

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., a New Jersey membership corporation; SOCIETY OF AMERICAN LAW TEACHERS, INC., a New York corporation; COALITION FOR EQUALITY, a Massachusetts association; RUTGERS GAY AND LESBIAN CAUCUS, a New Jersey association; PAN 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; ELAINE CHAO, in her capacity as U.S. Secretary of Labor; 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.

No. 03-4433

DECLARATION OF E. JOSHUA ROSENKRANZ

I, E. Joshua Rosenkranz, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a shareholder at Heller, Ehrman, White & McAuliffe LLP, attorneys for the Plaintiffs-Appellants in this action. I make this declaration in opposition to the government's motion to stay the mandate in this case.

2. On January 7, 2005, I sent a letter to Scott McIntosh, an attorney at the U.S. Department of Justice representing Defendants-Appellees in this matter. The letter proposes that the parties jointly agree to propose to the Court an interim compromise, allowing the military to continue recruiting on campus, without demanding affirmative support from law schools. A true and correct copy of this letter is attached hereto as Exhibit A.

3. On January 14, 2005, Mr. McIntosh telephoned me to indicate that the government is not interested in an interim resolution, and would instead petition this Court to stay the mandate in its entirety.

4. That same day, the government submitted its application for a stay, supported by five declarations, including a declaration from Maj. Gen. Jack L. Rives of the U.S. Air Force. This declaration contained numerical references to recruiting survey data compiled by the Air Force, but did not attach the underlying survey data, or explain exactly what was asked on the survey. *See* Rives Decl. ¶¶ 19, 31. The declarations also contained many other statements that appeared to be conclusions based on internal compilations of recruiting data. *E.g.*, Romig Decl. ¶¶ 15-17.

5. On January 18, 2005, Sharon E. Frase, an associate at Heller Ehrman White & McAuliffe, sent a letter at my direction to Mr. McIntosh by fax and email, requesting the underlying surveys and survey data. A true and correct copy of this letter is attached hereto as Exhibit B. The government acknowledged receipt of this request in a letter of January 19, 2005. A true and correct copy of this acknowledgment is attached hereto as Exhibit C.

6. On January 20, 2005, Mr. McIntosh responded to the request with a copy of the survey used by the Air Force. In an accompanying letter, Mr. McIntosh indicated that the government is still considering the request for the survey data. A true and correct copy of the letter and the survey are attached hereto as Exhibit D.

7. To date, the government has not provided the underlying data.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 27, 2005
in New York, New York.

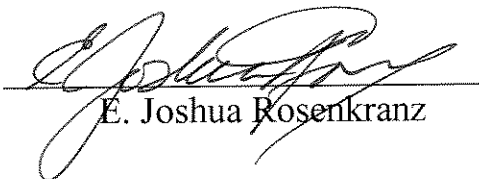

E. Joshua Rosenkranz

Exhibit A

HellerEhrman

ATTORNEYS

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Main (212) 832-8300
Fax (212) 763-7600

January 7, 2005

95683.0001

Scott R. McIntosh, Esq.
Attorney, Appellate Staff
U.S. Department of Justice
Civil Division
601 D Street N.W.
Washington, D.C. 20530

Re: FAIR v. Rumsfeld, No. 03-4433

Dear Scott:

Thank you for returning my call yesterday. I understand from our conversation that the Government has not yet decided what route to take in the above-captioned case. The Government is still contemplating the option of filing a cert. petition seeking review of the Third Circuit's opinion, and, if so, seeking a stay of the Third Circuit's mandate.

As I am sure you'd expect, since the Third Circuit has already held that our client's First Amendment rights are being violated every day that the Solomon Amendment is in force, we will oppose a stay of the mandate. But I wonder whether, in the interest of avoiding litigation over the stay, the Government would consider discussing a reasonable interim accommodation, while the case is pending before the Supreme Court. What I have in mind, again, just for the interim, is a middle ground position: A preliminary injunction that would bar military recruiters from demanding affirmative support or services from law schools or their career services offices, but that would continue to ensure recruiters' ability to enter campuses to recruit and their access to students and student contact information. Under such an arrangement, the military's on-campus recruiting efforts will not be hindered, and the law schools would be relieved from the aspect of the Solomon Amendment that most have found especially oppressive and that is of most recent vintage. While there are some law schools that would want to go further—as I am sure the Government would, in the other direction—we think an interim resolution like this balances the interests of the two sides in a way that is most Solomonic.

We could jointly propose to the Third Circuit that it issue its mandate, but subject to our stipulation about the limited scope of an injunction for the interim period. Or we could agree that the mandate should issue, but reach a separate understanding about the limited nature of the injunction the Plaintiffs would be seeking for the interim period.

Heller Ehrman White & McAuliffe LLP 120 West 45th Street New York, NY 10036-4041 www.hewm.com

New York Washington, D.C. Madison, WI San Francisco Silicon Valley Los Angeles San Diego Seattle Portland Anchorage
Hong Kong Beijing Singapore *Affiliated Offices:* Milan Paris Rome

I would be pleased to discuss other alternatives, whether substantive or procedural, for this interim period, in the interest of resolving the stay issue without troubling the courts.

Very truly yours,

A handwritten signature in black ink, appearing to read "Josh", written over the printed name "E. Joshua Rosenkranz".

