appellate level has been *FAIR v. Rumsfeld*, as it was called in the appellate case in 2004.

III. The Solomon Amendment’s Violation of Free Speech

The Forum for Academic and Institutional Rights (FAIR), an association of various law schools and law faculties, along with the Society of American Law Teachers (SALT) and various others, filed suit in the US District Court for the District of New Jersey in the fall of 2003, also seeking an injunction against enforcement of the Solomon Amendment on First Amendment grounds. After being denied a preliminary injunction by the district court, FAIR appealed to the United States Court of Appeals for the Third Circuit, where the case was heard by Judges Ambro, Aldisert, and Stapleton on June 30, 2004.²²

FAIR argues in its brief to the Third Circuit Court of Appeals that law schools are inherently expressive institutions. FAIR declares that law schools “self-consciously define themselves as shapers of future lawyers who can profoundly change our society, its mores and values.”²³ A core aspect of the work of a law school is, in their own estimation, the inculcation of a belief that “diversity and toleration of viewpoints, beliefs, and backgrounds is essential.”²⁴ In short, law schools’ non-discrimination policies are not simply admissions tools. They are declarations of purpose and of bedrock values; they are an instrument of instruction, and therefore expression, demonstrating through word and deed that discrimination based on sexuality, among other features, is inherently wrong. By forcing law schools to accommodate military recruiters, and thus to abet the discriminatory hiring practices of the United States Armed Forces, the Solomon Amendment is encroaching on law schools’ First Amendment rights.

Law schools’ non-discrimination policies, according to FAIR, represent “quintessential expression.”²⁵ Through their non-discrimination policies, law schools are “expressing [their] core values, whether couched in terms of equality, human dignity, justice, respect, or openness.” They are declaring and demonstrating “that it is not enough to pay lip service to foundational principles and that abetting discrimination can be every bit as harmful as discriminating directly.”²⁶ These non-discrimination policies, therefore “lie... at the intersection of three interconnected First Amendment rights: academic freedom, free speech, and freedom of expressive association.”²⁷ The military, the Congress, or the government as a whole may “disagree with a law school’s judgment.” The First Amendment guarantees, however, “that the decision if the law school’s to make, free from government interference.”²⁸ The government in this case, however, *has* interfered with that right. As FAIR argues, the government has violated the First Amendment in three distinct manners.

First, the Solomon Amendment interferes with a law school’s ability “to shape its pedagogy and communicate its

message *as it chooses*.²⁹ By forcing law schools to accommodate a discriminatory employer, the Solomon Amendment “muddles” law schools’ message of non-discrimination.³⁰ Law schools may continue to *claim* a commitment to non-discrimination. When the schools act contrary to that claim, however – whether they do so of their own volition or not – they “lose credibility to preach values of equality, justice, and human dignity,” and give the impression “that the school is not committed to non-discrimination.”³¹ One NYU student quoted in FAIR’s brief to the Third Circuit, for example, declares:

The message I have received over the last two years [since the school acquiesced to the demands of the Solomon Amendment] is that although sexual orientation has been listed in our non-discrimination policy for over two decades, gays and lesbians are *not* regarded as full and equal members of our community...[The NYU School of Law] is now an active instrument of their mistreatment and exclusion.³²

Despite the “ameliorative methods” required by the AALS – such as “posting signs explaining the military’s policy and the Solomon Amendment, hosting public discussions on sexual orientation and discrimination, etc.”³³ – the Solomon Amendment therefore renders law schools incapable of expressing their views on discrimination as they see fit.

Second, not only is the government preventing law schools from expressing their views on discrimination effectively, the Solomon Amendment forces law schools to subsidize “views it abhors, and support a cause against its will” by “providing it with scarce interview space, by lending it resources, and by devoting staff to make appointments for it.”³⁴ The Supreme Court held in *Abood v. Detroit Board of Education* (1977) that to require union members to “subsidize a union’s political activity with pennies from their dues” violated the First Amendment by requiring union members to make a statement, through the allocation of their funds, with which they disagreed.³⁵ Similarly, in *United States v. United Foods* (2001),³⁶ the Court ruled that “forcing mushroom growers to contribute a penny a pound towards collective activities” violated the First Amendment for similar reasons of forced speech.³⁷ The sums of money involved in these cases were comparatively small – mere “pennies.” In the case of law schools, the expenditure is not even a direct payout. Where mushroom growers were making a direct payment, however small, law schools are being forced to devote staff time, resources, and interview space to the military. Like direct payments, each of these requirements represents a financial burden on the law school, however small. By forcing law schools to expend *any* funds in support of military recruiting – and therefore in support of a discriminatory practice with which they disagree – the Solomon Amendment is impermissibly forcing law schools to support speech with which they do not agree.

