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Braxton Williams

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Rumsfeld v. Forum for Academic and Institutional Rights, Inc.:
By Allowing Military Recruiters on Campus, Are Law Schools
Advocating “Don’t Ask, Don’t Tell”?

By Braxton Williams*

*Braxton Williams is currently a third-year law student at the T.C. Williams School of Law at the University of Richmond in Richmond, Virginia.

I. Introduction

The freedom of speech protected by the First Amendment encompasses more than mere spoken words; it also protects conduct that has an expressive quality, such as flag burning.¹ In the important case of *United States v. O'Brien*,² the United States Supreme Court appeared to narrow these sorts of protections in cases where there is a sufficient government interest in prosecuting actions, such as burning draft cards, and when such acts are noncommunicative.³

After the Supreme Court's recent holding in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,⁴ the *O'Brien* holding's limitation on First Amendment protection for expressive conduct appears to be alive and well. In *Rumsfeld*, the Court held that an amendment conditioning the receipt of federal funds by law schools upon their acquiescence to military recruiters' presence on campus did not stifle the schools' First Amendment freedoms of speech and association – despite the schools' objections to the military's “don't ask, don't tell” policy under which it can discharge soldiers for being openly homosexual, and despite claims that allowing military recruiters equal access as other recruiters interfered with the schools' ability to express their objection to the arguably discriminatory practices of the military.⁵

Part II of this note examines the historical background of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* Part III analyzes the unanimous opinion. Part IV examines the case's potential impact on First Amendment jurisprudence.

¹ See *Texas v. Johnson*, 491 U.S. 397 (1989).

² 391 U.S. 367 (1968).

³ See *id.* at 377-82.

⁴ 547 U.S. 47 (2006).

⁵ See *id.* at 52, 70.

II. Historical Background of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*

A. The First Amendment

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁶

B. *United States v. O’Brien*

In 1966, at the dawn of the Vietnam War, four men, including the defendant, burned their registration certificates for the Selective Service on the steps of a courthouse.⁷ Afterwards, the defendant told agents with the Federal Bureau of Investigations that he had committed the unlawful act because of his personal beliefs.⁸ He also said later that the act was an effort to persuade other people to adopt his position against the Vietnam War.⁹

The district court, with which the United States Supreme Court agreed, rejected O’Brien’s arguments that the law he was charged with violating – prohibiting the destruction of draft cards – unconstitutionally infringed upon his First Amendment rights and failed to serve a legitimate purpose.¹⁰ Although it recognized that certain actions are protected by the First Amendment when there is a communicative element to those actions, the Supreme Court nevertheless upheld the statute making draft card burning unlawful because it did not prohibit an expressive act; rather, it prohibited a noncommunicative act.¹¹ The court stated, “[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever

⁶ U.S. CONST. amend. I.

⁷ *O’Brien*, 391 U.S. at 369.

⁸ *Id.*

⁹ *Id.* at 370.

¹⁰ *Id.*

¹¹ *Id.* at 381-82.

the person engaging in the conduct intends thereby to express an idea.”¹² Finally, such limitations on First Amendment protections are permissible when there is a sufficient government interest at stake¹³—in the defendant’s case, the “[g]overnment’s substantial interest in assuring the continuing availability of issued Selective Service certificates.”¹⁴

III. The *Rumsfeld* opinion

A. Facts and Procedural History

Forum for Academic and Institutional Rights, Inc. (FAIR), an association of law schools and faculties, filed suit against Secretary of Defense Donald H. Rumsfeld and others, challenging the constitutionality of a law passed by Congress called the Solomon Amendment,¹⁵ which requires institutions of higher education to give military recruiters the same access to their campuses as they do to other types of recruiters, or else be denied certain federal funds from the Department of Defense.¹⁶ Congress passed the law after law schools shut out military recruiters because of the schools’ objections to the federal government’s “don’t ask, don’t tell” policy allowing the military to discharge troops for being openly homosexual.¹⁷ The schools comprising FAIR have nondiscrimination policies that prohibit them from discriminating against people based on sexual orientation and other factors.¹⁸

For a while, some law schools found a way to comply with the Solomon Amendment while still voicing their objection to the military’s policy on homosexuals: they allowed military recruiters access only to the undergraduate campuses, while other recruiters, such as the hiring

¹² *Id.* at 376.

