

Justice Talking Radio Transcript

The Power of the Purse: Can Congress Use it to Control Speech?—Air Date: 12/5/05

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We've been looking at how the federal government tries to use funding to dictate policy for states and organizations. An interesting case being considered by the Supreme Court has to do with law schools denying military recruiters access to their students, and losing federal funding as a result. To tell us more about what is at issue, the details of the case and why it matters, we have with us Kent Greenfield and Joe Zengerle. Kent Greenfield is a law professor at Boston College. He is also the founder of the Forum for Academic and Institutional Rights, or FAIR. It's an association of three dozen law schools organized to fight for academic freedom and against discrimination. FAIR has brought a lawsuit against Donald Rumsfeld contesting the Solomon Amendment. This is the case being heard by the Supreme Court. Welcome, Kent.

KENT GREENFIELD: It's good to be here, Margot. Thank you for inviting me.

MARGOT ADLER: Also with us is Joe Zengerle. He is an adjunct professor at George Mason University's law school. He is also the executive director of the school's Clinic for Legal Assistance to Servicemembers, or CLAS. He is a former assistant secretary of the Air Force, and a Vietnam veteran. Welcome, Joe.

JOE ZENGERLE: Thank you, Margot. Nice to be here.

MARGOT ADLER: Kent, the Solomon Amendment gives the government the discretion to deny funds to universities that prevent military recruitment on campus. Doesn't the military have by necessity all kinds of requirements that fly in the face of anti-discrimination laws—requirements for age, health, height, mental capacity? And isn't this necessary to create a combat-ready force? I'll start with you, Kent. You can answer that, and then I'd like Joe to respond.

KENT GREENFIELD: Well, of course there are some things that the military has to make judgments about. But of course the "don't ask, don't tell" policy is something that is subject to a lot of debate these days. What the law schools are saying is that you can run your own military, but just don't tell us how to run our law schools. Within our own community, we hold that discrimination against gay men and lesbians is something that we oppose and want to fight against. You should not be using your federal benefits as a club to force us to discriminate.

MARGOT ADLER: Joe?

JOE ZENGERLE: I guess there is an irony going on here, as Kent has indicated. The irony that I see—there are many of them, but one of them is that a fundamental teaching of law schools rests on

abidance with the rule of law. Everyone obeys the law. When Kent says “the law schools” he is talking about law schools on his side of the case. We have representatives of 30-plus law schools on our side of the case in the amicus curiae brief we filed. We would say that what the law schools are doing on the other side of the case, Kent’s side, the FAIR side of the case, is punishing the military for complying with a federal statutory obligation. The military has no choice in this. And the complainants in this, the FAIR group, repeatedly say it’s the military’s policy. It’s really not the military’s policy; it’s a congressional policy. Congress has revisited the Solomon Amendment several times to amend it. Indeed it has done so sometimes without the initiative or the acquiescence of the Defense Department.

And there’s no doubt about that, because the Defense Department has gone to what is another aspect of this case, gone to the trade association for law schools. It’s called The American Association of Law Schools. Ninety-plus percent of the law schools in the United States must belong to the trade association. And the trade association has as a rule for all of its members the anti-discrimination policy. The Defense Department went to AALS and said look, we don’t have any choice. Congress told us to do this. And so if you say we discriminate, we’re discriminating on a lawful basis. We’re just complying with the statute. Can’t you put into your policy “unlawfully discriminate” as the barrier? And in that case we can sign your statement and get access. The AALS refused to negotiate on this point, and refused to acknowledge that it’s Congress that’s making this requirement, and the military is sort of stuck with the requirement.

MARGOT ADLER: Kent, your organization, Forum for Academic and Institutional Rights, or FAIR, has challenged the law as a violation of the First Amendment. On what grounds do you make this argument?

KENT GREENFIELD: We make two primary arguments. Our first is a compelled speech argument, and the second is an expressive association argument. And they’re both straightforward. The compelled speech argument goes like this: One of the premiere doctrines of the First Amendment is that the government cannot force people to speak. And the one thing that’s clear in this case—and the government admits it in their briefs to the Supreme Court—is that the law schools as a part of the Solomon Amendment are forced to host and carry government messages, government messages that the law schools disagree with. We’re forced to post their posters, send emails on their behalf, and facilitate meetings between the recruiters and students. We’re forced to accept them and assist them on our campuses. And the compelled speech doctrine in the First Amendment area is very strong, and it says that the government can’t force people to speak. So, as a condition of the Solomon Amendment, we are in fact forced to speak. The second branch of the First Amendment doctrine that we’re relying on is expressive association. As a part of First Amendment doctrine, the Court has said for decades that groups have a right to organize themselves around core principles. And we say that law schools define themselves in part through their long-standing commitment to non-discrimination. The Solomon Amendment forces us to assist discriminatory employers, contrary to our own core beliefs.