Third and finally, law schools are not only being forced to *subsidize* the military’s discriminatory message; they are “being forced to speak, in the linguistic or verbal sense.”³⁸ According to FAIR, “demands the military is making of law schools” include:

- Distribute our brochures.
- Post or literature on your bulletin boards.

- Email your students about our imminent arrival.
- Maintain our announcements in your binders for students to review.
- Include our listing in your printed publications.
- Introduce us to individual students and coordinate the logistics of where and when we can talk with them
- Lend us interview rooms, where we can converse with students and tell them why they should join us.
- Give us tables at fairs, where we can post “JAG Corps” table banners and encourage recruits to join us.³⁹

Law schools are being forced to participate actively in the dissemination of the discriminatory message that “Uncle Sam Wants You ... But Only If You’re Straight.”⁴⁰ The Supreme Court has previously ruled that the government cannot “force a citizen to display the state motto on his license plate, force a private utility to distribute unwelcome public service literature in the ‘extra space’ in its billing envelopes, or force a newspaper to provide equal editorial-page space to political candidates it opposes.”⁴¹ Even disregarding any financial burden, each of these cases has been ruled unconstitutional on grounds that the government may not force any private individual or corporation to publicly espouse a belief with which he, she, or it disagrees. Similarly, FAIR argues, the government may not require law schools to disseminate information they view as discriminatory.

Representative Solomon offered his amendment in order to *punish* law schools for expressing a message of non-discrimination with which he disagreed, and for doing so in a manner that he considered disrespectful towards the military.⁴² In passing the Solomon Amendment, Congress did not outright forbid law schools to deny military recruiters access to the law school campus. Instead, the Amendment conditions universities’ receipt of federal funding on the accommodation of the ROTC and military recruiters. In order to receive federal funds, law schools were forced to stop enforcing a non-discrimination policy that Representative Pombo termed a “backhanded slap at the honor and dignity of service in our Nation’s Armed Forces” because of its message that it is wrong for employers to discriminate on the basis of sexual orientation.⁴³

It is important to note, however, that even in the absence of a direct prohibition of the law schools’ sexual orientation non-discrimination policies, enforcement of the Solomon Amendment nevertheless violates the First Amendment. In *Speiser v. Randall* (1958)⁴⁴ the Court announced a doctrine of unconstitutional provisions, under which “the Government may not propose a penalty” nor deny a benefit “to produce a result which it could not command directly” because of constitutional restrictions.⁴⁵ In that case, the Court examined a California statute denying all tax exemptions to any individual who advocated the overthrow of the United States government, or who advocated the support of a foreign nation at war with the United States. While California did not attempt to forbid disloyal speech outright, the Supreme Court ruled that to withhold tax exemptions in order to effect a suppression of free speech was equally unconstitutional. The state may not purposefully restrict speech, whether or not that restriction is accomplished by direct order. Therefore, openly forbidding law schools to deny military recruiters access, and thereby communicate their message of non-discrimination, and

attempting to achieve the same result by withholding federal funds are equally unconstitutional.

These arguments appear to be compelling. The District Court, however, denied FAIR a preliminary injunction on two grounds. First, the court agreed with the arguments presented by the government that the Solomon Amendment regulated not speech, but conduct, and that law schools' ability to speak out against military recruitment outweighed any possibility that a military message with which the law school disagreed might be attributed to the school.⁴⁶ This position has been adequately discredited by the arguments outlined above.

