U.S. Military: 8 Elite Law Schools: 0

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Peter Berkowitz March 20, 2006

CHIEF JUSTICE JOHN ROBERTS'S UNANIMOUS opinion for the Supreme Court in *Rumsfeld* v. *Forum for Academic and Individual Rights*, upholding the constitutionality of the Solomon Amendment against challenge by a coalition of law schools and law faculties, decisively resolved the essential legal issues presented by the case. The 8-0 decision (Justice Alito did not participate) made matters crystal clear: Congress, without infringing law schools' and law professors' First Amendment rights of speech and association, may condition federal funding to universities on law schools' granting access to military recruiters equal to that provided other employers. The Solomon Amendment leaves law schools perfectly free to keep the military off campus and away from their students--if they can persuade the universities of which they are a part to decline the millions, sometimes hundreds of millions, the universities receive in federal funds.

However, Roberts's opinion does give rise to, and leaves unresolved, one nonlegal but rather large and disturbing question: How could so many law professors of such high rank and distinction be so wrong about such straightforward issues of constitutional law?

The losing party, the Forum for Academic and Individual Rights (FAIR), is an association of 36 law schools and law faculty, only 24 of which are willing to be named publicly. In addition, groups of faculty members from many of the leading law schools in the land filed separate friend of the court briefs on behalf of FAIR (alone among law faculty, members of George Mason filed a brief--in which I played no role--supporting the constitutionality of the Solomon Amendment). These included a friend of the court brief signed by 40 Harvard Law School professors--including Dean Elena Kagan in her capacity as professor of law; University Professor Laurence Tribe; and University Professor Frank Michelman. The brief was prepared under the supervision of counsel of record Walter Dellinger, professor of law at Duke University and former solicitor general of the United States in the Clinton administration.

Another friend of the court brief was signed by 42 members of the Yale Law School Faculty, including Harold Hongju Koh, dean and professor of law; former dean and Sterling Professor of Law Anthony Kronman; and Sterling Professor of Law and Political Science Bruce Ackerman. In addition, a joint friend of the court brief was submitted by Columbia University, Harvard University, New York University, the University of Chicago, the University of Pennsylvania, and Yale University. Their counsel of record was Seth Waxman, a visiting professor of law at Georgetown, and, like Dellinger, a former solicitor general in the Clinton administration.

This dazzling array of eminent law professors proved incapable--even after hiring the best Democratic party legal talent money could buy--of advancing a single legal argument persuasive enough to pick off even a single dissent from the four more progressive justices on the court--Souter, Breyer, Ginsburg, and Stevens--or to provoke even a single concurrence expressing a single demurral on a single point of law from Chief Justice Roberts's opinion.

No doubt this unanimity was in substantial measure a result of the inherent weakness of the law professors' case. It also very likely had something to do with Roberts's reputation for working well with colleagues of differing points of view, and with the commitment he gave at his Senate Judiciary Committee hearing to foster collegiality among his colleagues.

But one should not underestimate the incisiveness of Roberts's legal reasoning. The Harvard brief put forward a statutory claim: Law schools that prohibit the military from recruiting on campus complied with the Solomon Amendment provided they applied a neutral rule--no employer that discriminates against gays and lesbians is allowed to recruit on campus--to all employers alike. Roberts concluded that the law professors misread the Solomon Amendment, which focuses not on the conditions and terms of access provided by law school policy but on the result:

> Under amici's reading, a military recruiter has the same "access" to campuses and students as, say, a law firm when the law firm is permitted on campus to interview students and the military is not. We do not think that the military recruiter has received equal "access" in this situation--regardless of whether the disparate treatment is attributable to the military's failure to comply with the school's nondiscrimination policy.

FAIR's free speech arguments fared no better under the Court's no-nonsense analysis. The Solomon Amendment does not compel law schools to speak words they find abhorrent. True, under its terms, law schools must send emails or post notices on bulletin boards concerning when and where military recruiters will be meeting with students, as law schools do for other employers. But such speech is compelled by the Solomon Amendment only to the extent that law schools provide the services generally. And it is a far cry from the types of plainly political speech--a government mandated pledge of allegiance or political motto--that the Court has prohibited the government from compelling.

Moreover, the Solomon Amendment does not compel law schools to unconstitutionally host or accommodate a message they find repugnant. Unlike cases in which the Court had found infringement of such First Amendment rights, a law school's antidiscrimination message, Roberts drolly explained, was not distorted or impaired by the military's presence on campus:

> Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can

> appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. . . . Surely students have not lost that ability by the time they get to law school.