¹³ *Id.* at 376-77.

¹⁴ *Id.* at 382.

¹⁵ 10 U.S.C. § 983(d) (Supp. 2005).

¹⁶ *Rumsfeld*, 547 U.S. at 51.

¹⁷ *Id.*

¹⁸ *Id.*

partners of law firms, were allowed access to the law school campuses.¹⁹ This continued until shortly after the September 11, 2001 terrorist attacks, when the United States government began requiring that schools give military recruiters equal access to the law school campuses.²⁰

FAIR alleged that the law schools' First Amendment rights of free speech and free association were violated by the action the Solomon Amendment forced them to undertake with regard to military recruiters.²¹ By forcing schools to choose between receiving federal funds and exercising their First Amendment right not to associate themselves with the military's policy towards homosexuals, FAIR argued, the Solomon Amendment violated the Constitution.²²

The district court denied FAIR's efforts to obtain a preliminary injunction against enforcement of the Solomon Amendment and held that recruiting is conduct, not speech, and thus could be regulated under *O'Brien*.²³ In response to the district court's decision, Congress codified the government's informal policy, creating the new version of the Solomon Amendment; it now holds that institutions of higher education must give military recruiters access to students and campuses that is at least equal to the access given to other employers.²⁴

On appeal to the United States Court of Appeals for the Third Circuit, that court agreed with FAIR's argument that the more recent version of the Solomon Amendment was unconstitutional for the same reasons as the old version.²⁵ The third circuit held that the Solomon Amendment regulated speech, not conduct, and thus disagreed with the district court that the activity in question could be regulated under *O'Brien*.²⁶ The court also held that the law,

¹⁹ *Id.* at 53 (citing *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld (FAIR I)*, 291 F. Supp. 2d 269, 282 (D. N.J. 2003)).

²⁰ *Id.* (citing *FAIR I*, 291 F. Supp. 2d at 283).

²¹ *Rumsfeld*, 547 U.S. at 53.

²² *Id.*

²³ *Id.* (citing *FAIR I*, 291 F. Supp. 2d at 311-14).

²⁴ *Id.* at 54 (citing 10 U.S.C. § 983(b) (Supp. 2005)).

²⁵ *Id.* (citing *Forum for Academic and Inst. Rights, Inc. v. Rumsfeld (FAIR II)*, 390 F.3d 219 (2004)).

²⁶ *Id.* at 55 (citing *FAIR II*, 390 F.3d. at 243-44).

by forcing schools to choose between receiving federal funds and giving up their rights to free speech and association, violated the unconstitutional conditions doctrine.²⁷ Even if the activities in question were treated as expressive conduct, the Solomon Amendment would still not pass constitutional muster under the test set forth in *O'Brien*.²⁸ The case was remanded to the district court to issue a preliminary injunction against the statute's enforcement.²⁹

B. The Supreme Court Opinion

1. *Interpretation of the Solomon Amendment*

Justice Roberts, writing for a unanimous Supreme Court, began by disposing of an interpretation of the Solomon Amendment by law professors who submitted amicus briefs.³⁰ The professors had argued that both parties in the case interpreted the law wrongly – that schools must provide the level of access to military recruiters that it provided to nonmilitary recruiters receiving the most favorable access.³¹ Roberts nevertheless sided with the interpretation put forth by the parties to the case.³²

2. *The Funding Condition Placed on Law Schools by the Solomon Amendment Was Constitutional*

Justice Roberts next examined the condition placed on law schools by the Solomon Amendment and found it to be constitutional.³³ Roberts noted that although Congress used its Spending Clause power to ensure equal access for military recruiters, as opposed to directly through its powers under Article I, the funding condition still deserved deferential treatment because it was passed by Congress acting under its authority to raise and support armies, a time

²⁷ *Id.* at 54 (citing *FAIR II*, 390 F.3d at 229-43).

²⁸ *Id.* at 55 (citing *FAIR II*, 390 F.3d at 244-46).

²⁹ *Id.* (citing *FAIR II*, 390 F.3d at 246).