Secondly, the District Court, after determining that the purpose of the Solomon Amendment was not to affect speech, and therefore strict scrutiny was unnecessary, the court applied a balancing of interests, weighing any "unintended" affect on free speech on the one hand against the compelling state interest in military recruitment. The court concluded that any infringement of First Amendment rights by the Solomon Amendment was permissible because such infringement "does not directly or entirely exclude a point of view," and is incidental to a compelling state interest – maintaining the armed forces.⁴⁷

FAIR acknowledges that the government's interest in raising armed forces and "its interest in hiring JAG lawyers" are both compelling.⁴⁸ Even if the court is to apply this balancing of interests, however, FAIR points out that the government has offered no evidence that the Solomon Amendment is necessary for effective military recruitment. The government, FAIR argues, "cannot just waft around a compelling state interest and call it a day; it cannot simply posit the existence of the disease sought to be cured."⁴⁹ While the Third Circuit Court of Appeals agreed that "invoking the importance of a well-trained military is not a substitute for demonstrating that there is an important governmental interest in opening the law schools to military recruiting,"⁵⁰ and therefore granted a preliminary injunction enjoining the government from enforcing the Solomon Amendment, that injunction has been stayed pending an appeal to the Supreme Court.⁵¹ On May 2, 2005, the Court agreed to review the case in their next term, which begins in October.⁵² FAIR is likely to find a far less receptive audience at the Supreme Court than they faced at the Third Circuit Court of Appeals.

IV. The Supreme Court and Deference to the Military under Rehnquist

As Diane Mazur argues in her article, "Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law," the Supreme Court once tried to draw a "careful line...defining the scope of military powers granted to Congress and to the Commander-in-Chief under the Constitution," and thereby limiting the effect of the military on civilian society.⁵³ Under Chief Justice William H. Rehnquist, however, the Court has developed an "understanding that the military is not bound by constitutional requirements in the same way that other governmental institutions are bound."⁵⁴ This judicial deference to the military has grown so powerful that the judiciary "has allowed Congress to use claims of military necessity...as a way of influencing social policy within civilian America – and without the limitations otherwise imposed by the Constitution."⁵⁵ In this case, the government is using the

claim of "military necessity" to affect civilian society's treatment of gays and lesbians – violating the First Amendment in the process – and, under the current Supreme Court, the government is likely to succeed in this endeavor.

A. A Threat to Liberty: Limits on Military Discretion Prior to the Rehnquist Court

According to Mazur, the Supreme Court was once careful to limit the extent to which the military, and particularly military law, could affect civilian society. Mazur argues that:

The most distinctive and noteworthy aspect of the Court's traditional view of civilian-military relations under the Constitution was the bright line drawn between military-related decisions that were deserving of judicial deference and those that were not. Military decisions were not worthy of deference simply because they were military. Military decisions were worthy of deference only when those decisions fell uniquely within the particular grants of power awarded to Congress and delegated to the military under the Constitution, and when substantive judicial review would be destructive of the effective exercise of that power.⁵⁶

Thus, the civil war era *Ex parte Milligan* declared that the military had no jurisdiction over civilians when the civil courts were open, even if the military had a real, compelling interest in trying a particular case.⁵⁷ Following the attack on Pearl Harbor, the Court extended that ruling to circumstances in which the civilian courts were closed by military necessity.⁵⁸ *United States ex rel. Toth v. Quarles* (1955)⁵⁹ denied the military the ability to try former service members in courts martial, even if the alleged offense occurred while in the military.⁶⁰ By 1960, according to Mazur, no circumstance existed under which a court martial could try a civilian.⁶¹ Furthermore, *Trop v. Dulles* (1958),⁶² the Court invalidated a statute imposing loss of citizenship on "servicemembers convicted of desertion" on grounds that, regardless of the needs of military discipline, military punishment could not extend to the denial of civilian rights.⁶³ The "fundamental lesson" of these cases, in Mazur's words, was "that if the exercise of military discretion affects civilians, the military has exceeded the limits of any constitutional immunity from judicial review."⁶⁴ In the 1969 case of *O'Callahan v. Parker*, the Court seemed to confirm this view when it ruled that an off-duty service member, in civilian clothes and off-post, was subject to criminal charges in civilian courts, not in courts martial, even though the military cited the need for comprehensive discipline within the armed services. "The expansion of military discipline beyond its proper domain," the Court warned, "carries with it a threat to liberty."⁶⁵

B. A Separate Society: The Expansion of Military Discretion, and Military Conservatism, Under the Rehnquist Court

Mazur argues that, prior to Chief Justice Rehnquist's appointment, the Court had established a long history of case law delineating the boundaries of military discretion. Since Rehnquist's appointment, the Court has consistently, and, in Mazur's opinion, systematically and intentionally, abolished that line, allowing the military to affect civilian society almost at will. Relying on the precedent of *Orloff v. Willoughby* (1953),

a fairly uncontroversial decision in which the judiciary bowed to the Armed Services' discretion in an area so clearly within the Constitutional mandate of Congress and the military that Constitutional strictures on military discretion were not even mentioned, Justice Rehnquist penned a decision in the case of *Parker v. Levy* (1974), that would form the basis for an entirely new conception of civil-military relations.

