Accepting the Court's Invitation

Martha M. Ertman

"The only thing worse than being talked about is not being talked about."
–Oscar Wilde

Opponents of the Solomon Amendment and much of the legal academy were disappointed with the Supreme Court's ruling in *Rumsfeld v. FAIR*.[1] The Court held that the Solomon Amendment did not violate law schools' First Amendment freedoms of speech and association, rejecting various law schools' arguments that conditioning university funding on allowing military recruitment on campus forced schools to endorse the military's anti-gay policies, in direct contravention of many schools' commitment to nondiscrimination.[2] As the following essays demonstrate, there's more to say about this speech case.

The essays respond to the Court's invitation to students, administrators, and faculty who oppose the Solomon Amendment and/or the Don't Ask Don't Tell policy (DADT) to remedy what they take to be "bad speech" and unwanted association with more speech and association. The Court stated that "[l]aw 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."[3]

Moreover, the Court noted that "[s]tudents and faculty are free to associate to voice their disapproval of the military's message."[4] While the AALS Sexual Orientation and Gender Identity Issues (SOGII) Section, the FAIR litigants,[5] amici, along with others who worked on and watched the

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1. 547 U.S. 47 (2006).
2. FAIR stands for the Forum for Academic and Institutional Rights, Inc.
3. 547 U.S. at 60.
4. 547 U.S. at 69.
5. Litigants in the case included FAIR, the Society for American Law Teachers (SALT), the Coalition for Equality, Rutgers Gay and Lesbian Caucus, law students Pare Nickisher, Leslie Fischer, Michael Blauschild, and law professors Erwin Chemerinsky and Sylvia Law.

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case, disagree with its core holding, we are eager to accept the Court's invitation for more speech.[6]

Recognizing that this conversation engages the entire legal academy, the SOGII Section organized a special three-hour session entitled *Accepting the Court's Invitation* on the future direction of military recruitment and the DADT policy at the 2007 AALS Annual Meeting in Washington, D.C. The following essays, drawn from that panel, provide concrete examples of the kinds of speech lawyers, law students, administrators, and activists will engage in post-*Rumsfeld v. FAIR*. These discussions, I hope, will extend well beyond law schools to affect the Don't Ask/Don't Tell policy itself.

The essays offer three perspectives. First, Shalanda Baker, a young lawyer expelled from military service for being gay, candidly reports how the DADT policy adversely affected her career, education, and personal life. She provides a vivid depiction of the flesh-and-blood reality of how this discriminatory policy hurts service members. Second, James Leipold, Executive Director of the National Association of Law Placement (NALP), reports on what law schools are doing to speak out against the Solomon Amendment and DADT. After detailing the results of a NALP survey of schools' response to the Court's invitation to speak out against the Solomon Amendment and DADT, Leipold recommends that law schools actively engage their communities to (1) tailor amelioration efforts to maximize resistance to the ban on gay service members; (2) redress the policy's pernicious effects on gay, lesbian, bisexual, and transgendered (GLBT) students; and (3) work with Congress to repeal DADT. Finally, Joan Schaffner details a dispute at George Washington University Law School about whether the Solomon Amendment requires that the school allow a student group to organize a career fair on campus and invite military recruiters. Schaffner contends that the Solomon Amendment, as interpreted in *FAIR*, requires that law schools provide equal access but not equal treatment. Therefore, unless the military demands access to the recruitment fair, they need not be invited. She also argues that as a legal and policy matter, the law school's interest in enforcing its own nondiscrimination policy and protecting its GLBT students from discrimination outweighs the full employment opportunity interest of the student organization. In short, she argues that official school organizations should be bound by the school's nondiscrimination policy and implementing regulations.[7]

6. Recognizing that there are other views on the matter held by those in the legal academy, we sought to have the panel reflect a diversity of opinions. Joseph Zengerle from George Mason University was initially slated to round out the panel to express the views held by some faculty members and schools who support either the outcome of the FAIR case, the Solomon Amendment, or the DADT policy itself. However, he was ultimately unable to participate in the panel or in this symposium.

7. Other panelists at the AALS SOGII program included former service member David Hall, describing his experience under the DADT policy; Service Members Legal Defense and Education Fund attorney and Policy Director Sharon Alexander, discussing DADT litigation and repeal efforts; Kate Martin, Director of the Center for National Security Studies, discussing implications for military domestic surveillance of opposition to DADT and the

Law schools have a singular opportunity, and an indeed obligation, to respond to the Court's invitation to speak out against the Solomon Amendment and DADT. Activism in law schools and Congress may well contribute to the demise of the discriminatory ban on gay service members. Even some military leaders oppose the ban. In January 2007, retired Chairman of the Joint Chiefs of Staff John M. Shalikashvili urged the "serious reconsideration" of DADT in a *New York Times* editorial.[8] Recognizing that national attitudes toward gay people have changed since DADT was enacted in 1993, General Shalikashvili asserted, "I now believe that if gay men and lesbians served openly in the United States military, they would not undermine the efficacy of the armed forces."[9] Moreover, in light of current levels of military engagement, he continued, "we must welcome the service of any American who is willing and able to do the job."[10]

Because a law school's job is to train advocates and facilitate justice, speaking out against Don't Ask, Don't Tell in the aftermath of the *FAIR* decision provides a unique opportunity for faculty members, administrators, and students to do their jobs better. The more speech, the better for both social justice and law school performance. As Oscar Wilde observed, "nothing succeeds like excess."

Solomon Amendment at the nation's law schools; and law professors from a range of schools on their DADT amelioration practices, including Chai Feldblum (Georgetown), Kathleen Clark (Washington University in St. Louis), and Alan Minuskin (Boston College). You can view the panel (or listen to it) on the AALS web site, available at <http://www.aals.org/am2007/wednesday/index.html> (last visited Aug. 18, 2007) (Scroll down and click on "Accepting the Court's Invitation: Law Schools Respond to the Solomon Amendment Case.").

8. John M. Shalikashvili, Second Thoughts on Gays in the Military, N.Y. Times, January 2, 2007, at A17.

9. *Id.*

10. *Id.*