E. Joshua Rosenkranz

Exhibit B

HellerEhrman

ATTORNEYS

Sharon E. Frase
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Main (212) 832-8300
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January 18, 2005

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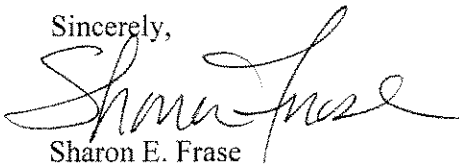
Scott R. McIntosh, Esq.
Attorney, Appellate Staff
U.S. Department of Justice
Civil Division
601 D Street N.W.
Washington, D.C. 20530

Re: FAIR v. Rumsfeld, No. 03-4433

Dear Mr. McIntosh:

In reading through the Government's submission in support of the stay motion, we noticed references to surveys of incoming Air Force JAGs selected from 2000 to 2004. There are also several references to recruiting statistics that presumably were garnered from summary reports of recruiting efforts and outcomes. We would appreciate an opportunity to review the survey language, and the compiled results for the Air Force and for each of the other branches (if any), for those years and for the previous five years. We would also like to review any statistical reports on which these declarations were based. Could you please provide these documents to us at your earliest convenience so that we can examine them as we prepare our opposition?

Sincerely,



Sharon E. Frase

NY 460720 v1

Exhibit C



SRMcIntosh

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7259
Washington, D.C. 20530

Tel: (202) 514-4052
Fax: (202) 514-8151

BY FAX AND ELECTRONIC MAIL ONLY

January 19, 2005

Sharon E. Frase
Heller Ehrman
120 West 45th Street
New York, NY 10036-4041

Re: FAIR v. Rumsfeld, No. 03-4433 (3rd Cir.)

Dear Ms. Frase:

I received yesterday afternoon your letter of January 18, 2005, in the above-captioned case. Your letter asks the government to provide you with specified information and materials in connection with the preparation of your opposition to the government's pending stay motion.

The Department of Justice and the Department of Defense are actively consulting regarding your request. I will get in touch with you as soon as a decision is made regarding our response.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott R. McIntosh".

Scott R. McIntosh
Special Counsel, Appellate Staff
Civil Division

Exhibit D



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7259
Washington, D.C. 20530

SRMcIntosh

Tel: (202) 514-4052
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BY ELECTRONIC MAIL ONLY

January 20, 2005

Sharon E. Frase
Heller Ehrman
120 West 45th Street
New York, NY 10036-4041

Re: FAIR v. Rumsfeld, No. 03-4433 (3rd Cir.)

Dear Ms. Frase:

I am writing in response to your letter of January 18, 2005, in the above-captioned case. Your letter asks the government to provide you with the following information and materials in connection with the preparation of your opposition to the government's pending stay motion:

- 1) The language of the JAG surveys referenced in the Air Force declaration submitted with the stay motion;
- 2) "[T]he compiled results [of such surveys] for the Air Force and for each of the other branches (if any)," from 1995 through 2004; and
- 3) "[A]ny statistical reports on which these declarations were based."

We do not understand your letter to assert any legal entitlement to the requested material. As you know, the Federal Rules of Appellate Procedure do not provide for discovery or otherwise obligate the party seeking a stay of the mandate to provide factual information to the opposing party.

While we are under no legal obligation to provide the information that you have requested, we are voluntarily undertaking to provide the survey language covered by request #1 above. A sample copy of the questionnaire is attached for your reference. The survey data set forth in the Air Force declaration are based on the respondents' answers to questions III and VI. The questionnaire language in questions III and IV was unchanged during the period referenced in the declaration (2000-2004).

The Department of Justice and the Department of Defense are continuing to review requests #2 and #3. Those requests are substantially broader and seek information that extends beyond the scope of the declarations themselves. Because federal offices in Washington are closed today in connection with the Presidential inauguration ceremonies, our review cannot be completed before tomorrow. We will contact you as soon as we have made a determination regarding the remaining requests.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

/s/

Scott R. McIntosh
Special Counsel, Appellate Staff
Civil Division

Judge Advocate Entrance Questionnaire

Your thoughts about The Judge Advocate General's Department are valuable. These questionnaires are given serious attention by the Professional Development Division and will be used to guide our Department's allocation of resources for future recruiting. *Please return this questionnaire with your Oath of Office and Certificate of Briefing.*

I. How were you commissioned?

- Direct Appointment ROTC OTS Service Academy

II. How did you join The Judge Advocate General's Department?

- Direct Appointment FLEP/ELP ROTC Educational Delay
 Recall One Year College Program Graduate Law Program
 Interservice Transfer (from service: _____)
 Intraservice Transfer (from AF career field: _____)

III. How did you learn about The Judge Advocate General's Department? *(please check all that apply)*

- Materials in your law school career services office, i.e. brochure, job posting, poster, etc.
 (please specify school and source: _____)
- Recruiter visits to your law school.
 (please specify school and year of visit: _____)
- Word of mouth, i.e. other JAGs, military members, family members, etc.
 (please specify whom, where, and when: _____)
- The JAG web page, www.jagusaf.hq.af.mil.
- Other electronic job posting web pages.
 (please specify web page: _____)
- Recruiting video.
- Recruiting brochure, "Immediate Challenge, Unlimited Opportunity."
- Recruiting poster.
- Direct mail letter sent to law students from The Judge Advocate General.
- Advertisements in print media.
 (please specify publication: _____)
- Information from other service recruiter, i.e. Army, Navy, Marines, Coast Guard.
 (please specify: _____)
- Other.
 (please specify: _____)
- None.

IV. Why did you choose to become a *Judge Advocate*?

V. Why did you choose to become an *Air Force Judge Advocate*?

VI. What recruiting efforts influenced you most to join our Department? (*please specify*)

VII. What recruiting efforts, if any, did you find not helpful? (*please specify*)

VIII. What recommendations would you make to improve our recruiting efforts?