

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, a New Jersey membership corporation; SOCIETY OF AMERICAN LAW TEACHERS, a New York corporation; COALITION FOR EQUALITY, a Massachusetts association; RUTGERS GAY AND LESBIAN CAUCUS, a New Jersey association; PAM NICKISHER, a New Jersey resident; LESLIE FISCHER, a Pennsylvania resident; MICHAEL BLAUSCHILD, a New Jersey resident; ERWIN CHEMERINSKY, a California resident; and SYLVIA LAW, a New York resident,

Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense; ROD PAIGE, in his capacity as U.S. Secretary of Education; TOMMY THOMPSON, in his capacity as U.S. Secretary of Health and Human Services; NORMAN Y. MINETA, in his capacity as U.S. Secretary of Transportation; and TOM RIDGE, in his capacity as U.S. Secretary of Homeland Security,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SUPPLEMENTAL BRIEF FOR THE APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	10
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 7

Statutes

Ronald W. Reagan National Defense Authorization Act for Fiscal Year
2005, Pub. L. No. 108-375, 118 Stat. 1811 1

Solomon Amendment, 10 U.S.C. § 983(b) passim

Legislative History

H.R. 3966, 108th Cong., 2d Sess (2004) 2-3

H.R. Rep. No. 108-443(I) (2004) 3,4,6

S. Rep. No. 108-260 (2004) 3

150 Cong. Rec. H1704 (March 30, 2004) 3,4,7

150 Cong. Rec. H1705 (March 30, 2004) 3,5,7

150 Cong. Rec. 1706 (March 30, 2004) 5

150 Cong. Rec. 1707 (March 30, 2004) 4

150 Cong. Rec. 1708 (March 30, 2004) 5

150 Cong. Rec. 1709 (March 30, 2004) 4

ARGUMENT

On October 28, 2004, the President signed legislation that amends the Solomon Amendment, 10 U.S.C. § 983(b). See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811. In relevant part, the new legislation codifies the Department of Defense's prevailing interpretation of the Solomon Amendment, under which colleges and universities that receive specified federal funds must give military recruiters access to campuses and students that is at least equal in quality and scope to the access provided to any other employer. In so doing, the legislation disposes of the plaintiffs' contention – raised below and repeatedly invoked, although not directly presented, in this appeal – that DoD's construction of the Solomon Amendment is inconsistent with the terms of the statute and the intent of Congress.¹

The plaintiffs assert that "[t]he recent amendment to the Solomon Amendment changes nothing" (Supp. Br. 4). In response to this non-event, the plaintiffs have filed a supplemental brief of more than three thousand words. Much of the brief is devoted to renewing arguments that the plaintiffs have already presented in their original briefs in this appeal. See Supp. Br. 4-6, 9-10.

¹ The plaintiffs state elliptically that, in light of the new legislation, they "no longer need to argue" that DoD's interpretation of the Solomon Amendment is contrary to Congressional intent (Supp. Br. 7 n.5). Whether or not they "need" to, they no longer *can* make such an argument.

Because the new legislation ratifies the government's existing interpretation of the Solomon Amendment, it does not require the plaintiffs to repeat constitutional arguments that this Court has already heard, and we do not intend to repeat our own views, which have been presented in our appellate brief and at oral argument. However, the plaintiffs' supplemental brief makes two points that do call for a brief response.

First, the plaintiffs claim that the new legislation was motivated by a desire to suppress speech. Second, the plaintiffs suggest that Congress lacked an adequate factual basis to justify the principle of equal access embodied in the legislation. Both of these claims are misconceived. The legislative history makes clear that Congress was motivated not by the desire to suppress political views, but instead by the compelling need to protect the military's ability to recruit volunteers during time of war. And Congress had ample reason to believe that colleges and universities that restrict military recruiters to second-class access are significantly interfering with that compelling national goal.

