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**THE FEDERALIST SOCIETY'S
CIVIL RIGHTS LAW PRACTICE
GROUP**

presents

**SOLOMON AMENDMENT: CAN
CONGRESS CONDITION BENEFITS TO
COLLEGES AND UNIVERSITIES ON
THEIR WILLINGNESS TO ALLOW
MILITARY RECRUITERS ON CAMPUS?**

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(**moderator**)

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FEDERALIST SOCIETY**SOLOMON AMENDMENT: CAN CONGRESS CONDITION****BENEFITS TO COLLEGE AND UNIVERSITIES****ON THEIR WILLINGNESS TO ALLOW MILITARY****RECRUITERS ON CAMPUS?**

MR. REUTER: My name is Dean Reuter. I'm the Director of the Federalists Society's practice groups, and I'm happy to welcome you here today. I want to begin by thanking our panelists in advance. John Eastman will probably thank them at the end of this program, so let me take a moment to thank John Eastman, who's going to moderate. I'll introduce him only very briefly so we can get started with the substantive part of the program.

Professor John Eastman is a professor at Chapman Law School in Southern California. He has been a U.S. Supreme Court clerk for Clarence Thomas. And most importantly from our perspective, he is head of one of the practice groups that sponsors this program today, and he's a good friend of the Federalist Society.

So without anything further, Professor

1 Eastman.

2 PROFESSOR EASTMAN: Thank you, Dean. For
3 those of you that know me, I'm not normally in the
4 position to be an immoderate on a panel, this or any
5 other. I'm actually, in this particular case, one of
6 the light green briefs out of the sea of dark green
7 briefs that were filed.

8 But my light green brief is so far out of
9 the realm of discussion (asking where was the
10 constitutional authority for spending to which this
11 condition was attached in the first place), that it
12 really didn't need to be part of the discussion. But
13 there are some interesting aspects of where people
14 are lining up in this case that I want to layout
15 generally before I introduce our first panelist.

16 For example, "FAIR" is making a claim that
17 its freedom of speech and freedom of association
18 rights are involved. Yet basically, as a condition
19 on membership in the AALS or ABA, my law school was
20 told, "you have to prescribe to this particular
21 statement of views and distribute it to your students
22 in order to be members." Harvard, I've learned

1 | during the course of this litigation, receives \$300
2 | million annually from the federal government.
3 | Georgetown, you need to pay attention to that. And
4 | the argument is made that this condition is, I guess,
5 | so coercive by threatening the entire \$300 million
6 | that it ought to be unconstitutional, that we ought
7 | to limit it to the particular program at issue. Yet
8 | oddly, the people making that argument at Grove City
9 | College argued just the opposite, that we ought to
10 | expand the federal conditions to the entire scope of
11 | federal authority.

12 | So there are some interesting lineups of
13 | the case. I hope we'll explore that and many other
14 | aspects of the case today.

15 | I'm going to introduce the panelists one
16 | at a time to break up the discussion a little bit.
17 | And first up is Shannen Coffin. He's a partner in
18 | the Washington firm of Steptoe and Johnson, where he
19 | practices constitutional and appellate litigation.
20 | From 2002 to 2004, he served as Deputy Assistant
21 | Attorney General for the Federal Programs Branch of
22 | the U.S. Department of Justice, Civil Division. In

1 | that capacity, he oversaw and coordinated a lot of
2 | trial litigation on behalf of the federal government,
3 | including the Department of Defense in the district
4 | Court litigation in the FAIR case itself. He's a
5 | graduate of this august institution, in 1994, and
6 | also has a BBA from Loyola University in New Orleans.
7 | He clerked for David Sentelle on the U.S. Court of
8 | Appeals here in the District of Columbia. He's a
9 | frequent contributor to the *National Review Online*,
10 | as well as numerous radio and television programs,
11 | including -- we get the full, fair and balanced mix
12 | here -- NPR, MSNBC, Fox News, and the PBS News Hour.

13 | Shannen Coffin.

14 | MR. COFFIN: Thank you, Professor Eastman.
15 | Since I'm back in the building where professors like
16 | David Cole used to torture me with hypotheticals, I
17 | thought it fitting to start today with a couple of
18 | hypotheticals.

