

SOLOMON AMENDMENT PANEL
Saturday, Jan. 8, 2005

Excerpts from a speech at the American Association of Law Schools conference.

I want to talk about what law schools – and, in particular, what law school administrators and law school faculties – should be doing in response to the Solomon Amendment.

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Now that the Third Circuit Court of Appeals has ruled that the Solomon Amendment is unconstitutional, and the Supreme Court will be considering the case this Term, it is even more important than ever that law schools take major, public steps to express their disagreement with the military's discriminatory policy.

Let me talk, first, about what forms this responsive action should take, and second, why I think it's even more important now than ever to take such action.

First, take the opportunity to ask for a faculty meeting and join FAIR as a faculty. Go onto the www.solomonresponse.org website. I did a little template email that you can use in getting your colleagues to join. Please do it. And especially, if you're in this audience and you're not gay – please, please consider taking the lead.

Second, joining FAIR is great, but it is not enough. And, let's be realistic, it also may not happen at your school. So, independent of joining FAIR (and encouraging yourself and fellow law teachers to join SALT), I believe it is critical that the day the military comes to recruit, your faculty and/or your administration must sponsor some major, public event.

This event can be a teach-in or it can be a roundtable discussion. It can be on DADT (Don't Ask Don't Tell) or it can be on the Solomon Amendment. A fine teach-in is to assign the Third Circuit FAIR decision – and teach that.

The key thing is that there needs to be some **public event** at which DADT is discussed, and the event must be sponsored by faculty and/or administrators – not by students. (And especially not just by gay students.)

And – here’s the second piece of the necessary action -- at that teach-in, roundtable, whatever the event is—two points must be made:

First, faculty participants must explain why they oppose the military’s discriminatory policy with regard to gay people. In particular, **you must explain why the military’s policy is at odds with the principles of justice you are trying to teach your students.**

Second, faculty participants need to say: “let us be clear -- having this type of program does not solve the problem. That is, as long as the military is here recruiting, our message about the value of non-discrimination will be muddied and minimized – no matter how many teach-ins or roundtables we hold.”

I’ve got copies of a letter in the back of the room that I wrote to our student paper to make this point – and I’ll post that letter on the site as well.

Why is it so important to have such an event at which these points are made – and why is it more important now that the FAIR decision has come down?

Well, let’s focus on Judge Ambro’s decision in *FAIR*.

There are some interesting theoretical questions about the differences between the expressive association claim and the compelled speech claim in the case – which I am going to restrain myself from making right now. Because the argument I want to make now about the importance of having a public event applies regardless of which First Amendment claim being used.

To illustrate my point, though, ***I’m going to use the First Amendment expressive activity claim, because I personally think that is the appropriate one for this situation.*** And, unlike Bill, I am

very comfortable with the court's heavy reliance on *Dale* in that regard.

Here's why: As Judge Ambro explained, what the Supreme Court said in *Dale* was that a group that seeks to transmit a system of values engages in expressive activity. And, as the Third Circuit correctly held (in this case and in its *Circle School* case): "By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." (Well, maybe not as directly as we want – but still, it is usually a goal of a school to have certain values and to manifest them to students!)

And then Judge Ambro uses what I think is a correct application of *Dale*: He says – "Just as the Boy Scouts endeavored to "inculcate youth with the Boy Scout values" – both expressively and by example – **the law schools endeavor to inculcate their students with their chosen values by expression and example in the promulgation and enforcement of their nondiscrimination policies.**"

And as Judge Ambro explains, and this is the key point: ***just as the Supreme Court found that forcing the Boy Scouts to have an openly gay scoutmaster would inherently undermine their expressive activity of inculcating the value that homosexuality is immoral, forcing law schools to have military recruiters as part of the school's placement activities would inherently undermine their expressive activity of inculcating the value that discrimination based on sexual orientation is wrong.***

It was never a question for me that having an openly gay scoutmaster inherently undermines the message that being gay is immoral. I thought the dissent in *Dale* was simply wrong and disingenuous on this point – when they said it wouldn't have had that result.

Instead, my two problems with the *Dale* opinion were: 1) the deference the majority gave to the Boy Scouts' mere assertion that they were trying to transmit the value that homosexuality was immoral, when that was never really clear in their various public materials (and, unfortunately, Judge Ambro reinforces that deference point in the FAIR opinion); but 2) more importantly, my problem with the result in *Dale* was its application of the strict scrutiny test.

That is, let's assume the Boy Scouts were trying to inculcate the value that homosexuality was immoral, and hence having an openly gay scoutmaster would be a burden on that expressive association. The next question needs to be -- is it nevertheless **legitimate** for the government to place that burden on the Boy Scouts because doing so is **narrowly tailored to a compelling government interest**?

In *Dale*, Justice Rehnquist deals with that pretty important step of the constitutional analysis in **one sentence**:

We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. **The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association.** That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

Well, how is that for reasoning? To me, *that* was the major problem in *Dale* – that the majority **incorrectly** found that the New Jersey non-discrimination statute did not meet the strict scrutiny test.

By contrast, in the military recruiting context, I think Judge Ambro **correctly** found that **the Solomon amendment did not meet the strict scrutiny test.** That is, after finding that there was a burden on the law schools' expressive association, **the court correctly concluded that while recruiting good military lawyers is a compelling government interest, the Solomon amendment was a particularly ridiculous and ineffectual way of achieving that interest.**

So, back to what law schools should do now: Given the basis and the reasoning of the Third Circuit's opinion in FAIR, I think it should matter to you a whole lot that your law school be the type of community that **wants** to be an expressive association that stands behind its non-discrimination policy.

Or, let me say the same thing this way:

Let's assume that, tomorrow, the military announced that it was no longer going to admit people of color in the military. Or that it was no longer going to admit Jews who were open about their religion. Or it was no longer going to admit Muslims who were open about their religion.

Think about whether – if a military recruiter came onto your campus to interview and recruit students for jobs, and explicitly advertised that it would not be hiring any students of color, Jewish students or Muslim students – would your law school community feel some need to say: we disagree with that hiring policy?

Because if your law school community **would** want to express publicly its disagreement with the military's policy in **those** types of situations, then there is no good reason why your law school community should not want to do the same with regard to the current military policy -- which says exactly that with regard to your students who are openly gay, lesbian or bisexual.

And let me tell you – if your law school does *not* have that kind of public response, your gay students feel it. If there is silence from the faculty and the administration when the military comes to recruit on your campus, that silence speaks volumes.

And that's because the gay students know that that type of silence would not exist if the military were excluding individuals on the basis of race or religion. It just wouldn't.

And, in addition, if you don't have that type of public response – you are *passing up the opportunity* to inculcate values in your students, and to model values for your students, in exactly the way the Third Circuit accepted we were doing.

So, especially after the FAIR decision has come down – you need to show the Third Circuit that it was right – that law schools **are** expressive associations that care about communicating to our

students that the government's policy of not allowing openly gay people to serve in the military is inconsistent with your values.

Here's the bottom line: the First Amendment claim of expressive association rests on the assertion that there *is* an association, that there *is* a community, that is trying to express some values. That community needs to be the body of the faculty; it needs to be the bones of the administration – for it to have any real weight as an expressive association.

Thank you.