



# Higher Education Law Information Memo

March 2006

## Bond, Schoeneck & King, PLLC

### New York

Albany ■ 518-533-3000  
Buffalo ■ 716-566-2800  
Ithaca ■ 607-330-4000  
Long Island ■ 516-267-6300  
New York City ■ 646-253-2300  
Oswego ■ 315-343-9116  
Syracuse ■ 315-218-8000  
Utica ■ 315-738-1223

### Kansas

Overland Park ■ 913-234-4400

## Bond, Schoeneck & King, P.A.

### Florida

Bonita Springs ■ 239-390-5000  
Naples ■ 239-659-3800

## SUPREME COURT UPHOLDS CONSTITUTIONALITY OF SOLOMON AMENDMENT IN *RUMSFELD V. FAIR*

In its much anticipated decision in *Rumsfeld v. Fair*, the United States Supreme Court last week upheld the constitutionality of certain provisions of the Solomon Amendment, thereby affirming the right of Congress to compel colleges and universities to give military recruiters equal access to recruitment programs as a condition of receiving some types of federal funding.

### Background

Starting in the 1970s, largely in response to the civil rights movement, many colleges and universities began to require job recruiters to abide by nondiscrimination policies in order to participate fully in institutionally – sponsored recruiting activities. As a result, many institutions have excluded United States military recruiters or otherwise limited the access of military recruiters to certain school-sponsored services for recruiters on the ground that the military's sexual orientation policy ("Don't Ask, Don't Tell"), which prohibits openly gay individuals from remaining in any branch of the service, is contrary to these institutional non-discrimination policies.

In 1994, in response to institutions' efforts to bar or restrict military recruitment, Congress passed the Solomon Amendment. Solomon requires certain enumerated federal agencies to deny funding to colleges and universities that the Department of Defense determines have a policy or practice of restricting military representatives from participating in recruiting activities on their campuses. During

Solomon's initial years, the Department of Defense generally allowed schools to provide the military with less than the full access to certain recruiting services and/or programs afforded to non-military recruiters, provided that some level of access was provided. For instance, some schools allowed only non-military recruiters access to interview rooms or publicized only non-military recruitment. However, in late 2001 the Department began insisting that schools provide the military with "equal access" to recruiting services and students. In 2004, Congress enacted an amendment that expressly ratified the Department's equal-access interpretation of the law.

In response, the Forum for Academic and Institutional Rights ("FAIR"), a coalition of academic institutions and others, filed a lawsuit in United States District Court for the District of New Jersey contending that Solomon is unconstitutional because it requires institutions to forego federal funding in exchange for the ability to exercise their First Amendment rights. FAIR requested that the District Court impose a preliminary injunction to prevent the Department of Defense from enforcing Solomon against the institutional members of FAIR. Although the District Court refused to grant a preliminary injunction against enforcement of the law, it also denied the Department's request that FAIR's case be dismissed.

On appeal, the Third Circuit Court of Appeals reversed the District Court's ruling and ordered the District Court to enjoin

*BS&K publications are for clients and friends of the firm and are not intended to substitute for professional counseling or advice.*

*For information about our firm, our practice areas and our attorneys, please visit our interactive web site, [www.bsk.com](http://www.bsk.com).*

© 2006 Bond, Schoeneck & King, PLLC  
All Rights Reserved

Printed on recycled paper

**BOND, SCHOENECK & KING, PLLC**  
ATTORNEYS AT LAW ■ NEW YORK FLORIDA KANSAS



enforcement of the law. The Third Circuit found that law school recruiting programs, which involve the distribution of information including messages, flyers, and verbal communication to students and to the public, are clearly an expressive activity entitled to significant protection under the First Amendment's free speech guarantees. The Court of Appeals found that schools were entitled to First Amendment protection from being compelled to disseminate discriminatory speech to which they objected. The Third Circuit relied, in part, on a series of opinions in which the Supreme Court held that the government may not condition certain government-provided benefits on an individual's surrender of his or her constitutional rights. Because Solomon conditioned funding on institutions giving up their First Amendment rights, the Court of Appeals held that it was unconstitutional.