19 | First, the federal government conditions
20 | numerous educational grants to universities on
21 | compliance with Title IX, which among other things
22 | requires equal opportunities in college athletics for

1 | women. Suppose for a minute a university -- let's
2 | put it in the deep South for the sake of flavor --
3 | has a deeply held belief that women's athletics is
4 | incompatible with the proper role of women in
5 | society. Women are nurturers, not competitors, and
6 | therefore the University refuses to field a women's
7 | athletic team, notwithstanding the fact that a number
8 | at the University might like to have them. When
9 | the Department of Education goes to pull their
10 | funding for noncompliance with Title IX, the
11 | university falls back on their First Amendment rights
12 | to free speech and free association.

13 | Next, and perhaps a little less
14 | hypothetical, suppose an evangelical university
15 | somewhere in, say, South Carolina is threatened by
16 | the IRS for losing its tax exempt status as a charity
17 | because it has a racially discriminatory admissions
18 | policy, running afoul of Internal Revenue Service
19 | regulations that forbid tax-exempt organizations from
20 | engaging in racial discrimination. Suppose that
21 | university claims that the race discrimination policy
22 | violates their deeply held religious beliefs about

1 | the necessity for segregation of the races.

2 | In each case, the claims of the University
3 | of don't seem too hard to dispose of. Indeed, as the
4 | Supreme Court reasoned in dealing with the second set
5 | of facts in *Bob Jones University v. United States*,
6 | while denial of benefits will inevitably have a
7 | substantial impact on the operation of private
8 | religious schools, it will not prevent those schools
9 | from observing their religious tenets. Put bluntly,
10 | if these convictions are so important to the
11 | university's core belief systems, then it's not an
12 | undue constitutional hardship to forgo federal
13 | subsidies in order to honor them.

14 | That, in perhaps an even more politically
15 | correct nutshell, is the issue facing the Supreme
16 | Court in *Rumsfeld v. FAIR*, a case that, I have to
17 | admit, when it came across my desk at the Department
18 | of Justice, I never thought would make it this far.
19 | Since *FAIR* was a case that I oversaw at DOJ, my
20 | fellow panelists asked me to put the background into
21 | a little perspective, and they may regret that, but I
22 | will honor it with at least some neutrality in

1 | describing that background.

2 | Not surprisingly, there's been a long-
3 | running feud between the academy and the military
4 | since the Vietnam era. That feud is played out
5 | visibly in their arena of military recruiting. In
6 | 1968, faced with stiff resistance to military
7 | recruiters on campus, Congress fired the first
8 | statutory salvo in the NASA Authorization Act in
9 | 1969, directing NASA to withhold grants to any
10 | universities that barred military recruiters from
11 | campus and followed that with a similar prohibition
12 | in Department of Defense funding in 1972.

13 | In 1994, again faced with flagging
14 | recruitment from the nation's top schools and noting
15 | that recruiting is the key for an all-volunteer army,
16 | Congressman Gerald Solomon sponsored legislation that
17 | not only authorized but required the Secretary of
18 | Defense to withhold any grant or contract funding to
19 | any institution of higher education that "has a
20 | policy of denying, or which effectively prevents, the
21 | Secretary of Defense from obtaining for military
22 | recruiting purposes entry to campuses or access to

1 | students on campuses". Since its enactment, the
2 | Solomon Amendment has been amended a couple of times
3 | to expand the funding conditions to other agencies of
4 | government.

5 | Everyone got along just fine for several
6 | years after enacting the Solomon Amendment, despite
7 | broad disapproval in the legal academy for the
8 | military's code of conduct and formal policies
9 | prohibiting discrimination on the basis of sexual
10 | orientation in employment. The American Association
11 | of Law Schools, faced with the reality of lost
12 | funding threatened by Solomon Amendment, authorized
13 | its members to permit military recruiters to use
14 | their career services, provided that schools will
15 | ameliorate measures, like saying they really didn't
16 | like it.