1. As noted by the plaintiffs, the current amendment to the Solomon Amendment was introduced in the House of Representatives as a freestanding bill, H.R. 3966, whose operative terms were subsequently incorporated into the Department of Defense authorization bill for fiscal year 2005. See H.R. 3966, 150

Cong. Rec. H1702-1703 (March 30, 2004). The bill's principal sponsor explained that the legislation was being introduced for two reasons. The first was to discourage "barriers [that] have been erected by some colleges and universities to military recruiters having access to students on campus, particularly in their law schools." 150 Cong. Rec. at H1704 (Rep. Rogers). The second was to eliminate any doubt about the correctness of DoD's interpretation of the Solomon Amendment, by "stat[ing] unequivocally that the military should have the same equal access in scope and quality to that of any other civilian employer." *Ibid.*

The committee report on H.R. 3966 explained that, "[f]or the last several years, a growing number of university law schools and colleges of law have treated military recruiters in ways significantly different from the recruiters of other employers, apparently with the objective of making recruiting difficult, or to frustrate its objectives." H.R. Rep. No. 108-443(I), at 6 (2004) ("House Report"); see also S. Rep. No. 108-260, at 330 (2004) (discussing parallel provision of Senate bill) ("The committee is concerned about instances of unequal treatment of military recruiters at certain colleges and universities"). The bill's supporters described repeated instances in which military recruiters, while not physically barred from campuses, were nonetheless subjected to deliberately obstructive and "second-class" treatment that "significantly reduc[ed] their ability to reach students." 150 Cong. Rec. H1705,

H1709 (Rep. McKeon); *id.* at H1709 (Rep. Skelton). As supporters explained, such restrictions on access by military recruiters were increasingly harmful because "[t]he propensity for young Americans to volunteer for military service * * * has been declining." 150 Cong. Rec. H1704 (Rep. Skelton); see also *id.* at H1707 (Rep. Cox) ("The military is being hurt by these policies, and America is being hurt by these policies"). At the same time, the military now faces wartime demands that make recruiting "bright and competent and knowledgeable people" (*id.* at H1704 (Rep. Skelton)) especially crucial. In the words of the committee report:

[A]t no time since World War II, has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs. [¶] Successful recruitment[, in turn,] relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to [the access provided to] other employers.

House Report at 3-4.

As this summary makes clear, the motivation behind this legislation was to protect the ability of the Department of Defense to recruit effectively at the nation's institutions of higher education. What is conspicuously absent from the legislative history is any indication that Congress was acting in order to penalize or deter political dissent. As one of the legislation's sponsors explained, "this is *not* about

telling people what to think or what to say. It is about giving students freedom of choice." 150 Cong. Rec. H1708 (March 30, 2004) (Rep. Cox) (emphasis added). The legislation's supporters carefully distinguished between physically impeding recruiting efforts, which the law seeks to discourage, and the right to express political views, which the law leaves undisturbed. In the words of Representative Bachus, one of the law's supporters, "[i]f law students want to debate this issue, if they want to write in the paper, that is one thing, but when they block military recruiters, as they have done, it is time for us to end this foolishness." *Id.* at H1706. It is the denial of equal access itself that is the concern of the legislation, not the political views behind the denial.

The plaintiffs claim that "[v]arious Congressmen noted that they were in favor of this latest version of the Solomon Amendment precisely so that students could not protest" (Supp. Br. 1). But the two examples that they cite (*id.* at 8-9) manifestly fail to support that claim. Representative McKeon complained of an episode at New York University that went far beyond anti-recruiting speech to include actual *detention* of potential recruits. 150 Cong. Rec. H1705 ("potential recruits were harassed and detained by protestors"). And while Representative Bachus did indeed call for Congress to "end this foolishness," his full remarks (quoted above) make clear that he was referring to "block[ing] military recruiters," not – as he took pains to point

out – to anti-recruiting speech. Neither of these Representatives suggested that the purpose of the legislation was to prevent students and faculty members from expressing their opposition to military recruiting, and nowhere else in the legislative history does any such suggestion appear.²

2. The current legislation reflects Congress's judgment that access to campuses and students "in a manner that is at least equal in quality and scope to the access * * * provided to any other employer" (10 U.S.C. § 983(b)(1)) is necessary, particularly during wartime, to effectively recruit college graduates for the volunteer armed forces. The plaintiffs take exception to that legislative judgment. They complain that "[t]here is literally not a shred of empirical or passably quantitative evidence to suggest that [legislative] statements and beliefs [about the need for the legislation] are true." Supp. Br. 8. According to the plaintiffs, Congress acted on the basis of "ruminations and notions and nothing more." *Ibid.*

² The plaintiffs mischaracterize a letter from the Under Secretary of Defense as complaining about "failures [of universities] to stifle student protest" (Supp. Br. 9). In actuality, by its terms, the Under Secretary's letter is directed at all university practices that "restrict access or limit opportunities for military recruiters to participate fully in job fairs, placement office services, and interview programs." House Report at 7. As part of that general concern, the letter objects to acts of student and faculty harassment that "imped[e] the path to designated interview rooms." *Ibid.* Nowhere does the letter suggest that student protest as such is objectionable and should be prevented.

