

---

No. 03-4433

---

IN THE 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; 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- Appellant,

v.

DONALD 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 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.

Appeal From the United States District Court  
for the District of New Jersey  
Honorable John C. Lifland

---

BRIEF OF SERVICEMEMBERS DEFENSE NETWORK AS  
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS  
FAIR, ET AL. AND REVERSAL OF THE DISTRICT COURT

---

Jonathan A. Kenter  
BINGHAM MCCUTCHEN LLP  
399 Park Avenue  
New York, NY 10022  
Telephone: (212) 705-7000

Tyler M. Paetkau  
Melissa J. Goldberg  
BINGHAM MCCUTCHEN LLP  
Three Embarcadero Center  
San Francisco, California 94111  
Telephone: (415) 393-2000

Attorneys For Amicus Curiae  
Servicemembers Legal Defense Network

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST OF AMICUS CURIAE .....	1
INTRODUCTION.....	2
ARGUMENT .....	2
A.    Deference To The Government In Military Affairs Is Not Appropriate In This Case .....	3
1.    The Solomon Amendment does not regulate internal military affairs and is not necessary for national security .....	3
2.    The government’s deference-to-the-military cases are distinguishable because they relate to internal military affairs and involve non- public forums and military personnel .....	7
B.    The Military’s Asserted Interest Does Not Justify An Intrusion on First Amendment Rights .....	9
C.    The Military’s Interest In “Convenient” Recruiting On Law School Campuses Is Not Compelling And Does Not Deserve Deference .....	17
D.    Cases Finding Compelling Interest In Recruiting Are Distinguishable .....	20
CONCLUSION .....	22
CERTIFICATE OF COMPLIANCE .....	23
CERTIFICATE OF FILING AND SERVICE .....	24

## TABLE OF AUTHORITIES

Page

### CASES

<i>Adair v. England</i> , 183 F. Supp. 2d 31 (D.D.C. 2002) .....	5, 6, 7
<i>Allen v. Card</i> , 799 F. Supp. 158 (D.D.C. 1992) .....	22
<i>Anderson v. Laird</i> , 466 F.2d 283 (D.C. Cir. 1972).....	4, 5
<i>Blameuser v. Andrews</i> , 630 F.2d 538 (7th Cir. 1980) .....	20
<i>Bledsoe v. Webb</i> , 839 F.2d 1357 (9th Cir. 1988).....	21
<i>Brown v. Glines</i> , 444 U.S. 348, 354 (1980).....	8, 9, 11
<i>Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy</i> , 367 U.S. 886 (1961) .....	7
<i>Christofferson v. Washington State Air Nat'l Guard</i> , 855 F.2d 1437 (9th Cir. 1988) .....	9
<i>Gilligan v. Morgan</i> , 413 U.S. 1 (1973).....	4, 21
<i>Goldman v. Weinberger</i> , 475 U.S. 503 (1986) .....	6, 11, 21
<i>Greer v. Spock</i> , 424 U.S. 828 (1976).....	11
<i>Hartmann v. Stone</i> , 68 F.3d 973 (6th Cir. 1995) .....	5
<i>Holmes v. California Army Nat'l Guard</i> , 124 F.3d 1126 (9th Cir. 1997).....	9
<i>Home Bldg. &amp; Loan Ass'n v. Blaisdell</i> , 290 U.S. 298 (1934).....	10
<i>Kiiskila v. Nichols</i> , 433 F.2d 745 (7th Cir. 1970).....	5, 13
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1972).....	11
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	2
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958).....	2
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931) .....	21
<i>Nebraska Press Ass'n v. Stuart</i> , 427 U.S. 539 (1976) .....	21
<i>Nomi v. Regents for Univ. of Minn.</i> , 796 F. Supp. 412 (D.	