17 | The current dispute, whether the briefs in
18 | the case tell you this or not, erupted at a Holiday
19 | Inn. It increasingly agitated over the military's
20 | statutory policy on homosexual conduct, the faculty
21 | at Yale University Law School clambered for
22 | confrontation with the military. The Law School

1 | threatened the Army with denial of access to its
2 | recruiting function off campus.

3 | Yet Yale Law School threatened the Army
4 | with denial of access to its main recruiting function
5 | off campus at a Holiday Inn in New Haven, unless the
6 | military signed its anti-discrimination pledge, a
7 | pledge that included a prohibition of discrimination
8 | on the basis of sexual orientation. The Army, of
9 | course, could not do so because contrary to popular
10 | belief, the "Don't Ask/Don't Tell" policy was not in
11 | fact an informal policy of the military subject to
12 | change at the whim of the Secretary of Defense, but a
13 | statutory command enacted by Congress and signed into
14 | law by President Clinton.

15 | A bloodless standoff ensued. Yale offered
16 | to provide what it considered separate-but-equal
17 | treatment to the military in a proposed compromise
18 | that would deny access to the Holiday Inn recruiting
19 | fair and law school placement office but permit
20 | access to the facilities of undergraduate recruiting
21 | offices.

22 | The Department of Defense responded that

1 | it read the Solomon Amendment to require equivalent
2 | access to law students. In other words, the holiday
3 | Inn or bust.

4 | Yale offered a temporary waiver but
5 | refused to extend it beyond a semester or two. And
6 | when DOD didn't get the assurances it was seeking
7 | regarding access to law students, it began the
8 | process of certifying non-compliance with the Solomon
9 | Amendment by Yale, a process that, once completed,
10 | would deny approximately \$300 million in federal
11 | funds to the University. And for good measure, and
12 | to cover its bases on the statutory interpretation
13 | issue, the military asked Congress to amend the
14 | Solomon Amendment to codify its equal access
15 | interpretation of the law, and Congress complied.

16 | While extended negotiations or, better
17 | put, posturing between the two principals was going
18 | on at the Pentagon, the Forum for Academic and
19 | Institutional Rights, or FAIR -- and I want Professor
20 | Feldblum to address how many of its members it took
21 | to come up with that acronym -- brought suit in
22 | district court in New Jersey. The organization,

1 | which as I understand it was formed solely for the
2 | purpose of this litigation, brought suit on behalf of
3 | its members, which we eventually learned at DOJ, as a
4 | result of standing challenges to their lawsuit,
5 | included some specific law schools that receive
6 | federal funding, which got rid of their standing
7 | problem, and their faculty members and students,
8 | alleging that the statute violated their First
9 | Amendment rights to free speech and free association.

10 | FAIR lost in district court, but that
11 | decision was reversed by a divided panel of the Third
12 | Circuit. And here we are.

13 | Let me turn the remainder of my time, if
14 | there is any, to the merits and return to my
15 | hypotheticals in my opening remarks. Despite the
16 | overheated atmosphere in which the *FAIR* case arises,
17 | it is really a very simple case. It is much less a
18 | case about the government's power to force a message
19 | or force association than it is a case about the
20 | government's ability to condition the billions of
21 | dollars that flow into institutions of higher
22 | learning.

1 Why are these federal antidiscrimination
2 laws such an apt analogy here? Because they do the
3 exact same thing; they condition their seed of
4 federal funds in the forms of grants and tax breaks
5 on the recipient's compliance with certain conduct
6 requirements. At bottom, they have nothing directly
7 to do with speech but are rather addressed at
8 conduct.

9 So, too, with respect to the Solomon
10 Amendment. The statute says nothing about message
11 speech or association; it merely requires the
12 recipients of federal funds to permit access to their
13 students on campus by the military. FAIR has sought
14 to shoehorn the First Amendment into this debate by
15 claiming that the Solomon Amendment is no different
16 than the anti-discrimination provision that was
17 struck down in the *Boy Scouts v. Dale*. There, the
18 Supreme Court held that a New Jersey sexual
19 orientation anti-discrimination statute violated the
20 Boy Scouts' First Amendment rights to free
21 association when it applied it to require the
22 organization to accept gay scoutmasters.