Howard Levy, an army doctor, was prosecuted for "conduct unbecoming an officer and a gentleman" and for "disorders and neglects to the prejudice of good order and discipline" under the Uniform Code of Military Justice for his sharp criticism of the war in Vietnam, and particularly for openly calling the Special Forces "liars and thieves and killers of peasants and murderers of women and children."⁶⁶ The case was, in the Court's estimation, clearly about discipline, rather than speech – the right to free speech being somewhat limited while "actually engaged in service to the government." Levy's conviction under the Uniform Military Code of Justice (UCMJ) was therefore upheld.⁶⁷ According to Mazur, however, the outcome of the case was not nearly as important as Rehnquist's language. In his opinion, Rehnquist declared that "the Court has long recognized that the military is, by necessity, a specialized society separate from civilian society and a society apart from civilian society."⁶⁸

This language has, first of all, allowed the Court to "disregard constitutional limitations on the scope of its deference to the military."⁶⁹ In *Solorio v. United States* (1987), for example, the Court ruled that a coastguardsman accused of sexual assault in a private residence should be tried in a court martial, even though the crime had no "service connection." The Court thus overturned its ruling in *O'Callahan v. Parker* (1969), declaring that service-members are subject to military, rather than civilian, prosecution at all times.⁷⁰

More significant, in Mazur's estimation, is the fact that the idea of the military as a "separate society" has allowed the military to re-conceptualize itself not only as "a society apart from," but as "a society above...its lesser civilian counterpart."⁷¹ The military does not *need* constitutional restrictions, because the military is subject to a higher, stricter code of conduct than is civilian society.⁷² We are left with "a military that is now more *apart from* the people than *of* the people."⁷³ Moreover, because the military is thus shielded from the ever-broadening requirements of constitutional interpretation, the Armed Services have become a bastion of social conservatism. *Parker v. Levy* (1974) "facilitate[d] a trend of court-sanctioned social conservatism...justified [only] by claims of military necessity."⁷⁴ According to Mazur, therefore, prior to Rehnquist, "Deference to the military was a question of constitutional structure and separation of power, not a means of resisting cultural change. Today, in contrast, judicial deference to the military serves as a vehicle for social conservatism, and nothing more."⁷⁵

That the military has, over recent decades, increasingly become a bastion of social conservatism is borne out by Ole R. Holsti's statistical research, as presented in his article "A Widening Gap between the US Military and Society?: Some Evidence, 1976-1996."⁷⁶ For example, according to Holsti's statistics, in 1976, 33% of service-members identified as Republicans, and 12% as Democrats, as compared to 25% Republican and 42% Democrat for civilians. While the

difference between military and civilian identifications was already significant, the gap widened considerably over the next twenty years. In 1996, 67% of service-members identified as Republicans, and only 7% as Democrats, where the percentages for civilians were 34% and 41% respectively.⁷⁷ Holsti's data demonstrates that "[o]pen identification with the Republican Party is becoming the norm."⁷⁸

Holsti goes on to argue that "the gap between the military and civilian society gives prominence to the military's contempt for a society that it views as materialistic, hedonistic, and decadent," and therefore, following the implication of Rehnquist's language in *Parker v. Levy*, inferior.⁷⁹ The differences between military and civilian leaders on social issues, such as the right to choose, the right of homosexuals to teach in public schools, and school prayer, are "consistently very large," and in the case of such issues as the death penalty, they continue to widen.⁸⁰ These differences in and of themselves are not necessarily problematic. However, when coupled with the military's increasing power to affect widespread social practices, the social conservatism of the military may pose a threat to civilian society, particularly minorities.