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
Minn. 1992), <i>vacated and remanded</i> , <i>Nomi v. Regents of Univ. of Minn.</i> , 5 F.3d 332 (8th Cir. 1993).....	18
<i>Orloff v. Willoughby</i> , 345 U.S. 93 (1953).....	21
<i>Parker v. Levy</i> , 417 U.S. 733 (1974) .....	3, 9, 11
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981) .....	3, 4, 9, 10, 11, 21
<i>Ryder v. United States</i> , 515 U.S. 177 (1995).....	12
<i>Schlesinger v. Ballard</i> , 419 U.S. 498 (1975).....	4
<i>Searcey v. Crim</i> , 642 F. Supp. 313 (N.D. Ga. 1986), <i>aff'd in part, vacated in part, and remanded</i> . <i>Searcey v. Crim</i> , 815 F.2d 1389 (11th Cir. 1987).....	19
<i>Selland v. Perry</i> , 905 F. Supp. 260 (D. Md. 1995).....	4
<i>Snepp v. United States</i> , 444 U.S. 507 (1980).....	8
<i>Thomasson v. Perry</i> , 895 F. Supp. 820 (E.D. Va. 1995).....	3
<i>Turner Broadcasting System, Inc. v. F.C.C.</i> , 512 U.S. 622, 664 (1994).....	13, 15
<i>United States Civil Service Comm'n v. National Ass'n of Letter Carriers</i> , 413 U.S. 548 (1973).....	8
<i>United States v. Acevedo-Delgado</i> , 167 F. Supp. 2d 477 (D. P.R. 2001).....	8
<i>United States v. Albertini</i> , 472 U.S. 675 (1985).....	7
<i>United States v. City of Philadelphia</i> , 798 F.2d 81 (3rd Cir. 1986).....	12, 14
<i>United States v. Nat'l. Treasury Employees Union</i> . 513 U.S. 454 (1995).....	13
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	17
<i>United States v. Robel</i> , 389 U.S. 258 (1967).....	10
<i>United States v. Schmucker</i> , 815 F.2d 413 (6th Cir. 1987).....	17
<i>United States v. Wilson</i> , 33 M.J. 797 (A.C.M.R. 1991).....	9
<i>Watson v. Arkansas Nat'l. Guard</i> , 886 F.2d 1004 (8th	

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
Cir. 1989) .....	22
<i>Wayte v. United States</i> , 470 U.S. 598 (1985).....	17

**OTHER AUTHORITIES**

140 Cong. Rec. H3860-03, H3863 (1994) (Rep. Underwood) .....	16
Falik, <i>Exclusion of Military Recruiters From Public School Campuses: The Case Against Federal Preemption</i> , 39 U.C.L.A.Rev. 941 (April 1992) .....	12, 13
118 Cong. Rec. 22,437 (daily ed. June 26, 1972).....	13

**RULES**

Fed. R. App. P. 29(a).....	1
----------------------------	---

**STATUTES**

10 U.S.C. § 503 .....	12
18 U.S.C. § 2388 (2001) .....	21

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Servicemembers Legal Defense Network (“SLDN”) is a national, non-profit legal services and policy organization dedicated to protecting the rights of military personnel affected by “Don’t Ask, Don’t Tell.” SLDN works to ensure that all Americans have the freedom to serve. Unfortunately, that is not the reality under “Don’t Ask, Don’t Tell.” SLDN’s mission is to end discrimination against and harassment of military personnel affected by “Don't Ask, Don't Tell” and related forms of intolerance. For a decade, SLDN has worked to end the military’s discriminatory policy and provided free legal services to those harmed by “Don’t Ask, Don’t Tell.” SLDN has responded to over 5,100 requests for assistance and effected almost three dozen changes to military policy and practice.

Servicemembers Legal Defense Network seeks leave to file a brief of *amicus curiae* because of its unique and highly germane expertise on this issue. All parties have consented to SLDN submitting this brief as *amicus curiae* pursuant to Fed. R. App. P. 29(a).

## INTRODUCTION

SLDN submits this *amicus* brief on the narrow issue of whether deference applies to the Solomon Amendment.

## ARGUMENT

Especially in times like these, “deference” to the military seems like a good idea. But, regardless of the level of military activity, the Supreme Court has emphasized the need for a high level of scrutiny in the freedom of association area. “State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461 (1958). “The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.” *NAACP v. Button*, 371 U.S. 415, 438 (1963).

The Court should not blindly defer to the government’s asserted interest, or assume that the Solomon Amendment is necessary to further that interest. Deference to the government is not appropriate in this case for several reasons. First, this is not a case regarding regulations or laws relating to the internal affairs of the military, or laws necessary for national security, where deference to the military is obviously appropriate. Moreover, although courts ordinarily defer to laws regulating the military when Congress has made “judgments on military

needs and operations,” *Rostker v. Goldberg*, 453 U.S. 57, 69 n.6 (1981), Congress made no such judgment here. As the legislative history on the Solomon Amendment shows, Congress wanted to “send a message over the wall of the ivory tower of higher education.” 140 Cong. Rec. H3861-63 (statement by Rep. Pombo, co-sponsor of Solomon Amendment); see District Court’s opinion at 9 n.2 (discussing legislative history of Solomon Amendment). Congress did not even consider any facts or evidence regarding the military’s asserted recruiting need and the effect of law schools’ enforcement of their non-discrimination policies on the military’s *ability to recruit*. The legislative history simply does not contain any discussion of the military’s needs and operations. Accordingly, deference is not appropriate here.