1 The thrust of FAIR's challenge is that
2 this case no different than *Dale*; but it's different,
3 by a long shot. Two visits a year to the Holiday Inn
4 in New Haven is hardly the same in scope and quality
5 of association as forced inclusion, not only as a
6 member, but as the leader of a particular
7 organization. The Boy Scouts were forced by New
8 Jersey law to accept in their membership individuals
9 whose conduct ran afoul of core principles of their
10 organization.

11 Solomon requires military recruiters to be
12 allowed to attend job fairs, if that's how the
13 university does its recruiting. The forced
14 association claims, then, are simply specious.
15 Indeed, the Court, as Professor Eastman mentioned,
16 gave the back of the hand to similar although not
17 particularly well articulated claims in the Title IX
18 context in *Grove City College v. Bell*.

19 Nor do the compelled speech arguments made
20 by FAIR, and successfully so in the Third Circuit,
21 hold water. *FAIR* stretches a number of
22 uncontroversial cases that say that the government

1 cannot force a person to express a message with which
2 he disagrees, on license plates or utility bills, for
3 the much more controversial proposition that the
4 government cannot condition the receipt of funds on
5 one's own conduct. One need look no further than the
6 Yale campus, where military recruiters were the
7 subject of pickets, protests and verbal abuse, to see
8 that no speech is compelled by their presence on
9 campus. If anything, speech was enhanced by the
10 controversy surrounding the amendment, leading to a
11 renewed debate about military hiring practices.

12 The compelled speech analysis is no more
13 applicable here than it is in the case of the
14 hypothetical university that is concerned with
15 allowing women's sports on campus, concerned that
16 will send a message with which it disagrees. It is
17 simply a case of universities trying to have their
18 cake and eat it too. But that's hardly compulsion.

19 Now, in fairness to the opponents of the
20 Solomon Amendment, they argue that the government
21 prevention of discrimination, as in *Bob Jones* and in
22 my Title IX example, is a really important government

1 | interest, and I can't disagree with that. But it's
2 | hard to imagine that the constitutional authority of
3 | Congress to raise and support an army and provide for
4 | the common defense is somehow less compelling than
5 | the need for a women's hockey team.

6 | Finally, and at the end of the day,
7 | where's the speech? Access to campus for job
8 | recruiting is fundamentally an economic activity, not
9 | an inherently expressive activity. The university,
10 | its faculties, and its students remain free to
11 | express all the outrage they want at the military
12 | policies; they just can't expect the government to
13 | subsidize them, if they want to close the door to the
14 | military.

15 | At worst, then, Solomon is -- and this is
16 | a worst I think -- subject to the standards of
17 | regulation for conduct that has an incidental effect
18 | on expression in *U.S. v. O'Brien*, the draft card
19 | burning case. But as the district court properly
20 | concluded, it withstands that scrutiny as well. It
21 | advances an important government interest in
22 | maintaining a highly effective military, an interest

1 | that is unrelated to the suppression of speech and
2 | one that is the essential to the furtherance of that
3 | interest.

4 | Interestingly, the last portion of that
5 | test has the universities arguing that their students
6 | really aren't all that smart and that the military
7 | can prepare itself just fine without access to
8 | Georgetown and Yale and Harvard students.

9 | Sadly, it's an about-face for a very proud
10 | tradition of participation in the military and
11 | national security apparatus by universities like
12 | Yale. And I commend to you, not necessarily for his
13 | legal analysis but for some fairly impassioned
14 | rhetoric, Judge Aldisert's dissenting opinion in the
15 | Third Circuit, basically disagreeing with the message
16 | that universities are sending here.

17 | So, that's a 10,000 or 100,000 foot
18 | overview of the reasons that the case should fail in
19 | the Supreme Court. But like all such matters of hot-
20 | button political issues, the merits tell only part of
21 | the story. As I like to think of it, for the new
22 | swing justice on the Supreme Court, Tony Kennedy,

1 | this case really presents the perfect storm: Free
2 | Speech, the academy, and gay rights. So, while it
3 | should be laid easily to rest on the merits, we'll
4 | just have to wait and see.