C. Military Discretion as a Weapon in the Culture Wars

The increasing social conservatism within the military is particularly problematic, according to Mazur, because the Court under Rehnquist has allowed the military to become a tool in the *kulturkampf*.⁸¹ The Court has allowed military discretion to take precedence over any "bright line" between civilian and military societies, "even if claims of military necessity were employed *for the purpose of* imposing collateral consequences on civilians and influencing social policy within civilian society."⁸² In *Rostker v. Goldberg* (1981), for example, the Court offered little discussion of the effect that the "developing principles of equal protection on the basis of sex" would have on military's refusal to allow women to register for the draft.⁸³ The government declared the issue to be of military necessity, and therefore Rehnquist declared discussion to be over.⁸⁴ Even though the military itself "believed that registration of women would promote military effectiveness," the government could forbid the registration solely because of "the current [civilian] thinking as to the place of women in the Armed Services." Mazur states, "Rather than require the government to demonstrate a specific military need to *exclude* women from registration, it was permissible to reverse the usual standard of constitutional review and ask instead whether there was a military necessity to *include* them."⁸⁵

The government was allowed to raise the bugbear of "military deference" specifically *in order to* affect the place of women in society as a whole, including civilian society. Rehnquist had, in other words, created a "sub-rational" level of scrutiny for matters relating to the military: whatever the military says goes (as does anything said by the government, acting under the guise of the military power granted it by the Constitution). This principle was reaffirmed when, in the face of impending changes to Navy regulations that would allow women to serve on board submarines, Congress passed legislation expressly forbidding such a change – specifically, according to Mazur, to secure traditional women's roles – and without any interference from the courts.⁸⁶ In the passing and continual strengthening of the Solomon Amendment, the Congress is exercising similar so-called

military authority in its attempt to affect the position of gays and lesbians in society as a whole.

As the Third Circuit points out, the Solomon Amendment was initially passed *over the objections* of the Department of Defense. The DOD “objected to the proposed amendment as unnecessary and duplicative,” and argued that “withholding funds from universities could potentially be harmful to defense research initiatives.”⁸⁷ Representative Pombo argued, however, that Congress needed to:

‘send a message over the wall of the ivory tower of higher education’ that colleges’ and universities’ ‘starry-eyed idealism comes with a price. If they are too good – or too righteous – to treat our Nation’s military with the respect it deserves[,] then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America.’⁸⁸

The Solomon Amendment, according to the Congressional Record, is not just about recruiting. It is about sending a message. It is about forcing law schools to retract their implied statement “that employment in the Armed Forces...is less honorable” than in employment that does not discriminate based on sexuality.⁸⁹ Because its intended effect is on *the content of a message*, rather than simply on recruitment numbers, the Solomon Amendment is not only clearly in violation of the First Amendment, it is a clear example of the use of military discretion to effect civilian society, as outlined by Diane Mazur.

Moreover, Congress has been careful to exempt those schools with reasons not to allow military recruiters *other* than protest from penalty under the Solomon Amendment. Law schools that do not allow *any* recruiters on campus are exempted. Law schools that allow recruiters only upon student request are exempted if there is a lack of student interest, and law schools with a “longstanding policy of pacifism based on historical religious affiliation” are exempted.⁹⁰ According to FAIR, “In short, every conceivable non-protest reason to exclude the military is exempted; the government has targeted only law schools motivated by disagreement with some policy or another of the military.”⁹¹ The Solomon Amendment was passed in reaction to law schools’ application of their sexual-orientation non-discrimination policies, and was careful to exempt other possible reasons for banning military recruiters. Whatever other, recruitment-related motives its members may hold, Congress is clearly using the Solomon Amendment at least in part in order to influence the place of gays and lesbians in civilian America under the shield of “military discretion.”

V. Conclusion

American law schools, particularly as represented by the Association of American Law Schools, stand committed to the equality of gay men and lesbians in American society. As part of that commitment, law schools have exercised their First Amendment rights of free speech, academic freedom, and freedom of expressive association to bar recruiters who discriminate based on sexual-orientation, including the military, from their campuses. Congress, however, disagrees with the *message of non-discrimination* that law schools are sending.

Law schools are declaring that sexual-orientation based discrimination is wrong, that the military’s anti-gay policy is wrong, and that the military thus has a mark against its honor. Indignant at any such uppity criticism of the military, Congress has acted *in violation of the First Amendment* to coerce law schools into withdrawing that message, or at the very least limiting its effectiveness. The government has been able to accomplish this feat largely because, since the appointment of Justice Rehnquist, the military has become a bastion of social conservatism, and a tool to be used in the *kulturkampf*.

The Congress of the United States disagrees with American law schools’ position that discrimination against gays and lesbians is wrong, even in the context of military recruitment. Since the 1994 passage of the Solomon Amendment, and with increasing force with each successive version of the legislation, therefore, Congress has unconstitutionally attempted to prevent American law schools from effectively exercising their First Amendment rights in defense of gays and lesbians by threatening to withhold federal funds from schools that insist on fully enforcing their non-discrimination policies.

