PROFESSIONAL RESPONSIBILITY

AN OFFER THEY WON'T REFUSE

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Editor's Note: This article was written before the 8-0 decision handed down by the United States Supreme Court in* Rumsfeld v. FAIR *on March 6, 2006, in which the Court ruled that the Solomon Amendment does not violate the right to free speech when it forces law schools to allow a "discriminatory employer" such as the military on campus.

On December 6, 2005, a group of law schools, professors and students asked the Supreme Court to strike down the Solomon Amendment, a federal law that conditions funding for universities on the requirement that the universities afford military recruiters the same access to students that they grant other employers. This group told the Court that enabling military recruiters to interview students for careers in the Judge Advocate General's (JAG) Corps in law school facilities is unconstitutional because the Amendment thereby compels the law schools to endorse "the military's. . .explicit policy" of discriminating on the basis of sexual orientation. Not only are the law schools and other complainants wrong on the law and the facts, but their attack on equal access to campuses for JAG recruiters, if successful, would help perpetuate one of the worst legacies of the Vietnam War: The divide between the American academy and the American military.

This divide between universities and the military can be seen in the law schools' challenge to what they repeatedly and erroneously label as a *military* policy: the mandatory "Don't Ask, Don't Tell" policy adopted by Congress and signed by President Clinton. These law schools (unlike a coalition of law school faculty and students who have filed a brief with the Court opposing complainants) disguise the fact that the military is simply following the directive of *Congress* to exclude openly gay service members. Any other behavior by "the military" would (we hope) raise far more serious issues than this lawsuit does, because it would mean military leaders were ignoring their civilian (and constitutional) superiors.

Ironically then, what the law schools seek to do is penalize the military for adhering to the rule of law. Of course, mischaracterizing the issue by declaring that the military is engaged in "invidious discrimination" instead of legally mandated behavior allowed plaintiffs' lead counsel to claim on the front page of *The New York Times* that striking the Solomon Amendment would affirm law schools' right to exclude "bigots." But compliance with a federal statutory obligation, which the complaining law schools themselves accept as valid, is profoundly different from the sort of voluntary—and sometimes illegal—behavior at which law schools' antidiscrimination policies are aimed. The failure of the law schools to acknowledge this distinction suggests the deeper problem in American higher education.

Law schools, and universities generally, must be open forums where academic freedom encourages all sides to be heard. It is to foster open discussion of all issues that we reward faculty with lifetime tenure in their jobs, a rarity in today's economy, and fund state universities that house even the most virulent critics of American society. The further irony is that, while loudly complaining about the alleged infringement on their right to speak (as though they would be taken to adopt the personnel policies of employers allowed to recruit), the law schools are seeking to restrict their students' freedom of inquiry.

In a competitive market, of course, such limitations on access would likely succumb to market pressures, for schools with more employers would out-compete schools with fewer. In a competitive market Congress would have no need to be concerned about any individual law school's behavior toward JAG recruiters (or anyone else). But legal education is not a fully competitive marketplace, and has not been for almost a hundred years. The potent combination of the American Bar Association and the law school trade association, the Association of American Law Schools (AALS), has dampened competition and distorted market forces.

In the *Journal of Legal Education,* law professor George Shepherd recently argued that these two organizations acting together require American law schools to engage in a wide range of cost-increasing behavior that help price legal education out of the reach of the poor, including many minorities, while primarily benefiting the faculty. Regarding the case under discussion, an AALS policy would require essentially all law schools to make their career services unavailable to JAG recruiters. Congress, in the exercise of its constitutional power to "raise and support Armies," successfully countered this lack of competition by bribing universities to override their law schools and allow JAG recruitment on an equal footing. Having lost the special position sought by their anticompetitive behavior, law schools are now asking the courts, among other things, to restore it.

Law schools represent a privileged segment of the academic community generally, and many of the complaining law schools are distinctly more selective than most. It is equal access to their students which these schools would deny at a time when the best qualified JAG officers are needed to confront the difficult questions facing our armed forces today. The American military's commitment to the rule of law is so strong that JAG officers play an active role

in advising combat operations and other defense policies, as well as developing and executing military justice standards, which is why supporting the military's access to the broadest and best pool of future lawyers is critically important.

This is the ultimate irony the complaining law schools create: They seek to deprive the military of graduates exposed to the values they claim to have taught. The impact of their denying equal access contributes to the perception of the continuing role class plays in the makeup of military manpower, a characteristic intensified by the all-volunteer nature of the force since the draft ended a generation ago. If these law schools are indeed committed to the notion of justice and equal treatment, enriching the ranks of military lawyers with their graduates and sharing the sacrifices of military service should be an important goal, not one cast aside in favor of contesting a statutory personnel policy this case cannot affect while perhaps reliving fond memories of some faculty members' days on the barricades of the 1960s.

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