### ***Rumsfeld v. FAIR***

The Supreme Court agreed to review the Court of Appeals' decision in May 2005. A significant number of colleges, universities, and civil rights organizations submitted *amicus* briefs to the Court in support of the Third Circuit's decision. However, in a unanimous opinion issued last week, the Supreme Court overturned the Court of Appeals, holding not only that Congress could condition federal funding on military access, but stating further that Congress would have been acting constitutionally even if it had directly mandated that schools give military recruiters equal access to recruiting programs in the absence of funding.

Writing for the Court, Chief Justice Roberts pointed out that Congress has very broad and explicit constitutional powers with respect to the military, and that the Supreme Court exercises a high degree of deference to Congress in relation to military affairs. Further, the Court found that Solomon did not compel schools to speak in a certain manner or to endorse a certain message. According to the Court, under Solomon, schools that disagree with the military's policy are not prohibited from criticizing it. Rather, Solomon's purpose is to regulate the conduct of schools only by requiring them to grant equal access to recruiters. Finally, the Court rejected FAIR's argument that the schools were engaging in protected free expression when they limited the access of military recruiters. Chief Justice Roberts stated that excluding military recruiters amounted to protected expression only when schools expressed disagreement with Solomon by excluding military recruitment and then explained the reasons for doing so. Justice Roberts stated, "[t]he expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it."

Strictly speaking, the Court's decision does not outlaw institutional policies that treat military recruiters differently than

other recruiters. It does, however, place colleges and universities in the position of potentially being compelled to choose between enforcement of institutional principles and continued receipt of certain federal funding. Although this choice may be more theoretical than practical for many institutions due to fiscal constraints, it is possible that some institutions may be willing or able to forfeit funding tied to Solomon as a matter of principle. Under Solomon as it presently exists, this is a decision left to the discretion of each institution. As noted above, however, the Court did not limit its opinion to Congress' use of the "power of the purse," but also found that Congress could have affirmatively mandated military recruiting access. Should Congress choose to exercise this power in the future, application of nondiscrimination or other institutional policies to prohibit (or limit more restrictively than private recruiting) on-campus military recruiting activities will become unlawful, and a willingness to forego federal funding will not allow an institution to impose such restrictions.

Some states also condition state funding to institutions on equal-access rules that are similar to those the Department of Defense has imposed. For instance, Section 2-a of the New York State Education Law requires all public or private schools that receive any state funding to grant representatives of any branch of the military the same level of access to student information and school property as any other organization providing students with information about "educational, occupational or career opportunities." *Rumsfeld v. FAIR* did not address these state statutes. Although states do not have the power Congress has to impose laws relating to the national defense, presumably such state statutes are constitutional under the federal Constitution and under *Rumsfeld* as permissible exercises of the states' own spending powers and, absent any broader civil rights protections that may arise under state constitutions, remain enforceable.

In the Capital District, call 518-533-3000 or e-mail:

Gregory J. Champion	gchampion@bsk.com
Nicholas J. D'Ambrosio	ndambrosio@bsk.com

In Central New York, call 315-218-8000 or e-mail:

Thomas S. Evans	tevens@bsk.com
John Gaal	jgaal@bsk.com
Philip J. Zaccheo	pzaccheo@bsk.com

On Long Island, call 516-267-6300 or e-mail:

Terry O'Neil	toneil@bsk.com
--------------	----------------

In New York City, call 646-253-2300 or e-mail:

Michael I. Bernstein	mbernstein@bsk.com
Louis P. DiLorenzo	ldilorenzo@bsk.com

In Western New York, call 716-566-2800 or e-mail:

Robert A. Doren	rdoren@bsk.com
Richard C. Heffern	rheffern@bsk.com