Unfortunately for the law schools, and for gay and lesbian law students, the Supreme Court under William Rehnquist has been extremely deferential to claims of military necessity. While the recent Guantánamo Bay cases – *Rasul v. Bush* (2004) and *Al Odah v. United States* (2004), in which the Court ruled that American civil courts have jurisdiction to review the detention of prisoners at Guantánamo Bay, and that the writ of habeas corpus extends to that jurisdiction – may seem imply that the Court is reversing direction regard, this is most likely not the case. First, the circumstances surrounding those cases were not only unique, they were extreme. Secondly, in the Guantánamo Bay cases the government argued that military discretion required that prisoners be held outside the jurisdiction of the American courts. The Court was therefore not ruling on military discretion in general; the justices were asserting that the authority of the Court ultimately outweighs military discretion. Moreover, despite the Court’s ruling in *Lawrence v. Texas* (2003),⁹² the Court is unlikely to reverse its position of deference to the military for homosexuals. The privacy argument put forth in that opinion does not relate directly to the First Amendment claims being made in *Rumsfeld v. FAIR*. In addition, any claims that the Court is softening towards the position of gays and lesbians in general must be viewed in light of the *Lawrence* opinion’s clear insistence that that decision has no bearing on governmental recognition of homosexual relationships. The Court may not be as prejudiced against gays and lesbians as it was in 1986, when *Bowers v. Hardwick* affirmed the right of Georgia to prosecute homosexual acts, but the Court remains far from accepting.

Once it reaches the Supreme Court, this case will not only be about the law; it will be about public policy regarding gays and lesbians. Under Rehnquist, the Court has been all too willing to differ to Congress or the military on grounds of “military discretion,” even where military expression affects civilian society. In the case of *Rumsfeld v. FAIR*, then, the Court will likely be only too happy to defer to Congress in its wisdom. Having to endure and support the presence of a discriminatory employer may be an insult both to law schools and to gays and lesbians, but it is an insult to which they likely will have to become accustomed.