**A. Deference To The Government In Military Affairs Is Not Appropriate In This Case.**

**1. The Solomon Amendment does not regulate internal military affairs and is not necessary for national security.**

“Because the military is, ‘by necessity, a specialized society separate from civilian society,’ *Parker v. Levy*, 417 U.S. 733, 743 (1974), the Supreme Court has held that ‘Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules *by which [military society] shall be governed . . . .*’ *Id.* at 743, 756.” *Thomasson v. Perry*, 895 F. Supp. 820, 827 (E.D. Va. 1995) (emphasis added). In the case of the Solomon Amendment, however,

Congress did not proscribe rules governing military society; it proscribed rules governing civilian society at private institutions. “The invocation of the deference due Congress in determining how best to assure the readiness of our Armed Forces for battle cannot settle the issue before us.” *Schlesinger v. Ballard*, 419 U.S. 498, 519-20 (1975) (J. Brennan, dissenting). Deference is not warranted if the infringement on individual rights “is not itself relevant to and justified by the military purposes.” *Id.* at 520.

“Deference is warranted when the policy in question concerns the ‘complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force,’ *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), and is a ‘studied choice of one alternative in preference for another furthering that goal.’” *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981).” *Selland v. Perry*, 905 F. Supp. 260, 264 (D. Md. 1995). This is not such a case. Neither the military nor Congress made any professional judgment or studied choices with respect to an asserted military need for the Solomon Amendment. Thus, in *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), in a free exercise challenge to regulations at the federal military academies that required attendance at religious services, the court noted:

The military's interest espoused in this case has already been contrasted to “paramount and compelling” concerns which have justified infringements of personal freedoms in the past. *This case does not involve programs vital to our immediate national security, or even to military operational or disciplinary procedures.* Nor does it

appear that the ruling will have any detrimental impact on the academies' training programs.

*Id.* at 296 (emphasis added). Or, as cautioned by the Sixth Circuit in a case in which families challenged enforcement of regulations in a child care program on the base, which prohibited certain religious practices such as praying: “the Army has wandered far afield. It stands not in an area where *the link to its combat mission is clear*, it does not even stand in an area where the link is attenuated but nonetheless discernable. Instead, the link here is far more ephemeral.” *Hartmann v. Stone*, 68 F.3d 973, 985 (6th Cir. 1995) (emphasis added).

*Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir. 1970) (en banc) also cautioned against accepting broadly stated military interests in the First Amendment context. In that case, a civilian employee was a member of Veterans for Peace in Vietnam and engaged in antiwar rallies in town and near, but not on, a naval base. *Id.* at 746-48. Subsequently, she was excluded from the base. *Id.* In rejecting the sufficiency of the state interest, the court observed that the government’s “assertion is ... *a broad claim that undefined military and national defense considerations* are sufficient to permit the government to infringe plaintiff’s rights to freedom of speech and association.” *Id.* at 750 (emphasis added).

The recent decision, *Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002), illustrates the critical distinction between regulation of internal military affairs and regulation of external, public conduct in which the military is involved. The *Adair*

court first noted that where the laws regulating the military “have no specific operational, strategic, or tactical objective,” they are subject to strict scrutiny. The *Adair* court distinguished *Goldman v. Weinberger*, 475 U.S. 503 (1986), which held that “[o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.” The *Adair* court distinguished *Goldman* because “*Goldman* dealt with a regulation that involved *inherently operational, strategic, or tactical matters. . . . The challenged regulation related directly to the military’s role in conducting national defense.*” 183 F.Supp.2d at 50 (emphasis added). In contrast, in *Adair* “the issues revolve[d] around considerations that [were] not related strictly to military affairs or to the defense of the country. That is the policies at issue here [were] designed to hire, retain and promote chaplains to satisfy the religious needs of Navy service members. These policies relate[d] to quality-of-life issues for military personnel and [had] no specific operational, strategic, or tactical objective.” *Id.* “*Since operational or strategic considerations [were] not at issue, the court need not give the military the same level of deference in this case that it otherwise might.*” *Id.* at 51 (emphasis added). Here, the statute does not even relate to military personnel at all; it regulates civilians, in a private institution, nowhere near a military base.