5 | PROFESSOR EASTMAN: Fair and balanced, our
6 | next speaker, Chai Feldblum is a professor at
7 | Georgetown University Law Center. I hope the
8 | Georgetown folks won't hold this against her, but
9 | she's also a graduate of Harvard Law School and a law
10 | clerk to Judge Frank Kaufin and Justice Harry
11 | Blackman. Professor Feldblum has been actively
12 | involved in civil rights, including gay rights, since
13 | 1988. Her academic writings on gay rights emphasize
14 | the need to engage in the moral values aspects of gay
15 | sexuality. Professor Feldblum is a long-time
16 | disability rights advocate, and in her current
17 | practice at the Federal Legislation Clinic here at
18 | Georgetown, she represents Catholic Charities USA and
19 | Workplace Flexibility 2010. Professor Feldblum
20 | helped found the group FAIR, one of the plaintiffs in
21 | this case, and has been active in this case since its
22 | inception. And I want to commend her for the role

1 she had in the brief itself. The Harvard faculty
2 treated this as an issue where the morality of the
3 question was entirely one-sided, and at the opening
4 of FAIR's brief, they at least had the honesty to
5 admit that this is a very evenly morally divided
6 issue, and I welcome her contribution to the debate.

7 PROFESSOR FELDBLUM: Thank you. Well, I
8 can take no responsibility or credit for the name
9 FAIR. That was Kent Greenfield, who was a law
10 professor at B.C., Boston College, who's really been
11 a prime mover in the organization. He came up with
12 it himself and we all agreed.

13 Although, I do have to say that it
14 reminded me of a case that I did help work on,
15 challenging the ban on the service of gay people in
16 the military, when it was just something that the
17 military had on its own, which is the way it was for
18 almost 30 years, before it was codified by Congress
19 in 1993. We were going to name that case, John Ready
20 and Jane Able v. Les Aspen, who was then the
21 Secretary, so it would be Ready and Able v. the
22 government, and some people thought that was too

1 | cute. So if you go, you'll see the cases just called
2 | Able versus -- which doesn't quite get the same
3 | point.

4 | I think Shannen did us a good job and a
5 | favor by explaining the sort of furor around the
6 | Holiday Inn, not because it was just Yale, actually,
7 | that was doing this, but it was schools all around
8 | the country. But the reason why it's important is it
9 | highlights for you that there was a shift in the
10 | government enforcement of the Solomon Amendment.
11 | That is, the Solomon Amendment said you're going to
12 | lose your federal funds unless you provide access for
13 | U.S. students to the military. What most schools did
14 | after that, as Georgetown did, was actually provide
15 | access. So we allowed the military to stuff flyers
16 | into the students' mailboxes; we allowed them to have
17 | materials available; we get the names and address.
18 | What we didn't do is treat them exactly the same as
19 | other employers. Most particularly, for the
20 | government fair that Georgetown runs, where we pay
21 | the Washington Court Hotel for us, as opposed to the
22 | Holiday Inn, the JAG Corps was not allowed to

1 | participate in that. Okay, so they got access but
2 | they didn't get completely equal treatment.

3 | And basically, what the Defense Department
4 | started doing to Yale, to Georgetown, to lots of
5 | schools, is saying no, no, it's not just access; it's
6 | equal treatment to every other recruiter. And the
7 | Defense Department actually just helpfully put out a
8 | press release this past Monday on the case. They
9 | quoted Bill Carr, the Deputy Undersecretary of
10 | Defense for Military Personnel Policy, who said this.
11 | "The Solomon Amendment establishes that for military
12 | recruiting, which is an important public function to
13 | be done, the schools have to provide the Defense
14 | Department at least the level of cooperation they
15 | give to other employers. That's a reasonable quid
16 | pro quo and federal funding being contingent on that
17 | seems reasonable as well." And then the press
18 | release goes on to explain, "At the heart of the
19 | controversy is the military's Don't Ask/Don't Tell
20 | homosexual conduct statute. The military's policy
21 | prohibits homosexual conduct and forbids service
22 | members from revealing homosexual orientation. The

1 | policy also forbids commanders from asking service
2 | members about their sexual orientation. However,"
3 | the press release continues, "many institutions of
4 | higher education forbid discrimination based on
5 | sexual preference. They look at U.S. laws governing
6 | the military's homosexual policy as discrimination."