MARGOT ADLER: I would imagine that Joe has many responses to this, but I first want to ask him a question. Law schools do have a history of refusing to allow law firms that discriminate to recruit on campus, as Kent argued before. And many have argued that before these policies were put in place many law firms simply didn’t hire blacks or women. And when the recruiters were barred

from campus the law firms quickly changed their tune and began hiring women and minorities. So clearly the law schools are trying to do what they're doing to effect change for gays. What is your argument against that?

JOE ZENGERLE: Well, I guess I would start with the fact that you cannot dismiss the requirements of "don't ask, don't tell," which is not at issue in this case. Part of our difficulty with the case itself is that whatever the outcome in the Supreme Court, the statutory bar to enlisting or enrolling as servicemembers openly gay individuals will not be affected. Part of the problem with the case is that FAIR has chosen this indirect way to take action with regard to its views. There are two avenues that would be much more effective in their approach. One is a repealer of "don't ask, don't tell," pending in the Congress right now. It has at least 100 co-sponsors in the House. The other direct challenge that could be brought is pending in Massachusetts, and there is also the case pending in California, but the Massachusetts class action directly challenging "don't ask, don't tell" is another avenue of approach in which you directly confront the thing that concerns you.

The Solomon Amendment is another approach that uses the spending power of the Congress to which the courts have given wide deference in the past, and have established standards by which the spending power can be used. The spending power has been used in ways to strongly encourage educational institutions to eliminate discrimination of all sorts. For example, federal financial assistance to educational institutions is at risk if those educational institutions continue to discriminate against women in Title IX. Federal financial assistance and other kinds of federal assistance to educational institutions is barred if those institutions continue to discriminate on the basis of race. Those cases—the Supreme Court in one case and a court of appeals in the other case—were upheld as a proper exercise of the spending power of Congress. And in this case, the Congress is seeking to use the power of its money to coerce, if you will—but that's not a word that we would use—to strongly encourage the law schools not to discriminate against JAG recruiters or military recruiters on campus. The Congress has not forced a government message.

MARGOT ADLER: Now, let me sort of throw this gauntlet out to Kent, because you've raised several different problems. The first question, Kent, that Joe has raised, is about the issue that, you know, that the real issue is "don't ask, don't tell." Why aren't you going at it that way instead of the Solomon Amendment?

KENT GREENFIELD: I think that's an area where Joe and I can agree. I do think the underlying problem is "don't ask, don't tell." But while "don't ask, don't tell" is on the books, the law schools have a First Amendment right in our view to not be a party to the discrimination required by "don't ask, don't tell." It can't be the case that we only have the First Amendment right to fight against things that are unlawful, as Joe implied before. We have a right to fight against even lawful discrimination if we think it's wrong. And that goes also to the third point that Joe raised. Why is it that our activities with regard to career services are an important part of our educational philosophy? The reason is that we define our community as a whole, in part based on our dedication to non-discrimination. And it's just as important in our classrooms as in our admissions offices, and as in our career services offices.

MARGOT ADLER: But the second point that he made I'd really like to hear you weigh in on. He is talking about how many federal funding programs condition the receipt of federal dollars on the

adoption of non-discrimination policies. He mentions Title IX and non-discrimination on the basis of race and gender. Aren't you trying to have it both ways? It's okay for the government to use its monies to enforce policies you like, but not policies you don't like?

KENT GREENFIELD: No, and here is why. First of all, the spending clause power is a very important power, a very powerful source of authority for the federal government. But it has always been cabined by the Bill of Rights. And so the spending power in this case is there to encourage law schools, force law schools, to be a conduit of their discriminatory recruiting. But we say that it's cabined by our First Amendment rights to so resist. Now, the difference between our case and the situations that Joe mentions, the statutes such as Title IX that force law school to not discriminate on the basis of gender or race, is that the underlying right of the universities is different. Universities do not have a First Amendment right to discriminate on the basis of race or gender. The Court has so held. There is a compelling interest on the part of the government to fight against discrimination on those bases. It is not the case then for us to say we want to limit or not use our resources to assist military recruiters, because it's simply an apple and an orange. The right of a university to fight against the military is not the same as a purported right to discriminate on the basis of race or gender.

MARGOT ADLER: Earlier, I spoke with Jared Wood who is a law student at Boston College. He is one of the leaders of the Coalition for Equality, a student group opposed to the Solomon Amendment on campus. The group is a plaintiff in the case that is before the Supreme Court. Listen to what he has to say.