*Adair* also distinguished *Goldman* on the ground that it was a Free Exercise Clause case, and noted the decision does not stand for the “sweeping proposition that in *all* matters relating to the First Amendment and military courts, courts should show the armed forces substantial deference.” *Id.* at 51 (emphasis in original). “[A]though this Court is mindful of the Supreme Court’s admonishment that the judiciary should give substantial deference to matters related to management of the military, such protection does not extend to practices that may subvert one’s inalienable constitutional rights.” *Id.* at 52 (citation omitted).

**2. The government’s deference-to-the-military cases are distinguishable because they relate to internal military affairs and involve non-public forums and military personnel.**

The government may cite many courts’ broad statements concerning the “compelling” interests of the military. For example, some courts have held the security interest to be a sufficient government interest. *See United States v. Albertini*, 472 U.S. 675, 689 (1985) (government’s interest in security “important interest” to justify excluding banned protester from military open house); *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895-97 (1961) (government’s interest in maintaining security of military installation outweighed government employee’s interest in working at particular location); *United States v. Acevedo-Delgado*, 167 F. Supp. 2d 477, 481 (D. P.R.

2001) (assessing compelling interest within freedom of religion context; court held “that the Government has a compelling interest to justify his exclusion from [a military installation]. The compelling government interest in this case is the ability to effectively carry out national security needs by protecting the security of United States Naval installations.”). All of these cases, however, involved events occurring in *non-public* forums. More particularly, they involved military bases. In contrast, First Amendment activities that take place on private university campuses warrant the highest level of scrutiny. In addition, the military’s interest in security is an altogether different type of interest from recruiting.

Similarly, some courts have held the military interest in effectiveness and discipline to be substantial interests.<sup>1</sup> *See, e.g., Brown v. Glines*, 444 U.S. 348, 354-55 (1980) (balancing First Amendment interests of soldiers with “substantial government interest” of “military effectiveness” sought to be protected by regulations and holding interest to be sufficiently substantial).<sup>2</sup> These cases are

---

<sup>1</sup> In these cases, the courts assess whether there is a “substantial” government interest, as opposed to a “compelling” interest. Restrictions on the speech of government employees must “protect a substantial government interest unrelated to the suppression of free speech.” *Snepp v. United States*, 444 U.S. 507, 509, n.3 (1980).

<sup>2</sup> Other courts have reached similar conclusions. *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-65 (1973) (upholding “important interests sought to be served by the limitations on partisan political activities” by military); *United States v. Wilson*, 33 M.J. 797, 799-801

(Footnote Continued on Next Page.)

distinguishable, however, inasmuch as the Solomon Amendment impedes the First Amendment rights of private citizens, as opposed to soldiers. “Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to [military] command. If it does, it is constitutionally unprotected.” *Parker v. Levy*, 417 U.S. 733, 759 (1974).<sup>3</sup>

**B. The Military’s Asserted Interest Does Not Justify An Intrusion on First Amendment Rights.**

When First Amendment rights of non-military personnel are at issue the government must still justify its intrusion into private citizens’ First Amendment rights. Congress is not “free to disregard the Constitution when it acts in the area of military affairs.” *Rostker*, 453 U.S. at 67. Although the Supreme Court has

---

(Footnote Continued from Previous Page.)

(A.C.M.R. 1991) (upholding conviction of military policeman who blew his nose on American flag because military had “substantial government interest” in promoting “military effectiveness”); *Christofferson v. Washington State Air Nat’l Guard*, 855 F.2d 1437, 1443 (9th Cir. 1988) (upholding firing of officers for whistle blowing and holding “that whatever First Amendment interests are implicated ... are outweighed by [the state’s] strong interest in promoting the efficiency of the military services”); *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126, 1133 (9th Cir. 1997) (“[T]he government’s interest in maintaining effective armed forces has been repeatedly upheld”).

<sup>3</sup> “[W]hile members of the military services are entitled to the protections of the First Amendment, ‘the different character of the military community and of the military mission requires a different application of those protections.’” *Brown v. Glines*, 444 U.S. 348, 354 (1980) (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)).

recognized the need for “deference to legislative and executive judgments in the area of military affairs, *Rostker*, 453 U.S. at 66, “deference does not mean abdication,” *id.* at 70, and “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.” *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *see also Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 298, 426 (1934) (“even the war power does not remove constitutional limitations safeguarding essential liberties”). “The concept of ‘national defense’ cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the in name of national defense, we would sanction the subversion of one of those liberties--the freedom of association--which makes the defense of the Nation worthwhile.” *Robel*, 389 U.S. at 264.

As summarized by Justice Marshall: “As *Robel* and many other cases show, all governmental power –even the war power, the power to maintain national security, or the power to conduct foreign affairs – is limited by the Bill of Rights. When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative Branch or Executive Branch, but rather consider

those claims in light of the individual freedoms.” *Kleindienst v. Mandel*, 408 U.S. 753, 782-3 (1972) (J. Marshall, dissenting).