³⁰ *Id.* at 55-56.

³¹ *Id.* The professors argued that the Solomon Amendment required schools to provide the same access to campuses that it gives *all* other recruiters.

³² *Id.* at 56.

³³ *Id.* at 58-60.

when “judicial deference . . . is at its apogee.”³⁴ Additionally, notwithstanding the constitutional limits on conditional spending by Congress,³⁵ the Court held that an unconstitutional conditions doctrine analysis was unnecessary because funding conditions are not considered unconstitutional if they can be imposed directly without violating the Constitution.³⁶ Roberts wrote that the statute’s funding condition was constitutional “[b]ecause the First Amendment would not prevent Congress from directly imposing the Solomon Amendment’s access requirement.”³⁷

3. *The Solomon Amendment Did Not Muzzle Free Speech*

The opinion concluded that the Solomon Amendment did not infringe upon the law schools’ First Amendment rights, because they could express their opposition to the military’s discriminatory policies while still complying with the statute.³⁸ Justice Roberts observed that the law regulates conduct, not speech: “[i]t affects what law schools must *do* – afford equal access to military recruiters – not what they may or may not *say*.”³⁹ The assumption underlying this conclusion is that law schools’ association with, or accommodation of, the military’s message, does not make the kind of expressive statement that would place it within the purview of the First Amendment. Justice Roberts addressed the issue of expressive conduct (and eliminated that possibility) in more detail later in the opinion.⁴⁰

Justice Roberts then rejected the two ways the Third Circuit concluded that the Solomon Amendment violated free speech: first, that the act of allowing military recruiters on campus requires certain actions, such as sending e-mails or posting flyers, that entail speech; and second,

³⁴ *Id.* at 58 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

³⁵ *See United States v. Am. Library Assn.*, 539 U.S. 194, 210 (2003).

³⁶ *Rumsfeld*, 547 U.S. at 59-60 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

³⁷ *Id.* at 60.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 65-68.

that the statute forces law schools to accommodate the military's message.⁴¹ Roberts recognized that the law prohibits the government from compelling speech, but rejected the plaintiffs' contention that such was the case with the Solomon Amendment.⁴² The opinion distinguished two cases: *West Virginia Bd. of Ed. v. Barnette*,⁴³ holding a state law requiring children in school to pledge allegiance to the United States flag unconstitutional,⁴⁴ and *Wooley v. Maynard*,⁴⁵ declaring a New Hampshire law requiring state citizens to display the state motto on their license plates unconstitutional.⁴⁶ "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same" as the compelled speech in those two cases, Justice Roberts declared, "and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is."⁴⁷

As for the Third Circuit's second argument for a free speech violation – that the Solomon Amendment forces schools to accommodate the military's message – the Supreme Court noted that, unlike cases in which free speech violations were found after someone was forced to accommodate another's message,⁴⁸ the law schools' own message was not affected by their accommodation of military recruiters.⁴⁹ One case cited by the Court, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,⁵⁰ involving a state law that required a parade

⁴¹ *Id.* at 60.

⁴² *Id.* at 61.

⁴³ 319 U.S. 624 (1943).

⁴⁴ *See id.*

⁴⁵ 430 U.S. 705 (1977).

⁴⁶ *Rumsfeld*, 547 U.S. at 61.

⁴⁷ *Id.* at 48.

⁴⁸ *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) (holding that a parade organizer does not have to include in a parade a group whose message the parade's organizer disagrees with); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality opinion) (holding that a utility company cannot be compelled by a state agency to put a newsletter from a third party in its billing envelope); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a right-of-reply statute is unlawful because it interferes with newspaper editors' right to decide what goes in their publication).

⁴⁹ *Rumsfeld*, 547 U.S. at 64.