7 | The press release goes on to say what the
8 | lower courts did, and then concludes with this quote
9 | from Bill Carr. "The *don't ask, don't tell* law is a
10 | choice the nation has made about its military, and if
11 | the nation has asked that of the military and the
12 | military complies with it, then it is incongruous for
13 | the military to be punished for following the
14 | statutes." That seems very clear, and why are these
15 | nasty law schools punishing the military for just
16 | complying with the *don't ask, don't tell* law? Maybe
17 | it's because the law schools think that that law is
18 | unjust.

19 | Now actually, we don't really know what
20 | the law schools generally think about *don't ask,*
21 | *don't tell,* generally what they think about our
22 | policy, but we do know that they think it's unjust

1 | for their openly gay students, who have paid the same
2 | exorbitant tuition as all the other students, and
3 | should get the same right to be considered for jobs
4 | as any other student. That's what the law schools
5 | believe is unjust; that aspect of *don't ask, don't*
6 | *tell* that doesn't allow an openly gay student from my
7 | class who wants to be in the JAG Corps to even be
8 | considered for the job.

9 | When the JAG Corps comes here to recruit,
10 | and they have a sign -- imagine a sign behind their
11 | recruiting table, "Join the JAG" -- there's a little
12 | parentheses under that, "(unless you are gay and
13 | you're going to tell us about it. Then we don't
14 | think you're qualified.)"

15 | So the law schools think this is unjust
16 | because they passed on their own, and then together
17 | through the American Association of Law schools -- a
18 | policy saying that they don't think their students
19 | should be discriminated in employment based on
20 | various characteristics, including race, sex,
21 | religion, and sexual orientation. And the bylaws of
22 | the association that they've all joined say, "A

1 member school shall communicate to each employer to
2 whom it furnishes assistance and facilities for
3 interviewing and other placement functions --" like
4 paying Washington Court Hotel for space -- "should
5 communicate to each employer, the school's firm
6 expectation that the employer will observe the
7 principle of equal opportunity."

8 Now, there might be some of you out there
9 who don't think that discrimination based on sexual
10 orientation is the same as, is as unjustified as, for
11 example discrimination based on race or religion.
12 And you know what? You'd be in good company because
13 Congress agrees with you. Congress thinks that women
14 and black people and Jews and Muslims should be able
15 to join the military, but they don't think that
16 openly gay people are qualified. So, the Congress
17 definitely feels the discrimination isn't the same.

18 But the question here is, the law schools
19 think so. The law schools think so. And the
20 question is, can Congress use the heavy stick of
21 federal funds to force the law school to give the
22 military special rights? Let's be clear. What

1 | Congress did when it passed the Solomon Amendment was
2 | it passed a special rights law for military
3 | recruiters. It said that even if you're not going to
4 | give other recruiters who discriminate access to your
5 | facilities and helping them out, you have to do it
6 | for the military. Well, the only question, if that's
7 | going to be unconstitutional, is if it's an
8 | unconstitutional condition. So you have to break
9 | that into two parts.

10 | First, let's be clear about what type of
11 | funding issue were not talking about. We're not
12 | talking about a situation where the government gives
13 | money to create a program, and then tells the folks
14 | who take that money how to run the program. For
15 | example, you may or may not like these cases, but
16 | while the federal government certainly cannot pass a
17 | law that says no doctor shall discuss abortion with
18 | his or her patient -- I mean, that would be a
19 | violation of that doctor's First Amendment rights --
20 | the government can say we are funding a family
21 | planning program called Title X, and anyone who takes
22 | money from that program cannot discuss abortion. In

1 | *Russ v. Sullivan*, 1991, the Supreme Court says
2 | Congress has that right. We affirmed that in the
3 | *American Library Association* case. If you take money
4 | to get computers in your library, you comply with our
5 | requirements.

6 | So for example, if the Congress decided,
7 | oh my God, those poor law students; all that heavy
8 | tuition, we should have a funding program for
9 | recruitment to make sure law students get good jobs,
10 | and they gave that money and law schools took it, of
11 | course they could say and this is how we want a
12 | program to run. The military recruiters get the
13 | central stage. That's not this case.