JARED WOOD: The right to recruit, the government having a First Amendment right to recruit, I don't believe that's explicitly anywhere in the Constitution. I don't know that the government has a First Amendment right. First Amendment rights are typically things that we reserved for individuals and for non-governmental organizations. So I don't think that the military has a First Amendment right in the same manner that you and I have, or that organizations we belong to, like our churches, might have. But additionally, the military has no problem finding qualified applicants for its legal positions. There is no shortage of individuals who are applying for those jobs. They are not desperate for them like they might be desperate for other positions in the military.

MARGOT ADLER: Like foot soldiers?

JARED WOOD: Correct. So there isn't a real government need to force their way onto campus and to violate our expressive association in order to meet their need. It just simply isn't there. But more importantly, the Supreme Court has held in recent cases, including one called Dale vs. Boy Scouts of America, that organizations have a right to determine for themselves what their standards are, and to be free from government intervening and compelling those organizations to take action or make an expression that is contrary to their core beliefs. And that's actually one of the key arguments that we're relying on in our argument before the Supreme Court on December 6th.

MARGOT ADLER: So, Joe, isn't Jared right that recruiters can just get a list of all the students, they can set up interviews at a local hotel, at their own recruitment offices, and actually these are slots that are very wanted?

JOE ZENGERLE: Well I've got a couple of responses, including one to your question, Margot. One is: Jared has a First Amendment take on where rights are possessed and where they are not. But I would say in this area of the spending power, that he has ignored a very important provision that we emphasize in our amicus curiae brief that we initiated at George Mason with some faculty members. That is, you will find in Article I Section 8 of the Constitution one of the most important powers of Congress, and that is to raise and support armies. That underlies the spending power. And there is a necessary and proper clause that enables the Congress to raise and support armies by using funds. And so you're dealing here with a constitutional right, and not only a right, but one to which the courts have traditionally given great deference. A particular example in this regard is the case of *Rostker v. Goldberg*. The Supreme Court there upheld the power to raise and support armies in the context of draft registration. Back in the Carter Administration, of which I was a part, draft registration was imposed to be a requirement on men but not women. And a lawsuit was initiated to challenge that discrimination against women. And the Supreme Court in the *Rostker* case held that we give great deference to the Congress's power to raise and support armies, and we uphold this discrimination against women in draft registration.

The second point that I would make in response to Jared's point about recruitment on campuses is that there is no indication of what would happen, but one could imagine if FAIR wins this case, that the American Association of Law Schools would hardly back down on this anti-discrimination rule. And that would mean that they would disallow JAG recruitment on every law school that was a member. And that's more than 90 percent of the law schools in America.

JARED WOOD: If I can jump in, if you don't mind... There is no evidence in this case that the military is having any difficulty at all recruiting lawyers for their JAG services. The military has not, in the two years that it has taken for this case to get to the Supreme Court, filed one affidavit in the court that has said that on-campus recruiting is a compelling interest.

JOE ZENGERLE: I think you're right about that, that there hasn't been evidence submitted by the military. But the Congress has come to that judgment, and they've come to that judgment in their own sense of what might happen, particularly if the Solomon Amendment is stricken by the Supreme Court. At that point I think you would see a real consequence.

JARED WOOD: Well there were no findings in Congress, and in fact the Defense Department opposed it early on, saying that it was not necessary. So what was clear in the debates of the Solomon Amendment back when it was originally passed and when it was re-passed last year, was that this was passed to punish law schools and universities for speaking out against the government. And that, in my view, is what the First Amendment is supposed to protect against.

MARGOT ADLER: Coming up on Justice Talking, more of our debate on the Solomon Amendment, and a conversation about the story behind the movie *North Country*, and the women who filed the first class action sexual harassment lawsuit in American history. Don't go away.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We're talking with Joe Zengerle and Kent Greenwood, both law professors, who have different ideas about what the government's role should be when it comes to federal funding and military recruiting.

MARGOT ADLER: I want to bring Dan Sullivan, who is a student at Harvard Law School, and a former intern with the Navy JAG Corps, into this conversation. Dan, are you there?

DAN SULLIVAN: Yes, I am. Hi Margot.

MARGOT ADLER: Hello. Dan, why do you think it's important for the military to have recruiters that are allowed on college campuses?

DAN SULLIVAN: Well I think there are two main reasons, at least from my perspective. I think the first is just the importance of the military in maintaining the freedom and security of our nation. In order to do that, they need to be able to recruit qualified men and women to serve in various capacities, even as lawyers, which comes as a surprise to some people. And I think this is more apparent than ever after September 11th. So I think it's important for them to be able to come on campus and recruit people. The other reason is, from my experience as a student, I want to have as many career options and career choices open to me as possible. And I think by banning the military recruiters from campus, the schools are limiting students' ability to get first-hand knowledge and first-hand experience about employers.

