Civil Rights

Defenders of Freedom Banned from Campus: The Third Circuit Enjoins Enforcement of the Solomon Amendment on First Amendment Grounds

*By Douglas H. Wood**

Congress enacted the Solomon Amendment in 1994 to guarantee recruiters for the United States military equal access to the campus of a college or university that receives federal funding. Specifically, the Solomon Amendment requires schools receiving federal funds to provide military recruiters access "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] Congress has recognized that on-campus military recruiting is critical to ensuring that the military has sufficient access to encourage the best and brightest to serve, especially given the heightened emphasis on national security in recent years. The Department of Defense has explained that discriminatory treatment of military recruiters "sends the message that employment in the Armed Forces is less honorable or desirable than employment with other organizations," thereby undermining the military mission. *See Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219, 227-28 (3d Cir. 2004).

Nevertheless, many schools have objected to the Solomon Amendment, arguing that the mere cooperation of their career services staff with United States military recruiters on an equal basis with any civilian recruiter would violate university non-discrimination policies in light of the military's "Don't ask, don't tell" policy. In their view, the presence of recruiters on campus would send a message that the school endorses the military's policy, in violation of their internal policies prohibiting discrimination on the basis of sexual orientation. Schools have sought to express their disapproval by barring the military from recruiting on campus on an equal basis with other employers.

The United States Court of Appeals for the Third Circuit recently awarded a significant victory to those who would bar on-campus military recruiting, by granting preliminary injunctive relief to "FAIR" (Forum for Academic and Institutional Rights) and others, enjoining enforcement of the Solomon Amendment on certain law school campuses. [2] Over a vigorous dissent, the Third Circuit panel concluded that the Solomon Amendment compromises law schools' First Amendment rights, and is therefore an unconstitutional condition on the use of federal funds.

The law schools seeking the injunction all have a non-discrimination policy like the following:

> The School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation.... Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy. [3]

The law schools view the military as discriminating on the basis of sexual orientation because the military separates from service those who "demonstrate a propensity or intent to engage in homosexual acts." [4] The law schools sued, arguing that the Solomon Amendment imposes a penalty for the legitimate exercise of their First Amendment rights and is therefore an unconstitutional condition on the use of federal funds.

The interplay between the majority and dissent in the Third Circuit decision is best understood by the truism that where one begins often determines where one ends. As detailed below, whereas the majority's analysis focuses almost exclusively on what the dissent properly calls "the all-pervasive approach that this is a case of First Amendment protection," the dissent takes a more nuanced approach that gives due consideration to Congress's constitutional power to support the military alongside First Amendment considerations.[5]

The majority begins and ends with the supreme importance of the First Amendment. With this focus in mind, the majority asserts first, that law schools are expressive associations whose First Amendment right to disseminate their chosen message is impaired by the inclusion of military recruiters on their campuses; and second, that the federal government cannot compel law schools to assist recruiters in the expressive act of recruiting. Because the Solomon Amendment allegedly violates the First Amendment in these two ways, either of which would trigger strict scrutiny, the majority reasons that the government is not using the least restrictive means of recruiting talented lawyers because, for example, the military could recruit talented lawyers by advertising on television rather than compelling school career services to cooperate with their recruiting efforts. The Solomon Amendment does not survive this strict scrutiny, the majority asserts, and is therefore unconstitutional.

In the majority's view, this case is about two aspects of the law schools' First Amendment rights—their freedom of expressive association and their freedom from being compelled to assist the government's expressive act of recruiting.

The majority's expressive association analysis proceeds by making an analogy between the facts in the present case and the facts in *Boy Scouts of America v. Dale*.[6] In *Dale*,

the Supreme Court held a state public accommodations law could not constitutionally be used to force the Boy Scouts to accept an openly gay scoutmaster.[7] The analogy is all the more persuasive because *Dale* involved upholding the right of a group to exclude a homosexual scout master; here, the majority holds that the law schools have the right to exclude those who exclude homosexuals. The majority makes the analogy to *Dale* as follows:

> Just as the Boy Scouts believed that 'homosexual conduct is inconsistent with the Scout Oath,' the law schools believe that employment discrimination is inconsistent with their commitment to justice and fairness. Just as the Boy Scouts maintained that 'homosexuals do not provide a role model consistent with the expectations of Scouting families,' the law schools maintain that military recruiters engaging in exclusionary hiring 'do not provide a role model consistent with the expectations of' their students and the legal community. Just as the Boy Scouts endeavored to 'inculcate youth with the Boy Scouts' values—both expressively and by example,' the law schools endeavor to 'inculcate' their students with their chosen values by expression and example in the promulgation and enforcement of their nondiscrimination policies. And just as Dale's presence in the Boy Scouts would, at the very least, force the organization to 'send a message, both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior,' the presence of military recruiters 'would, at the very least, force the law schools to send a message,' both to students and the legal community, that the law schools 'accept' employment discrimination 'as a legitimate form of behavior.'[8]