14 | This is, as you heard, more like the Title
15 | VI, like the Title IX. This is situations where the
16 | Congress is giving a whole bunch of money and then
17 | attaching to that money a condition: You must treat
18 | military recruiters better than you treat other
19 | recruiters who do discriminate. This is the classic
20 | unconstitutional conditions case.

21 | *Speisel v. Rendell*, the 1950s case, was a
22 | case where California wanted all its veterans to sign

1 a loyalty oath in order to get a property tax
2 exemption, and some veterans didn't want to do that.
3 And the Supreme Court said, look, if you couldn't
4 force them to do that loyalty oath directly, you
5 can't force them to do indirectly by saying, oh,
6 well, we're going to withhold this benefit.

7 So, the key question in this case, I
8 believe, comes down to -- and this is a better way to
9 think of it -- forget the funds for a second. Could
10 Congress directly pass a law that says to every
11 school, you must allow military recruiters to have
12 the same support that you give to other employers;
13 you must do that -- would that be a violation of the
14 school's First Amendment rights? If it would be,
15 than the fact that it's attached to funding, I don't
16 think makes it that much better for the government,
17 if there is a First Amendment burden.

18 And by the way, even if there is a First
19 Amendment burden -- remember, even if FAIR and the
20 schools want to say there's a First Amendment burden,
21 that's only the first step because the government can
22 always come back and say, this is narrowly tailored

1 | to compelling government interests, exactly the way I
2 | think they would come back with a challenge to Title
3 | IX, Title VI, Section 504 which prohibits
4 | discrimination based on disability. And I don't
5 | think there's a question but that the Court will find
6 | that raising a military, including hiring good JAG
7 | Corps lawyers, is a compelling government interest.

8 | No doubt, the dilemma for the government
9 | is going to be, is this narrowly tailored to that
10 | government interest? Do we also need to be at the
11 | Washington Court Hotel? And that it's not enough
12 | that our flyers are in student boxes and we say we're
13 | going to pay off their tuition, and do lots of other
14 | things. So, is it tailored? That's where I think
15 | the government will falter. So it starts with, is
16 | there a First Amendment violation going on here at
17 | all?

18 | Now, where I agree with Shannen is, it
19 | will depend on whether the Court thinks this is like
20 | what was going on for the Boy Scouts in *Dale*, and for
21 | the St. Patrick organizers in *Hurley*, or whether they
22 | don't think it's the same. I don't think they're

1 | going to make new law here, but it's going to be how
2 | do they see the facts. So let me just offer an
3 | alternative view of the facts than the ones that
4 | Shannen offered.

5 | Well, why do the law schools not want to
6 | help recruiters who discriminate? Why? From my
7 | perspective, it's twofold. One is, like I said, they
8 | think all of their students should have equal access
9 | to jobs and they don't want to be helping an employer
10 | that said up front I'm not even going to be
11 | considering ex-percentage of your students.

12 | But the second is about a message about
13 | justice. The law schools are saying we think
14 | employment discrimination based on sexual orientation
15 | is as bad as employment discrimination based on race
16 | and sex. And we think all types of employment
17 | discrimination of those kinds are so bad that we
18 | don't want to assist, facilitate, abet, anyone who
19 | discriminates in that way. It's a dual message of
20 | the law schools: We think discrimination is wrong;
21 | and, we think it's wrong to help someone. That's our
22 | message. That's why we have that rule.

1 My sense of the *Dale* case -- well, the
2 government says there is no message conveyed when law
3 schools have to allow military recruiters on campus.
4 The presence of military recruiters on campus does
5 not force educational institutions to convey the
6 message that they accept the restrictions on service
7 by the homosexuals in the military. Students in the
8 public readily understand that when recruiters visit
9 campus, they speak for their employers, not for the
10 educational institution.

