LAW REVIEW[1] 0612

Supreme Court Gets It Right

Ruling on Solomon Amendment has implications for USERRA and SCRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

10.2—Other Supreme Court Cases

***Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).**

In Law Review 166, CDR Wayne L. Johnson, JAGC, USN (Ret.), discussed the case *Forum for Academic & Institutional Rights v. Rumsfeld*, [390 F.3d 219 (3rd Cir. 2004)]. In that case, the 3rd U.S. Circuit Court of Appeals by a 2-1 ruling struck down as unconstitutional the Solomon Amendment, which provides that an educational institution that denies military recruiters the same access it offers other recruiters will lose federal funds. Congress enacted the amendment because some schools (mostly law schools) have sought to exclude access to military recruiters because of disagreement with the "don't ask, don't tell" policy mandated by Congress.

The U.S. Supreme Court in March unanimously reversed the 3rd Circuit ruling. In a well-written decision by Chief Justice John Roberts, the court rejected the strained interpretation of the

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Solomon Amendment offered by several *amici curiae* (friends of the court arguments). Those law schools and professors suggested that an educational institution could comply with the Solomon Amendment by the equal application of its non-discrimination policy. In other words: "We do not allow the military to recruit on campus, because we do not allow any recruiter that discriminates on the basis of sexual orientation."

"The statute requires the Secretary of Defense to compare the military's 'access to campuses' and 'access to students' to 'the access to campuses and to students that is provided to any other employer,'" Chief Justice Roberts wrote. "The statute does not call for an inquiry into why or how the 'other employer' secured its access. Under *amici's* reading, a military recruiter has the same 'access' to campuses and students as, say, a law firm when the law firm is permitted on campus to interview students and the military is not. We do not think that the military recruiter has received equal 'access' in this situation— regardless of whether the disparate treatment is attributable to the military's failure to comply with the school's nondiscrimination policy."

Under what is known as the "unconstitutional conditions doctrine," Congress is not permitted to condition eligibility for federal funding on conditions that Congress could not constitutionally impose directly. The court held that the Solomon Amendment did not violate this doctrine because Congress could have required campus access for military recruiters without regard to the receipt of federal funds.

Wrote Chief Justice Roberts: "The Constitution grants Congress the power to 'provide for the common Defence,' 'to raise and support Armies,' and 'to provide and maintain a Navy.' Congress's power in this area 'is broad and sweeping' . . . and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. See *Rostker v. Goldberg.* ... But the fact that the legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in Rostker, 'judicial deference is at its apogee' when Congress legislates under its authority to raise and support armies."

This broad reading of the Constitution's Article I, section 8, is good news for those interested in the liberal and effective interpretation and enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers' Civil Relief Act (SCRA). Those statutes impose sometimes burdensome requirements upon individuals, corporate entities, and state and local governments, whether or not those individuals or entities seek or receive federal funding. Employers and others subject to those burdens are free to complain, but there is no question that USERRA and the SCRA are constitutionally valid and enforceable.

CAPT Wright was one of the U.S. Department of Labor lawyers who helped draft USERRA. The views expressed are the views of the author and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government.

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ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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