In every case in which the Supreme Court has “deferred” to a decision by Congress governing the military, it has done so because the United States established the existence of an interest justifying an infringement of a constitutional right related to the “particular restriction.” *Goldman*, 475 U.S. at 507. For example, the Court upheld a regulation prohibiting the wearing of yarmulkes in public only because “the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity . . . .” *Id.* at 508. In cases involving conflicts between service members’ right of free expression and military need for discipline, the Court held that speech could be curtailed if the “fundamental necessity for obedience, and the consequent necessity for imposition of discipline” required it. *Parker*, 417 U.S. at 758; *see also Brown*, 444 U.S. at 354; *Greer v. Spock*, 424 U.S. 828, 837 (1976). Similarly, although the military has an interest in registering only men for the draft because “[m]en and women . . . are simply not similarly situated for purposes of a draft or registration for a draft,” *Rostker*, 453 U.S. at 78-79, no amount of deference permits Congress to establish “an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration,” *id.* at

78, because no military interest could support such distinctions. *See also Ryder v. United States*, 515 U.S. 177, 185 n. 4 (1995) (dismissing out of hand the argument that it should “defer” to the military’s decision to have a service member’s appeal heard by appellate judges appointing in violation of the Appointments Clause).

Relying solely on *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3rd Cir. 1986), the District Court stated that Congress considers the military’s access to colleges and universities for recruiting a “matter of paramount importance.” *See* District Court’s opinion at 71. Even if true,<sup>4</sup> merely having an interest that is

---

<sup>4</sup> The *City of Philadelphia* court asserted that “Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance” and “access to law schools and their students is an integral part of the military’s effort to conduct ‘intensive recruiting campaigns to obtain enlistments.’” But 10 U.S.C. § 503, the statute that *City of Philadelphia* asserted demonstrated such a need, states only that “The Secretary concerned shall conduct intensive recruiting campaigns to obtain enlistments. . . .” This is only a general statement that does not address what role access to law schools and students should play. The court also relied on “the long-standing Congressional policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters.” *City of Philadelphia*, 798 F.2d at 86. That Congress wished to encourage universities to welcome recruiters does not support the court’s “explicable leap” in finding a “paramount importance” of military recruiting on campus. Falik, *Exclusion of Military Recruiters From Public School Campuses: The Case Against Federal Preemption*, 39 U.C.L.A.Rev. 941, 962-63 (April 1992). The court also relied on the funding prohibition in the Department of Defense Authorization Act of 1973 (“DDA”), but as the Chairman of the House Armed Services committee noted, “this funding provision was not unique; all federal programs have cooperative requirements for receipt of government dollars.” Falik, 39 U.C.L.A.Rev. at 963, citing 118 Cong. Rec. 22,437 (daily ed. June 26, 1972) (statement of Rep. Herbert). Finally, the court quoted from a House committee

(Footnote Continued on Next Page.)

“important in the abstract does not mean” that the Solomon Amendment “will *in fact advance* those interests.” *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (plurality) (emphasis added). The government “must do more than simply ‘posit the existence of the disease sought to be cured.’ [citation omitted] It must demonstrate that the recited harms are real, . . . and that the regulation will *in fact alleviate these harms in a direct and material way.*” *Id.* (emphasis added); *see also United States v. Nat’l. Treasury Employees Union*, 513 U.S. 454, 475 (1995); *Kiiskila*, 433 F.2d at 749-50.

Broad assertions of a military need or interest are insufficient to justify an intrusion into an individual’s First Amendment rights. *Kiiskila*, 433 F.2d at 749-50. In *Kiiskila v. Nichols*, the Seventh Circuit rejected the government’s assertion that the military need for discipline justified keeping a civilian employee off its

---

(Footnote Continued from Previous Page.)

report discussing the intent of the DDA’s funding prohibition, but it omitted key language. The court quoted that the committee believed the “national interest is best served by colleges and universities which provide for the full spectrum of opportunity for various career fields . . . and by the opportunity for students to talk to all recruiting sources, including military recruiters,” but then omitted the remainder of the phrase, stating the committee “does not believe that Congress in any way should try to impose its will on colleges and universities.” H.R. Rep. No. 1149, 92d Cong. 2d Sess. 79 (1972). Thus, the actual statutes and their legislative history do not support *City of Philadelphia*’s broad conclusions as to the importance of the military’s interest in recruiting and of the necessary access to university campuses.

base because the government *failed to present evidence* showing that the plaintiff's presence *actually affected* military discipline or that the employee was subject to military discipline herself. The court made clear that assertions of military need that are not supported with evidence are insufficient when an individual's First Amendment rights are threatened or curtailed. *Id.* at 750.