The majority purports to follow the elements of an expressive association claim under *Dale*: whether the law schools are expressive associations, whether state action significantly affects the law schools' ability to advocate their viewpoint, and whether the government's interest justifies the burden it imposes on the law schools. Each of these elements is satisfied in the eyes of the majority. As detailed below, however, the majority's conclusion that allowing recruiters on campus is forced *expressive activity* by the law schools does not withstand scrutiny. As we shall also see below, the majority's assertion that "we need not linger" on the third element—whether the government's interest justifies the burden it imposes on the laws schools—exposes the one-sidedness of its approach as compared to the dissent.[9]

The majority next scrutinizes the extent to which the Solomon Amendment compels law schools to subsidize a message with which they disagree. The majority likens the law school's position to that of the parade organizers in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*,[10] who were compelled by a state non-discrimination statute to include an unwelcome gay, lesbian and bisexual contingent in their parade. In *Hurley*, the Court upheld the right of the parade organizers to exclude this homosexual message in their parade; here, the majority employs *Hurley* to uphold the right to exclude those who exclude homosexuals from campus recruiting. If military recruiters were permitted, in the majority's view, the law schools would be compelled to "*convey the message* that all employers are equal"—even those who allegedly violate the schools' non-discrimination policy—when they would rather "only *open their fora* and use their resources to support employers who, in their eyes, do not discriminate against gays."[11]

This is the key point of contention between the majority and the dissent: whether allowing recruiters equal access to campus is expressive activity. For the majority, the very presence of recruiters on campus *conveys a message* of school endorsement. The majority views the campus as a forum which should be open only to those of whom the university administration approves. Being forced to open their forum to employers who supposedly discriminate is likened to compelling the law schools to subsidize a message with which they disagree. By contrast, for the dissent, to condition federal funds on recruiters having equal access to campus is to require schools to do something, not to say something. Schools are neither prohibited from criticizing nor compelled to endorse anything about the United States military; they are simply asked to allow recruiters on campus on an equal footing with other recruiters. For the dissent, that someone might construe a "message" from the law schools permitting military recruiters on campus is beside the point. Congress did not enact the law to prohibit free expression, but to help support the military, and supporting the military is something Congress is very specifically empowered to do.

The appropriate lens, then, for the dissent is not free expression and strict scrutiny, but a balancing of Congress's power to support the military against the law schools' interest in controlling its expressive message.

Not surprisingly, the dissent begins by setting the general context for a constitutional challenge to a statute like the Solomon Amendment, pointing out the presumption of constitutionality for congressional statutes, especially those bottomed in Congress's power to support the military. [12] As the dissent points out, this is far from a pure First Amendment case. No court, after all, has ever declared unconstitutional on First Amendment grounds a statute solely designed to support the military. [13] Applying the "balance-of-interests" test from *Roberts* v. *United States Jaycees,*[14] the dissent begins by asking whether any First Amendment interest of the law schools trumps the Article I powers of Congress to provide for a military; Congress has an Article I power to provide for the general defense, while the law schools have a First Amendment interest in self-expression.[15] The dissent points out that in weighing these competing concerns, courts consistently defer in military matters to the prior weighing of competing interests by Congress. [16] Indeed, "Judicial deference is at its apogee when reviewing congressional decision making in the realm of military affairs."[17] Deference is re-

quired because the competence of courts relative to that of Congress and the President could not be lower than it is in the area of formulating military policy.

Taking on the majority's analogy to expressive activity in *Dale*, the dissent points out that unlike attempted government action in *Dale*—forcing a group to accept a gay scout leader against its wishes—the Solomon Amendment does not compel membership.[18] It does not compel any law school to hire certain faculty or admit certain individuals as students. It does not force inclusion of any members; it merely permits the transient presence of outsiders on equal terms with other outsiders. Moreover, law school recruiting, unlike Scout troop leadership, is not intended to instill the organization's values or to convey any message endorsed by the school. At its core, the application of the Solomon Amendment to campus is not about expression, but about action—allowing the equal access of recruiters to campus.

