Lacking The Wisdom of Solomon

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Law professors' misguided opposition to the Solomon Amendment.

On Tuesday (December 6), the Supreme Court will hear arguments in *Rumsfeld* v. *FAIR*, a case that pits a broad group of law professors against the federal government and raises critical issues about national security, constitutional law, and the role of the university in a free society.

FAIR (Forum for Academic and Institutional Rights, Inc.) is an association of 36 law schools and law faculties (24 of which are willing to be named publicly). The law professors–if you count friend of the Court briefs this includes a substantial number of faculty from Harvard, Yale, Stanford, other top ten law schools, and many others from laws schools from around the country–are challenging the constitutionality of the Solomon Amendment. Enacted in 1994 and revised several times, the Solomon Amendment today requires universities either to permit military recruiters to come to campus and meet with 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," or lose the federal funds universities receive in support of academic work.

The law professors contend that the Solomon Amendment violates their First Amendment rights to freedom of speech and association. It does this, they claim, by forcing law schools to create an exception to their generally applicable anti-discrimination policy, which bans employers that discriminate on the basis of race, ethnicity, sex, or sexual orientation from recruiting on campus.

Under this policy, law schools want to bar military recruiters, or wish to subject them to special conditions when they come on campus. This is because of the military's "Don't Ask, Don't Tell" policy concerning gays and lesbians, which was instituted in 1993 under President Clinton. The law professors, however, do not challenge the constitutionality of "Don't Ask, Don't Tell." Nor do they seek to persuade a majority of their fellow citizens to vote into Congress representatives who will change the law.

Instead, they argue that since universities cannot afford to forego federal funding–Yale University received around $300,000,000 this year from the U.S. government–the Solomon Amendment coerces law schools to accord the military privileges law schools wish to reserve for employers that honor the law school's anti-discrimination policy. In so doing, the law

professors maintain, the Solomon Amendment compels law schools to send a false message–that they approve of the military's discrimination against gays and lesbians–and compels law schools to associate with an organization–the military–that sullies the ideals that law professors cherish.

The law professors should lose their case on straightforward legal grounds. The Solomon Amendment does not abridge their freedom of speech or association. It leaves the professors entirely free to express their disagreement, their disapproval, indeed their disgust with "Don't Ask, Don't Tell." And it creates no impediments to professors conveying their opinions loudly and clearly through teaching, publishing articles in scholarly journals and in the popular press, organizing campus demonstrations and sit-ins, giving lectures on campus and off, holding forth on radio and TV, blogging, and the like.

Nor does the Solomon Amendment abridge the professors' freedom of association. No law professor is compelled to be seen with or talk to the military recruiters on the few and brief occasions they set foot on campus. And no reasonable person–certainly not a law student properly trained by his professors in the canons of evidence and argument–could conclude from the recruiters' short and infrequent visits that law professors approve of the military's presence on campus. If there is the slightest misunderstanding–among students, administrators, fellow colleagues, or the general public–law professors, by their very vocation, could hardly be better placed to correct the public record.

At the same time, the Solomon Amendment serves a critical government end. It assists the military in recruiting from among the best law students in the nation to staff its internal legal corp. And it provides this assistance during a war that poses novel and difficult legal questions concerning, among other things, detention of enemy combatants, forms of interrogation, and citizens' privacy.

It is true that the Solomon Amendment involves a condition that many law professors find onerous, even repugnant. But there is no constitutional right to nullify duly enacted laws because one disagrees with the policy they express or experiences them as a painful burden.

Moreover, nobody is holding a gun to anybody's head, requiring universities to accept federal funds for academic work. If the law professors could persuade their deans and university presidents–to say nothing of themselves–to do without federal funding, then, notwithstanding the war and the needs of the nation's military, the law professors could, under the Solomon Amendment, keep military recruiters off campus. Trouble is, the law professors want their principle and to pay no price for standing by it.

As it happens, the law professors also deserve to lose because their principle is defective. In practice, they demand a double standard. When it came to affirmative action, a substantial majority of law professors around the country supported the successful arguments put forward by the University of Michigan Law School in *Grutter* v. *Bollinger* (2003). Our laws

generally and for the most part abhor classifications based on race, reasoned the Court. But, the Court held, because of its educational value, diversity in a student body is a compelling state interest. And university administrators and faculty, the Court agreed with the University of Michigan and the majority of law professors, rightly claim special expertise as educators in determining how to blend and balance races and ethnicities to achieve the optimal diversity.

Notwithstanding the special expertise and exemption from generally applicable law they claimed for themselves and persuaded the Court to recognize in regard to classifying on the basis of race, law professors, when it comes to "Don't Ask, Don't Tell," refuse to concede to the military any special expertise or exemption concerning the requirements of national security. The military, probably the most racially and ethnically integrated institution in the country, believes that permitting openly gay men and women to serve would impair troop discipline and morale by allowing soldiers who are sexually attracted to fellow soldiers to share austere and intimate quarters. The law professors, who generally lack expert knowledge about the American armed forces or national security imperatives, exhibit no interest in or brusquely dismiss such claims.

True, there is reason to question the military's policy. Great Britain lifted its ban on gays in the military in 2000 and Israel has never had one. These days officers in the U.S. armed forces will tell you that they don't pay much attention to questions of sexual orientation. They are more likely to face a Corporal Klinger problem–soldiers who, ahead of deployment to a battle zone, regretfully announce to their commanders that they are gay, only to be ordered to get out of the commander's face and get back to work–than they are to press charges to remove a soldier for his or her sexual orientation.

Yet there is also good reason to question the purpose and the consequences of the law schools' affirmative action policy. These include concerns that law schools are seeking the wrong kind of diversity–that of skin color rather than opinion–and that affirmative action hurts minorities by placing them in academic settings for which they are under-prepared.

But these reasonable doubts haven't stopped universities from insisting that the Constitution's general prohibition against classifying on the basis of race should be suspended to accommodate their special expertise in the formation of student bodies that advance critical educational goals. On what basis then do law professors, whatever doubts they might harbor about the soundness of the military's policy toward gays and lesbians, insist on their own right to receive substantial government money while depriving the military of opportunities to recruit among America's best and brightest?

Finally, it would be good for the law professors to lose because their policy is a bad one, which likely will have the opposite of the effect they presumably intend. By keeping the military off campus, the law professors wish to show solidarity with gays and lesbians. But what better way to actually transform a military culture that they believe is hostile to gays

and lesbians than to encourage students from the best law schools, where anti-discrimination principles are vigorously studied and taught, to serve as military lawyers. And what better way to encourage law students to enlist, than to welcome to campus a military eager to recruit students who have had the benefit of the law professors' teaching and scholarship.

In pursuing their fight against the Solomon Amendment to the Supreme Court, the law professors seem to prefer the appearance of righteousness to respect for the law, consistency of principle, and the reality of reform.

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