⁵⁰ 515 U.S. 557 (1995).

to include a group with whose message the parade organizer did not wish to be associated,⁵¹ illustrates the Court's reasoning well: parades, unlike recruiters on law school campuses, are "a form of expression, not just motion."⁵² The Court, then, did not think that mere acquiescence to the presence of military recruiters on law school campuses implicated any discernible message on the part of the law schools. Justice Roberts, on those grounds, struck down the FAIR schools' argument that by treating military and non-military recruiters the same way, they could be perceived as accepting the military's policies on homosexuals.⁵³ Again, Roberts stressed that law schools could still say whatever they want about the military's policies on homosexuals.⁵⁴

4. *The Conduct Compelled by the Solomon Amendment Was Not Sufficiently Expressive to Warrant First Amendment Protection*

The question addressed in this section of the opinion was essentially whether the conduct (as opposed to the speech) compelled by adherence to the Solomon Amendment was the type of expressive conduct that merited First Amendment protection.⁵⁵ Two cases cited by the Court illustrate the distinction it made before answering that question in the negative: in the *O'Brien* case, draft card burning was not given First Amendment protection, in part because of the legitimate government interest at stake.⁵⁶ In *Texas v. Johnson*, however, flag burning was deemed sufficiently expressive conduct to be protected by the First Amendment.⁵⁷ In *Rumsfeld*, the Court took a narrow view of what constitutes inherently expressive conduct akin to that seen in *Texas v. Johnson*. According to the Court's analysis, the law schools' actions at issue here lack an inherently expressive quality because it is only the speech that accompanies the conduct

⁵¹ *Id.*

⁵² *Rumsfeld*, 547 U.S. at 63 (quoting *Hurley*, 515 U.S. at 568).

⁵³ *Id.* at 64-65.

⁵⁴ *Id.* at 65.

⁵⁵ *Id.*

⁵⁶ 391 U.S. at 376 (1968).

⁵⁷ 491 U.S. at 406 (1989).

that makes it expressive.⁵⁸ To find otherwise, the Court said, would allow people to “always transform conduct into ‘speech’ simply by talking about it.”⁵⁹

Additionally, the Court noted that with the present facts, as in *O’Brien*, the limitation on free speech was permissible because of the presence of a substantial government interest “that would be achieved less effectively absent the regulation.”⁶⁰ The Court said the substantial government interest served by the U.S. military recruiters’ presence at law schools is “raising and supporting the Armed Forces – an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers.”⁶¹ Without the Solomon Amendment, non-military recruiters would be given an unfair advantage over military recruiters.⁶²

5. *The Solomon Amendment Did Not Violate the First Amendment Freedom of Association*

Having decided that the Solomon Amendment did not violate law schools’ freedom of speech, the Court then turned to the question of whether their First Amendment right to freely associate was violated.⁶³ The FAIR schools had argued that the statute’s requirements that military recruiters be allowed on their campuses, and law schools’ assistance of those recruiters, restricted their right to disassociate themselves from a group with whose policies they disagreed.⁶⁴ In support of its conclusion that the right of what the Supreme Court has called “expressive association”⁶⁵ was not infringed upon, the Court distinguished the case of *Boy Scouts*

⁵⁸ *Rumsfeld*, 547 U.S. at 66.

⁵⁹ *Id.*

⁶⁰ *Id.* at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

⁶¹ *Id.*

⁶² *See id.* at 70.

⁶³ *Id.* at 68.

⁶⁴ *Id.*

⁶⁵ *Id.* (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

of America v. Dale.⁶⁶ In that case, the Supreme Court held that a state law requiring the Boy Scouts to accept a homosexual as a scoutmaster violated the organization's First Amendment freedom of association because forcing the Boy Scouts to accept the homosexual scoutmaster would affect the organization's expression, and "the State's interests did not justify this intrusion."⁶⁷ FAIR's situation was different from the Boy Scouts', the Court reasoned, because although the law faculty are forced to interact with the military recruiters, the recruiters are not part of the school.⁶⁸ The Court stated, "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students – not to become members of the school's expressive association. This distinction is critical."⁶⁹

The Supreme Court then addressed FAIR's point that group membership decisions are not the only kinds of decisions protected by the right to freely associate.⁷⁰ However, the Court said that did not apply to the facts at hand because, unlike cases illustrating that point, the law in question – the Solomon Amendment – did not make a group's membership "less attractive," and thus did not have the requisite deleterious effect on the group's "ability to express [its] message" to invoke First Amendment protection.⁷¹

The Supreme Court reversed and remanded the Third Circuit's ruling.⁷² Justice Alito did not participate in the decision.⁷³

IV. Conclusion

It is not surprising that the Supreme Court did not address the military's "don't ask, don't tell" policy directly, although the controversial issue was arguably what attracted the attention of

⁶⁶ *Boy Scouts*, 530 U.S. at 655-59.