The plaintiffs seriously mischaracterize the state of the factual record that Congress had before it. The legislative history includes numerous descriptions of efforts by universities, students, and faculty to disrupt military recruiting and discourage potential recruits. See House Report at 7 ("Certain colleges and universities continue to restrict access or limit opportunities for military recruiters to participate fully in job fairs, placement office services, and interview programs"; "[i]n a few particularly egregious circumstances, military recruiters and prospective recruits have been forced to endure verbal abuse and harassment, guantlets of taunting fellow students and faculty impeding the path to designated interview rooms, and austere, remote interview locations"); 150 Cong. Rec. H1704 (March 30, 2004) (Rep. Rogers) ("barriers have been erected at some colleges and universities to military recruiters having access to students on campus, particularly in their law schools"); *id.* at H1705 (Rep. McKeon) (describing incidents of restricted and unequal access and harassment). These efforts occurred pursuant to an official policy of the American Association of Law Schools, an organization encompassing 166 of the accredited 188 law schools in this country. See JA 349; Brief Amicus Curiae of AALS 1.

This evidence is more than sufficient to show that "the Department [of Defense] is placed at a pronounced competitive disadvantage" in its efforts to hire

college graduates and post-graduates. House Report at 7 (letter from Under Secretary of Defense to Chairman of House Committee on Armed Services). As the Supreme Court has made clear, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000). Here, there is nothing either novel or implausible about believing that military recruiting is substantially harmed when universities deny military recruiters the same kind of access that they provide to other recruiters.³

It is critical to recognize that, by establishing a rule of equal access, the Solomon Amendment accepts and relies on *the universities' own assessment* of what is required for effective recruiting. When a university allows recruiters to conduct on-campus interviews, and provides recruiters with conveniently located interview

³ Limitations on recruiting opportunities that are applied even-handedly to all potential employers are far less damaging than limitations that single out disfavored recruiters like the military. For example, if all recruiting interviews are conducted in a remote location on a large university campus, the location is unlikely to lead students to forgo the interview process altogether. In contrast, if military recruiters are sent to a remote location while all other recruiters are provided with convenient, centrally located interview facilities, the likelihood that students will pass up military interviews in favor of interviews with other employers is far greater. By deliberately placing the military at a "competitive disadvantage" (House Report at 7 (letter of Deputy Under Secretary of Defense)), universities compound the problems created by recruiting limitations *simpliciter*.

facilities, and makes recruiting literature available through the university's placement office, and offers recruiters assistance in scheduling interviews, it is manifesting its own judgment about what is needed for recruiters adequately to reach potential recruits. And when the university denies those opportunities to military recruiters, while making them available to other potential employers, it is necessarily depriving the military of access that the university itself views as integral to effective recruiting.

Under these circumstances, it is fatuous for the plaintiffs to complain that Congress had an inadequate basis for believing that effective military recruiting requires access "in a manner that is at least equal in quality and scope to the access * * * provided to any other employer." *The access sought by the Solomon Amendment is the access that universities and colleges themselves regard as necessary for employers to reach potential employees.* The plaintiffs can hardly confine military recruiters to second-class access, then turn around and demand proof that their own actions will not have any material impact on recruiting. Congress had ample reason to believe that the very purpose of placing restrictions on military recruiting access is to "mak[e] recruiting difficult, or to frustrate its objectives." House Report at 6. Whatever the purpose, to deny military recruiters equal access is, by definition, to deny the degree of access that educational institutions themselves

regard as vital. Universities cannot complain about the factual predicate of a law that, in the end, rests on the universities' own factual judgments.

CONCLUSION

For the foregoing reasons, and for the reasons presented in the appellees' principal brief, the judgment of the district court should be affirmed.

Respectfully submitted,

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November 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2004, I filed and served the foregoing SUPPLEMENTAL BRIEF FOR THE APPELLEES by causing the required number of copies of the brief to be filed with the Office of the Clerk and served on the following counsel by overnight mail:

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