Endnotes

- ¹ Brief of *Amicus Curiae* Association of American Law Schools (AALS) in Support of Appellants at 5, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ² Brief of *Amicus Curiae* Association of American Law Schools (AALS) in Support of Appellants at 5, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³ Brief of *Amicus Curiae* Association of American Law Schools (AALS) in Support of Appellants at 5, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁴ Dan Bell. "The Solomon Amendment and the Don't Ask, Don't Tell Policy: Gays and Lesbian Lawyers in the Military." *New York University School of Law News, Events, and Calendars*. Available at: <<http://www.law.nyu.edu/news/calendars/2004_2005/LGBTprotest/>>.
- ⁵ Brief of *Amicus Curiae* Association of American Law Schools (AALS) in Support of Appellants at 5, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁶ 10 United States Code Annotated §654, cl. 15 (The United States Code, Annotated, or U.S.C.A., is published by WestLaw, and is one of two commercially available versions of the United States Code that provide the standard reference for practicing attorneys.)
- ⁷ Brief for Appellants at 6, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁸ Brief for Appellants at 8, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁹ 140 Congressional Record 11, 441.
- ¹⁰ 140 Congressional Record 11, 439.
- ¹¹ Brief for Appellants at 9, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ¹² Brief for the Appellees at 5, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ¹³ Brief for the Appellees at 7, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ¹⁴ *FAIR v. Rumsfeld*, 390 F.3d 219, 226 (2004).
- ¹⁵ *FAIR v. Rumsfeld*, 390 F.3d 227 (2004) (internal editing and quotation marks omitted).
- ¹⁶ *FAIR v. Rumsfeld*, 390 F.3d 227 (2004).
- ¹⁷ *FAIR v. Rumsfeld*, 390 F.3d 228 (2004).
- ¹⁸ 10 United States Code § 983(b)
- ¹⁹ Complaint of the Faculty of the University of Pennsylvania, *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, (E. Pa 2004).
- ²⁰ Complaint of the Faculty of the Yale Law School, *Burt v. Rumsfeld*, 354 F. Supp. 2D 156 (D. Conn. 2004).
- ²¹ *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2004).
- ²² *FAIR v. Rumsfeld* 390 F.3d. 223 (2004).
- ²³ Brief for Appellants at 4, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ²⁴ Brief for Appellants at 4, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ²⁵ Brief for Appellants at 20, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ²⁶ Brief for Appellants at 20, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ²⁷ Brief for Appellants at 21, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ²⁸ Brief of *Amicus Curiae* Association of American Law Schools (AALS) in Support of Appellants at 21, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ²⁹ Brief for Appellants at 31, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³⁰ Brief for Appellants at 13, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³¹ Brief for Appellants at 13, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³² Brief for Appellants at 14, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³³ Brief for Appellants at 3, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³⁴ Brief for Appellants at 30 and 31, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³⁵ *Abood v. Detroit Board of Education*, 431 US 209 (1977).
- ³⁶ *United States v. United Foods*, 533 US 405 (2001).
- ³⁷ Brief for Appellants at 31, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³⁸ Brief for Appellants at 32, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ³⁹ Reply Brief for Appellants at 1, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁴⁰ Brief for Appellants at 32, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁴¹ Brief for Appellants at 32, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁴² 140 Congressional Record H3863.
- ⁴³ 140 Congressional Record 11,441.
- ⁴⁴ *Speiser v. Randall*, 357 U.S. 513 (1958).
- ⁴⁵ *FAIR v. Rumsfeld*, 390 F.3d 229 (2004) (internal editing, quotation marks, and citations omitted).
- ⁴⁶ Brief for Appellants at 37, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁴⁷ Brief for Appellants at 37, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁴⁸ Brief for Appellants at 39, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁴⁹ Brief for Appellants at 39, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).
- ⁵⁰ *FAIR v. Rumsfeld*, 390 F.3d 245 (2004).
- ⁵¹ Order to Stay the Mandate, *FAIR v. Rumsfeld*, No. 03-4433 available at: <<<http://www.law.georgetown.edu/solomon/documents/FAIR3CirStay.pdf>>> (January 20, 2005).
- ⁵² Hope Yen, *High Court to Review Law Barring Campus Recruiters*, *Washington Post*, May 2, 2005; Available at: <<<http://www.washingtonpost.com/wp-dyn/content/article/2005/05/02/AR2005050200456.html>>>.
- ⁵³ Diane Mazur. "Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law." *77 Indiana Law Journal* 701, 706 (2002)
- ⁵⁴ Mazur, 703.
- ⁵⁵ Mazur, 705.
- ⁵⁶ Mazur, 717.
- ⁵⁷ Mazur, 720.
- ⁵⁸ Mazur, 721.
- ⁵⁹ *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).
- ⁶⁰ Mazur, 722-723.
- ⁶¹ Mazur, 725, note 151.

⁶² *Trop v. Dulles*, 356 U.S. 86 (1958).

⁶³ Mazur, 729.

⁶⁴ Mazur, 721.

⁶⁵ *O'Callahan*, 395 U.S. at 260-261. Cited in Mazur at 706.

⁶⁶ Mazur, 741.

⁶⁷ Mazur, 743.

⁶⁸ Mazur, 743, citing *Levy*, 417 US at 743, 744.

⁶⁹ Mazur, 751.

⁷⁰ Mazur, 752.

⁷¹ Mazur, 747.

⁷² Mazur, 752.

⁷³ Mazur, 755 (emphasis in the original).

⁷⁴ Mazur, 743.

⁷⁵ Mazur, 737.

⁷⁶ Ole R. Holsti, "A Widening Gap between the US Military and Society?: Some Evidence, 1976-1996." *International Security*, Vol. 23, No. 3 (Winter, 1998-199), 5-42.

⁷⁷ Holsti, 11, Table 1.

⁷⁸ Thomas Ricks, quoted in Holsti at 11.

⁷⁹ Holsti, 28.

⁸⁰ Holsti, 30.

⁸¹ Mazur, 759.

⁸² Mazur, 759 (emphasis in the original).

⁸³ Mazur, 760.

⁸⁴ Mazur, 762.

⁸⁵ Mazur, 763.

⁸⁶ Mazur, 777-778.

⁸⁷ *FAIR v. Rumsfeld*, 390 F.3d 226 (2004) (internal quotation marks omitted).

⁸⁸ 140 Congressional Record H3863.

⁸⁹ Brief for Appellants at 27, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).

⁹⁰ 10 United States Code § 983(c)

⁹¹ Brief for Appellants at 29, *FAIR v. Rumsfeld*, 390 F.3d 219 (2004).

⁹² *Lawrence v. Texas*, 539 U.S. 558 (2003).