Moreover, the government's and the District Court's broad reliance on *City of Philadelphia's* assessment of military's interest in recruiting on law school campuses is misplaced. First, the court's analysis of the military's interest in *City of Philadelphia* is inapposite because there, in contrast to here, no First Amendment rights were at stake.<sup>5</sup> Rather, *City of Philadelphia* was a preemption case that merely evaluated the validity of a local ordinance. 798 F.2d at 85. In fact, the law school in that case wanted to let the military on campus, but was being precluded by the Philadelphia Commission on Human Relations' enforcement of a city ordinance. *Id.* at 84-85. Thus, *City of Philadelphia* did not evaluate whether the government's asserted interest sufficiently justified an infringement on First Amendment rights.

---

<sup>5</sup> The Temple School of Law did raise its First Amendment rights as an issue, but the court did not evaluate this claim. Moreover, Temple contended that the Commission's enforcement of Philadelphia's local ordinance infringed on its First Amendment right to cooperate with and allow the military on campus, not that the military was infringing its rights. *City of Philadelphia*, 798 F.2d at 85.

Second, regardless of what test *City of Philadelphia* applied, the government in that case at least provided *some* evidence, how ever slim, demonstrating that recruiting *on campus* was important to the military and that there would be harmful consequences if the military were completely excluded *Id.* at 87. In fact, the court noted the importance of making a finding, under “present circumstances,” that the military’s ability to recruit skilled personnel was “significantly impaired. *Id.* at 87. Here, the government simply failed to present *any* evidence.

Despite the length of time law schools have had and enforced their non-discrimination policies against employers, including the military, the record contains no evidence demonstrating that the military has had any difficulty recruiting qualified candidates to fill its JAG positions as a result. Nor does the record contain any evidence demonstrating that enforcement of the Solomon Amendment has led to increased numbers of qualified student applicants who otherwise would not have applied. Thus, the government failed to prove that Solomon Amendment “will *in fact alleviate [specified] harms in a direct and material way.*” *Turner*, 512 U.S. at 664 (plurality) (emphasis added).

In fact, the evidence demonstrates the opposite – that the Solomon Amendment was not intended to, and does not in fact, further a compelling governmental interest. Law schools’ enforcement of their non-discrimination polices have not prevented the military from contacting students, nor steered

students away from contacting them directly. See Declaration of Appleton & Declaration of Tokarz ¶ 6; Declaration of Eskridge ¶ 32. The military can still reach out to students directly and participate in off-campus recruiting activities. Declaration of Seidman ¶15; Declaration of Law ¶15; Declaration of Rogers ¶ 23; Declaration of Eskridge ¶ 25. Furthermore, the military can, and still does use a recruiting devise that is both extraordinarily effective and fairly unique to the military, a scholarship program that defrays some of the costs of law school in return for a commitment to take a position in the JAG Corps. Declaration of Rosenkranz ¶ 12, Ex. 5.

Significantly, the Department of Defense itself *opposed* the Solomon Amendment in part because it believe the legislation was unnecessary. 140 Cong. Rec. H3860-03, H3863 (1994) (Rep. Underwood). Furthermore, even after the Department of Defense changed its position on the Solomon Amendment and starting demanding affirmative assistance by law schools, it did not asserted that the military was having trouble finding qualified candidates as a justification. In fact, the only evidence in the record regarding the military's opinion on its recruiting abilities demonstrates that competition for legal jobs in the military remained intense. Declaration of Law ¶ 16, Ex. 6 (letter from an Army recruiting officer stating that due to the intense competition, even "very qualified applicants will not be selected for a position.").

**C. The Military's Interest In "Convenient" Recruiting On Law School Campuses Is Not Compelling And Does Not Deserve Deference.**

To be sure, there are cases in which the government's interest in military conscription has been considered sufficient to justify restrictions on First Amendment rights. The seminal case, *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), upheld a regulation that prohibited burning of draft cards because of the government's "substantial interest" in assuring the continuing availability of issued Selective Service certificates. *Id.* at 377-78. The court explained: "We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates." *Id.* at 381; *see also* *Wayte v. United States*, 470 U.S. 598, 611-12 (1985) ("Few interests can be more compelling than a nation's need to ensure its own security"); *United States v. Schmucker*, 815 F.2d 413, 417-18 (6th Cir. 1987) ("The government ... has a compelling interest in being able to institute conscription quickly should it prove necessary, and registration is a crucial component of the conscription process").

