

## Highlights of the Opinion in FAIR v. Rumsfeld, November 5, 2003

1. The govt's motion to dismiss was denied, allowing the case to go forward.
2. Every plaintiff was held to have standing – FAIR, SALT, CFE, and individual students and professors.
3. The judge said that the DOD was misinterpreting the statute by requiring “equal access,” to wit: “[A]nything short of preventing or totally thwarting the military's recruiting efforts does not trigger funding denial pursuant to the statute.” (p. 83) “[L]aw schools are free to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters.” (p. 58)
4. The Solomon Amendment encroaches on First Amendment interests, but such interests are outweighed by the govt's interest in recruiting. Preliminary injunction denied.

### More detail:

- The Judge adopts our version of the facts nearly wholesale. Of particular note: the Judge recognizes the importance of non-discrimination policies to pedagogical environments that law schools strive to create. (p. 12) He notes that law schools made various efforts to comply with Solomon and at the same time adhere to their non-discrimination policies. (p. 15) He describes the military's satisfaction with the efforts that law schools made to accommodate military recruiters in 1998. (P. 16)
- The Judge repeatedly makes clear his view that the only funds at risk to a parent university when a subelement (e.g. a law school) is non-compliant are DOD funds. (E.g., p. 7) Under his interpretation of the regs, a university with a non-compliant law school would not lose any non-DOD funds, except those that go directly to the law school. This is a point that was almost universally misunderstood until the students at BC Law School performed the most comprehensive research into the regs to date in Spring of 2003.
- The Judge finds that every single one of our plaintiffs has standing, and he thoroughly debunks the Government's specious arguments. Even though a few members of FAIR came forward and were willing to be identified, the Judge makes clear that at this point in the litigation, FAIR could have kept its membership list secret and still had standing. (p. 24, 28) This was a major victory for FAIR.
- The Judge also dispatches the Government's claim that our law student and law faculty plaintiffs have only suffered dignitary harm insufficient to confer standing. (The Penn and Yale lawsuit plaintiffs should be celebrating today). He completely understood and endorsed our argument that what has been injured is the law professors' and students' "right to receive, benefit from, and in some cases, send information - the law schools' message of non-discrimination." (p. 35)
- The Judge disagrees with DOD's interpretation of Solomon to require "equal access" for military recruiters. He recognizes that the military itself is inconsistent on this point, requiring on the one hand no "substantial disparity" while on the other hand "[i]nsisting

on 'equal access.'" (p. 86) He also recognizes and strongly disapproves the military's effort to import equal access as a statutory requirement from the exemption for schools that give the military access equal in quality and scope to that afforded non-military recruiters. (p. 87) Noting that Congress could easily have included a provision for equal access but didn't, the Court "simply fails to see how the statute requires absolute parity when all that it requires is that a school not 'prohibit' or 'in effect prevent' military recruiting efforts." (p. 87) In a line that should strengthen the backbone of many a law school, the judge writes: "[A]nything short of preventing or totally thwarting the military's recruiting efforts does not trigger funding denial pursuant to the statute." (p. 83)

- Even though the court denies the PI, the Court plainly understands that the non-discrimination policies have communicative value that the Solomon Amendment affects. (E.g., p. 50) The Judge recognizes that the Solomon Amendment presents "novel constitutional issues," *id.*, and that "law schools qualify as expressive associations entitled to constitutional protection." (p. 55) Also, he concludes that recruiting has expressive content. (p. 62) The judge thus plainly did not have a problem with any of our threshold contentions, and we easily make it through the door into First Amendment analysis.
- Once the judge looks at the First Amendment interests, however, he believes that the 1A interests are not as strong as the were for the Boy Scouts in Dale or the parade organizers in Hurley. Schools remain free to speak out strongly against military recruiters, and allowing military recruiters on campus a few times a year does not "significantly affect the law schools' ability to express their particular message or viewpoint." (p. 56) Importantly, the judge reasoned that "law schools are free to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters.... [the law schools may take] ameliorative measures to distance the law schools from the military discriminatory policy." (p. 58) Linked with the judge's reading of the statute does not require equal access, these statements seem to support law schools' limitations on military recruiters, as long as such limitations do not "totally thwart" recruiting efforts.
- Solomon should be interpreted as a restriction on conduct that has incidental effects on speech (like O'Brien). The statute is not aimed at suppressing speech but at facilitating recruiting efforts. On this point, as on others, we are set up well for an appeal. The judge's ruling is totally on legal grounds, which will deserve no deference when we appeal. On the O'Brien point in particular, we are optimistic that we will be able to convince the 3<sup>rd</sup> Circuit that the statute is indeed about speech, not conduct.

Summary by Kent Greenfield and Tim Wei  
Full opinion at [www.solomonresponse.org](http://www.solomonresponse.org)