Nor does the Solomon Amendment impermissibly infringe the right of law schools and law professors to engage in expressive conduct. In contrast to, say, flag burning, which is "inherently expressive" and therefore protected by the First Amendment, law school policies banning military recruiters from campus or sending them off to a separate corner of the university lack expressive content until the policies are explained and justified by law school speech, which the Solomon Amendment does not regulate.

Finally, the Court held that the Solomon Amendment does not infringe law professors' freedom of expressive association. Their situation differs markedly from the one the Court dealt with in its leading case on the issue, which held that requiring the Boy Scouts to admit a homosexual as a scoutmaster forced the organization to send a message at odds with the very one they were established to express. Military recruiters enter campus infrequently and briefly, and no one on campus or off confuses them for members of the law school community or their message for the law school's message. Moreover, as Roberts was at pains to point out, "law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."

With their legal arguments publicly and authoritatively eviscerated by Roberts's opinion, what was the response of FAIR's attorneys and the company of distinguished law professors enlisting in the cause? Joshua Rosenkranz, who represented FAIR, told the *Washington Post* that the law schools always saw the suit as a "scrimmage in a broader war" about *equality*--a revealing remark from an attorney who had just suffered a dreadful defeat in a high profile First Amendment case.

His view about political motivations was echoed by Dean Harold Koh, who concluded his statement in reaction to the Court's decision on the Yale Law School website by declaring that, "We look forward to the day when the government gives all of our students--without regard to their sexual orientation--an equal opportunity to serve our country by working in our Nation's armed forces." And the decision provoked a defiant response at a website in support of FAIR hosted by Georgetown Law School (*SolomonResponse.org*): "The Supreme Court's opinion in *Rumsfeld* v. *FAIR* is a call to arms to law school administrations across the country to vocally demonstrate their opposition to the military's 'Don't Ask, Don't Tell' policy."

But if their aim all along was to secure the right for homosexuals to serve in the United States armed forces on terms equal to those of heterosexuals, why did the law professors divert attention for almost three years, during wartime, at a cost to the government that likely ran into the hundreds of thousands of dollars, to imaginary infringements of faculty First Amendment rights?

Perhaps the law professors are simply poor advocates, unable to craft compelling constitutional arguments even on an issue--their own free speech--that is near and dear to them. Or perhaps they cynically believed that, there being no major difference between law and politics, the more left-leaning justices would side with their ostensibly progressive cause, however ungrounded in constitutional text, history, structure, or precedent their legal arguments were. Or perhaps, knowing their case was a bad one, they nevertheless sought a symbolic expression of their support for gay rights.

Certainly law professors who wanted to eliminate "Don't Ask, Don't Tell" and had respect for democratic politics would not have put the focus on their own contrived deprivations of expression and association, but would have concentrated on the claims of gay and lesbian citizens who wish to put their lives on the line for their country. Such law professors would have educated themselves and made themselves aware that the U.S. armed forces are far and away the most integrated institutions in the nation, indeed, greatly surpassing elite law school faculties and student bodies.

For this reason, among others, such law professors would have appreciated that the military is deserving of some measure of deference in its judgments about distinctions that must be drawn among individuals to maintain troop cohesion and morale. Such law professors would also have been reluctant to promiscuously hurl accusations of discrimination at the military, especially since many of the law professors had only a few years ago argued for, and won from the Supreme Court in *Grutter* v. *Bollinger* (2003), a special exemption to classify at their law schools on the basis of race because of their presumed special expertise concerning the need in legal education for diverse student bodies.

Such law professors certainly would have continued to challenge "Don't Ask, Don't Tell" in speech and in writing, but they would have welcomed the military to campus and hoped that students from their law schools--students who had sat in their classrooms and been exposed to their ideas about freedom and equality--would choose to serve, the better to transform the military's culture from within. And such law professors would have remembered that what democracies most urgently need from scholars and teachers of the law is to impart understanding, refine intellects, and cultivate the art of legal reasoning.

Unwittingly, FAIR and its many allies among law professors at the nation's leading law schools did perform one public service. They gave Chief Justice John Roberts and members of the Roberts Court an opportunity to demonstrate in clear and convincing language that the First Amendment is not to be trifled with, and that the U.S. Supreme Court does not gladly suffer the rank politicization of the law.

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