However, there has been no showing, as indicated above, that military preparedness is or will be hampered by law schools' policies. In fact, the evidence

shows the contrary.

Moreover, there is a vast difference between conscription and recruiting. Conscription contemplates a national need far greater than filling the military's needs through regular employment practices. Courts have not deferred to the military when, as here, it desires to engage in the commercial activity of recruiting. In *Nomi v. Regents for Univ. of Minn.*, 796 F. Supp. 412 (D. Minn. 1992), *vacated and remanded*, *Nomi v. Regents of Univ. of Minn.*, 5 F.3d 332 (8th Cir. 1993),<sup>6</sup> the court addressed a similar situation involving military recruiting. There, the University of Minnesota had banned military and FBI recruiters from campus because their discrimination against homosexuals violated the university's nondiscrimination policy. *Id.* at 413-14. A student who wished to interview with the military alleged that the ban deprived him of his right to free speech. *Id.* at 415. The university countered that the military's recruiting was commercial speech that could be reasonably regulated. *Id.* at 416. The court held:

The Court agrees with defendants that *recruiting proposes a commercial transaction; the purpose of recruiting is to reach an agreement under which services will be exchanged for compensation.* The fact that the military, rather than a civilian employer, initiates the

---

<sup>6</sup> The Eighth Circuit vacated the district court's judgment and remanded the case with directions to dismiss the student's complaint. 5 F.3d at 333-34. The court held that the case was moot because the student had graduated from law school by the time it rendered its decision. *Id.* Thus, the court did not specifically criticize the court's finding that recruiting is commercial speech.

transaction does not alter its essential nature. Military employers compete with civilian employers to obtain the services they need; to obtain those services, they offer various compensation packages. Recruitment is the process by which they offer to exchange X for Y price. Therefore, the Court holds that recruitment speech – whether military or civilian – is commercial speech.

*Id.* at 417 (emphasis added).

As in *Nomi*, the military’s interest is commercial speech subject to strict scrutiny when First Amendment rights are at issue.

In this same vein, the mere convenience of military recruiting on law school campuses is not a “compelling” interest. For example, in *Searcey v. Crim*, 642 F. Supp. 313 (N.D. Ga. 1986), *aff’d in part, vacated in part, and remanded*, *Searcey v. Crim*, 815 F.2d 1389 (11th Cir. 1987)<sup>7</sup>, a case that involved peace activists who challenged the Board of Education's policy of granting military recruiters access to Atlanta public schools while denying similar access to peace activists, the court rejected a very similar argument advanced by the government. *Id.* at 314. The

---

<sup>7</sup> The Eleventh Circuit held that the district court should not have resolved the constitutional question of whether appellants created a public forum at the summary judgment stage. *Searcey*, 815 F.2d at 1392-93. The district court did not need to determine which of the forum categories was applicable to this case in order to grant preliminary relief because appellants' refusal to grant the limited access rights at issue failed scrutiny even under a nonpublic forum analysis. *Id.* at 1394-95. Thus, the Eleventh Circuit did not specifically criticize the district court's assessment that the military interest was not a compelling interest, but held that it was not appropriate at the summary judgment phase to consider what type of forum it was.

United States intervened as a defendant. *Id.* at 317. The United States, in support of the Board's policy, argued that “the recruiting needs of the military constitute a compelling state interest for granting it ‘preferred’ access to these forums.” *Id.* The court rejected this argument for several reasons. One was that “there has been no showing that the military lacks alternative means of contacting high school students; the mere convenience of contacting them at high schools is not a compelling state interest.” *Id.* (emphasis added).

#### **D. Cases Finding Compelling Interest In Recruiting Are Distinguishable**

A few courts have assessed the government interest within the military recruiting context; however, these cases are distinguishable on their facts. For example, in *Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980), the court found that the had a compelling interest in military recruiting but that interest was articulated in the context of the military’s decision to keep someone out of the military. In *Blameuser*, a student argued that the military’s *refusal to admit him* into an advanced ROTC course because of his views on white supremacy and Nazism violated the First Amendment. *Id.* at 539. The court held: “The *interest of our government in recruiting qualified candidates to be officers in the armed services is a compelling one* which may justify some inquiry into and consideration of an applicant's political beliefs to determine whether the candidate is deserving of

that ‘special trust and confidence.’” *Id.* at 543. Because no one is arguing here that the military has no interest in controlling who it employs, *Blameuser* does not apply.