⁶⁷ *Rumsfeld*, 547 U.S. at 68.

⁶⁸ *Id.* at 69.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 68-69.

⁷² *Id.* at 70.

⁷³ *Id.*

the media.⁷⁴ But *Rumsfeld v. FAIR* is still important because of the way it delineates between what constitutes protected First Amendment speech or conduct and what does not. The case illustrates a sort of spectrum, with protected speech on one side and unprotected speech on the other. A look at the decisions that inform this case shows that it is not necessarily the speech itself that tips the scale one way or the other, but often whether there is a legitimate government interest involved.⁷⁵ Burning a draft card⁷⁶ and burning a flag⁷⁷ are both expressive acts, for example, but the former serves a special purpose that is frustrated by its destruction, whereas setting a flag on fire obstructs no such chain of bureaucratic events. Thus, where at first glance *Rumsfeld v. FAIR* might seem to limit First Amendment protections, it might better be said that the decision underscores the Supreme Court's continued emphasis on the presence of a substantial government interest as part of its free speech analysis after *O'Brien*.

The Court was right not to label law schools' conduct as expressive, after ruling that it was not speech either.⁷⁸ The fact that faculty members might e-mail students to alert them to military recruiters' presence on campus or send out brochures and other information about military employers is incidental to the Solomon Amendment's basic requirement that the recruiters must simply be allowed on campus.⁷⁹ Indeed, to hold otherwise would be to create a slippery slope, as Justice Roberts suggests, where a multitude of actions would fall under the First Amendment's protective umbrella simply because they are accompanied by words or speech.⁸⁰ There is no discernible message to speak of here. For a school to invite one particular law firm or a U.S. Army recruiter over another employer expresses nothing aside from the fact

⁷⁴ See, e.g., Darren Everson, *Solomon's Wisdom*, SLATE, Mar. 7, 2006, available at <http://www.slate.com/id/2137701/>.

⁷⁵ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

⁷⁶ See *O'Brien*, 391 U.S. at 370.

⁷⁷ See *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

⁷⁸ *Rumsfeld*, 547 U.S. at 66.

⁷⁹ *Id.* at 61-62.

⁸⁰ *Id.* at 66-67.

that the school saw it fit to make that employer available to its students. Schools are, as Roberts stressed,⁸¹ free to voice their objection to the employers' policies.

Further, the law schools' nondiscrimination policies remain intact. It is, after all, up to the students to decide with whose message they agree or disagree, and to take interviews and accept job offers accordingly. Repugnant as the military's treatment of openly gay Americans may be to some, it is not the duty of law schools to filter on-campus recruiters based on how those recruiters' policies or employment practices square with those of the law schools that host them.

One legal scholar, however, has suggested that the Court's emphasis on law schools' freedom to voice their objection to the "don't ask, don't tell" policy marks a departure from previous decisions.⁸² "Never before has the Supreme Court held that the government can compel speech as long as the speaker can disavow the compelled message later," Erwin Chemerinsky states.⁸³ But Chemerinsky also allows for the possibility that *Rumsfeld v. FAIR* was a narrow ruling despite this possibly new analysis on compelled speech, in light of the Court's historic deference towards the government in times of war and the fact that the decision was handed down by "a Court that often has not been sensitive to discrimination against gays and lesbians."⁸⁴

The impact of this case is also unclear because it may only limit First Amendment protections involving similar fact patterns: institutions of higher learning compelled by conditional legislation to accommodate the presence of a group at whose policies the institution bristles. However, since the Court did not expressly limit its holding to the facts presented, it

⁸¹ *Id.* at 65.

⁸² See Erwin Chemerinsky, *The First Amendment and Military Recruiting*, 42 TRIAL 78, 79 (2006).

⁸³ *Id.* at 79.

⁸⁴ *Id.*

may leave the door open for the decision to have a wider impact on First Amendment jurisprudence.