The dissent also directly addresses the majority's compelled speech argument by distinguishing the present case from *Hurley*. Unlike the parade in *Hurley*, recruiting is undertaken not for expressive purposes by the law school, but for instrumental reasons by the recruiter—finding talented lawyers to hire, or in the case of the military, to commission as officers. Also unlike the parade organizers in *Hurley*, the dissent sees little risk that the inclusion of recruiters on campus will lead others to attribute a message to the law school. The dissent questions the majority's notion that a permissible factual inference may be properly drawn that the law schools' anti-discrimination policies are violated from the transient presence of a military recruiter on campus. Does it even logically follow from seeing a recruiter on campus that the law school endorses the military's "Don't Ask, Don't Tell" policy? [19] As the dissent remarks:

> A participant in a military operation cannot be ipso facto denigrated as a member of a discriminatory institution. And conjuring up such an image is the cornerstone of Appellant's First Amendment argument. [20]

And even if recruiting were expression and could be attributed to the law school, the First Amendment provides more latitude for compelled financial support of government speech than for compelled support of private speech, such as that at issue in *Hurley*.[21]

Having countered the majority's two main arguments—expressive association and compelled speech—the dissent states its affirmative analysis for determining the "proper measure" of the competing interests of providing for the general defense on the one hand versus safeguarding academic self-expression on the other. The most analogous case for the law schools' claim based on self-expression is *United States* v. *O'Brien*.[22] There, plaintiff claimed that burning a draft card was "symbolic expression," protected by the First Amendment.[23] But the Court ruled that the government was well within its rights to ban the burning of an important military record even if doing so did incidentally burden "symbolic expression."[24] The primary purpose of prohibiting burning a draft card is to make possible the constitutionally legitimate government activity of running a selective service system and providing for the common defense. Even though some expressive conduct might be impeded, the ban was proper because its purpose was not to curtail expression, but to preserve an important military record provided for by Congress pursuant to its power to support a military. Analogously, the law schools argue that barring recruiters from campus is "symbolic expression" protected by the First Amendment from being penalized by the government. As in the draft card-burning case, however, the purpose of the penalty here would not be to curtail expression, but to further the important and difficult military objective of recruiting qualified officers. And the government is well within its rights to penalize barring recruiters from campus even if doing so does incidentally burden "symbolic expression." Moreover, as the dissent points out, the Solomon Amendment does not condition federal funds on the absence of campus criticism, but on whether the law schools deny equal access to recruiters.

To the extent the law schools seek to convey a message, not by speaking, but by engaging in the symbolic protest of excluding recruiters from equal access to campus, as the Court in *O'Brien* majestically declared: "We cannot accept the view that an apparently endless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[25] In any event, requiring equal access to campus for recruiters only incidentally burdens expression. The primary purpose of the Solomon Amendment is to make possible the constitutionally legitimate government activity of recruiting for the military and providing for the common defense, not to affect any such "message."

Finally, as the dissent concludes, "What disturbs me personally and as a judge is that the law schools seem to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought of the effect of their action on the supply of military lawyers and military judges in the operation of the Uniform Code of Military Justice."[26] As anyone with military experience can attest, recruiting is important and challenging duty; the majority's dismissal of law schools' interference with that process and suggestion that alternative mechanisms would be sufficiently effective, fails to account for the realities of military recruiting. The dissent points out the further irony of the majority's rejection of military necessity: "They [the law 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."[27]

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Footnotes

[1]10 U.S.C. § 983(b).

[2]*See id.*

[3]*Id.* at 225.

[4]*Id*.

[5]*Id.* at 246-47.

[6]Boy Scouts of America v. Dale 530 U.S. 640 (2000).

[7]*See id.* 644.

[8]390 F.3d at 232 (internal citations omitted).

[9]*See id.* at 234.

[10]Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 9515 U.S. 557 (1995)

[11]390 F.3d at 238 (emphasis added).

[12]*Id.* at 247.

[13]*Id*.

[14]*Roberts v. United States Jaycees* 468 U.S. 609 (1984)

[15]390 F.3d at 247 (Aldisert, J., dissenting).

[16]*Id.* at 254.

[17]*Id*.

[18]*See* 390 F.3d at 259-60 (citing *Dale* at 644, 649).

[19]*See* 390 F.3d at 252.

[20]*Id*.

[21]*See id.* at 259.

[22]United States v. O'Brien, 20 391 U.S. 367 (1968).

[23]*Id.* at 369-70.

[24]*Id.* at 376.

[25]391 U.S. at 376

[26]24390 F.3d at 255.

[27]*Id*.