Similarly those cases that find that there might be an interest in preventing actual obstruction to recruiting do not apply. *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 591 (1976) (concurring opinion).<sup>8</sup> First, no one has actually obstructed recruiting. Second, these cases in no way hold that the military can trammel all rights in pursuit of recruiting regardless of the interests at stake.

In fact, courts have recognized as much. For example, in *Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988), the Ninth Circuit distinguished *Orloff v. Willoughby*, 345 U.S. 93 (1953), *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Gilligan v. Morgan*, 413 U.S. 1 (1973), and *Goldman v. Weinberger*, 475 U.S. 503 (1986), the primary Supreme Court military deference cases, as applying to “a member of the armed forces or an applicant for enlistment in the armed forces.” *Id.* at 1359.

---

<sup>8</sup> In fact, the U.S. has a statute that prevents obstruction. *See* 18 U.S.C. § 2388 (2001) (“Whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or *willfully obstructs the recruiting or enlistment service of the United States*, to the injury of the service or the United States, or attempts to do so -- Shall be fined under this title or imprisoned not more than twenty years, or both.) (emphasis added).

As in *Bledsoe*, the law schools and their students are “neither.” Thus, the *Bledsoe* court held that Title VII was applicable to the plaintiff, a civilian military employee. *See also Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992) (distinguishing military deference doctrine). The district court in *Allen* held that military deference was inapplicable because the law at issue, the Soldiers’ and Sailors’ Civil Relief Act of 1940 (“SSCRA”), focused on service members’ “rights devolving from civilian laws. The SSCRA has never been held to affect the internal administration of the military. Congress, as well as the judiciary, have historically deferred to the military in its *internal administration*.” *Id.* at 160 (emphasis in original).

As the Eight Circuit noted in *Watson v. Arkansas Nat’l. Guard*:

There is a vast difference between judicial review of the constitutionality of a regulation or statute of general applicability and judicial review of a discrete military personnel decision. In the first instance, a legal analysis is required: one which the courts are uniquely qualified to perform. The second involves a fact-specific inquiry into an area affecting military order and discipline . . . .

*Watson*, 886 F.2d 1004, 1010 (8th Cir. 1989).

## CONCLUSION

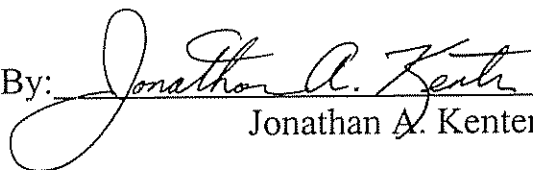
This is simply not a case where deference applies. The Solomon Amendment neither regulates internal military affairs nor responds to national security concerns. Nor did Congress make any judgment as to the military’s need and operations when it passed the Solomon Amendment.

Even so, deference does not enable the government to escape its burden to prove the Solomon Amendment actually furthers its asserted interests and thus, sufficiently justifies the infringement on private citizens' First Amendment rights. Moreover, there is simply no basis in the record to conclude that the military's asserted such interests are sufficiently advanced by the Solomon Amendment to justify infringing on the First Amendment. Thus, this Court should overrule the District Court's opinion.

DATED: January 12, 2004

Respectfully Submitted

BINGHAM McCUTCHEN LLP

By:  \_\_\_\_\_  
Jonathan A. Kenter

CERTIFICATE OF COMPLIANCE

I certify that the attached brief is in compliance with the type-volume limitations of Fed. R. App. Proc. 32(a)(7)(B) and 29(d). This brief is proportionately spaced, has a typeface of 14 points, and contains 5535 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: January 12, 2004

Respectfully Submitted

BINGHAM McCUTCHEN LLP

By:

  
Jonathan A. Kenter

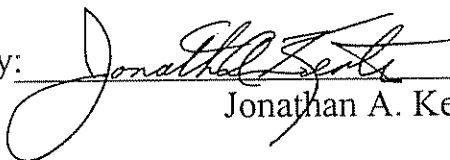
CERTIFICATE OF FILING AND SERVICE

I certify that the original and 10 copies of the foregoing were mailed to the Court through Federal Express on January 12, 2004, and that a copy of the foregoing was mailed through Federal Express to Joshua Rosenkrantz, lead counsel for Plaintiffs-Appellants and to Douglas N. Letter and Scott McIntosh, counsel for Defendants-Appellees on January 12, 2004.

DATED: January 12, 2004

Respectfully Submitted

BINGHAM McCUTCHEN LLP

By:  \_\_\_\_\_  
Jonathan A. Kenter