MARGOT ADLER: What would you say to a fellow law student at Harvard who is gay, and who says look, the bottom line is that I'm being discriminated against by the military?

DAN SULLIVAN: It's not the military setting this policy. It's not the JAG Corps. They have a statutory requirement here, and they're carrying this out. But I guess going back to the original point, it's up to the students to choose who they want to interview with. So there is any number of organizations that come on campus that are going to have different views that people disagree with, and that may have practices that people disagree with. And it's up to the students to choose who they want to talk to. And they can vote with their feet.

MARGOT ADLER: Kent, do you have anything that you want to ask?

KENT GREENFIELD: Would you say the same thing about a firm that only hired white people? That it's the white students' right to hear the views and interview with those white-only firms?

JOE ZENGERLE: There is no law firm in America that is forced by a federal statute to exclude persons of color from their recruitment programs on a law school or any other campus.

MARGOT ADLER: So you're essentially saying that the military's hands are tied?

JOE ZENGERLE: Absolutely they are tied.

MARGOT ADLER: I'd like to thank Dan Sullivan, who is a student at Harvard Law School and a former intern with the Navy JAG Corps. Thanks for talking to us.

DAN SULLIVAN: Sure.

MARGOT ADLER: I talked with Congressman Richard Pombo, one of the sponsors of the Solomon Amendment. I asked him if it was fair to punish an entire university for one college's action. Here is his reply.

RICHARD POMBO: Is it fair to punish the military because the president adopted a new policy? Is it fair to punish all of your students and take away the opportunity for them to even hear what the military has to offer them as a career because of your disagreement with the policy that then-President Clinton put in place? My argument would be that if you are that upset about it, that if you want to take a political stand in opposition to a policy that President Clinton put in place, then you should also be that upset that you refuse to accept federal taxpayer money as well.

MARGOT ADLER: Kent, let me ask you this. If you are trying to close the gap between these schools and the military, and if this is really a battle between Congress and certain policies, then how do you close the gap?

KENT GREENFIELD: If "don't ask, don't tell" went away, this policy of limiting military recruiters on law school campuses would go away in an instant. And I think that especially in these days where we are at war, I think it's especially important for the First Amendment to be protected. Dan Sullivan, the student from Harvard, mentioned that we need to protect the military because the military is fighting for our freedoms. It would be ironic indeed that because of support for a military that is fighting for our freedoms, we give up or are forced to give up our freedoms. And I think one other thing that needs to be said in response to Congressman Pombo is that it has never been the law, and it is not the law now, that the government can condition benefits on whether you waive your constitutional rights. If he is right that, look, in order to receive these federal funds you have to waive your constitutional rights to protest the military, then they can condition all kinds of government benefits—student loans; mortgage deduction, as my earlier hypothetical proposed; public housing; Social Security benefits—on your agreement to give up your First Amendment rights or Fourth Amendment rights or what have you. And for 50 years, the Supreme Court said that Congress cannot condition benefits on the signing of loyalty oaths, the refusal to protest, or etcetera. And that's what this case is, in our view.

JOE ZENGERLE: Well, I guess my answer is to say you beg the question as to whether a constitutional right is being given up. Law schools, again, don't speak through their recruitment processes in the commercial marketplace. They speak through the classroom, individual professors' opportunities to teach and to make statements, opportunities in public forum, and so forth. This is not that case, and so I don't think that's a fair way to characterize it. And I would also use another reference back to Vietnam in response to Congressman Pombo's statement. Back in Vietnam, we used to say don't confuse the warrior with the war policy. And that went on a lot. It took years for the American public to sort of back away from saying it's the veteran's fault, and to take another look at who was really adopting the war policy.

Similarly today, don't blame the warriors for the personnel policy. That shouldn't be put on their backs. That's something that should be properly directed to the judicial capacity to assess the

constitutionality of the “don’t ask, don’t tell” requirement, or put in the political process directly. Put it to Congress: Do you want to adopt this policy? In the last 12 years, have things changed sufficiently in the culture to change that policy? But don’t do it indirectly like this and try to work it into some kind of a constitutional right on which money is being conditioned. Because I don’t think that’s this case at all.

MARGOT ADLER: Joe Zengerle is a professor at George Mason University’s law school, and is a former assistant secretary of the Air Force. Kent Greenfield is a law professor at Boston College. He is also founder of the Forum for Academic and Institutional Rights. Thank you both for being here.

KENT GREENFIELD: My pleasure.

JOE ZENGERLE: Thank you.