11 In a line from one of the amicus briefs,
12 "Unlike *Dale* and *Hurley*, however, the Solomon
13 Amendment does not affect a law school's ability to
14 select its leaders, membership, or message." Well,
15 but that's the question. Does it affect the ability
16 of the law school to send a message? I think that
17 Shannen has not necessarily channeled correctly what
18 mattered to the Boy Scouts. If I were the Boy
19 Scouts, I wouldn't care if James Dale showed up just
20 one time at one event as a scoutmaster. To have a
21 happy healthy, well-adjusted homosexual saying it's
22 just fine to be gay, from the Boy Scouts perspective,

1 | undermines their message that homosexuality is not
2 | okay and not consistent with their values.

3 | From the law school's perspective, having
4 | the military recruiters showing up just twice -- but
5 | it's just twice at the recruiting event where
6 | students are trying to say to employers, hire me, and
7 | employers are trying to say to the students, this is
8 | who we are. That's exactly the event when having
9 | military recruiters there undermines the law school's
10 | message.

11 | Similarly in *Hurley*, parade; lots of
12 | different folks. The Supreme Court says, it may not
13 | be clear what message the parade organizers were
14 | trying to send, but there was clearly one message
15 | they were trying to send, which is they don't want a
16 | group that says they are proud and Irish and gay
17 | marching in the parade.

18 | That's what the law schools are saying:
19 | You may not be able to discern the message from our
20 | recruiting fair, but you know there is one message
21 | that is there: there's no one here who is
22 | discriminating on the following bases. And we don't

1 | want someone in there with a sign, "Join the JAG",
2 | that is clearly inconsistent with that message. It
3 | would be very sad if the Supreme Court, I think, did
4 | not affirm the Third Circuit in this case.

5 | Thank you.

6 | PROFESSOR EASTMAN: Back on our roller
7 | coaster to the other direction. Gerald Walpin, a
8 | practicing attorney in New York, concentrates on
9 | securities litigation, including class actions and
10 | derivative actions, white-collar defense, employment
11 | practices, including sexual harassment, and attorney
12 | and accountant malpractice litigation. He's been
13 | named in every single edition of *Best Corporate*
14 | *Litigators in the United States*. Particularly
15 | germane to our panel today, before joining his
16 | current firm he was a law secretary to federal court
17 | judges, served for three years as a JAG officer in
18 | the Air Force, and then five years as a Chief of
19 | Special Prosecutions for the United States Attorney
20 | for the Southern District of New York. He proudly
21 | represents that he prosecuted the longest criminal
22 | jury trial in the history of the United States

1 | courts. Until recently, he was president of the
2 | Federal Bar Council in the Second Circuit, also a
3 | member of the Board of Visitors of the Federalist
4 | Society, and just completed his term as Chairman of
5 | National Litigation Practice Group. He's also a
6 | member of the Board of Directors for the Center for
7 | Individual Rights and has received numerous awards,
8 | including the Human Relations Award by the Anti-
9 | Defamation League.

10 | Gerald Walpin.

11 | MR. WALPIN: Thank you very much. I'm
12 | going to tell you what's not at issue here first,
13 | because we're not here to discuss whether the *don't*
14 | *ask, don't tell* policy is a good or bad policy, or
15 | whether if I had been in Congress 12 years ago I
16 | would have voted for it, or whether, if I had been
17 | President Clinton, I would have signed it.

18 | We're here to discuss the appropriate
19 | response of universities to something that is the
20 | law. And contrary to Professor Feldblum, whether I
21 | think a law is just or not, or whether a bunch of
22 | professors think a law is just or not, it is still

1 | the law. And we all have to live under the law. And
2 | I would hope that law professors would teach
3 | students, which I learned, that the law is the law,
4 | and if you violate the law and don't want to live by
5 | it, as Martin Luther King said in much better
6 | language, you have to accept the penalty.

7 | Now, you've already heard why this is
8 | constitutional under the funding rights of the
9 | government. I want to discuss primarily the subject
10 | of academic freedom. That arises for two reasons.
11 | One is because the plaintiffs who are FAIR, and who
12 | by the way say that their first mission is "to
13 | promote academic freedom", say, you can condition
14 | federal funds on complying with important federal
15 | policies. And they admit that recruiting for the
16 | military is an important federal policy. But they
17 | say, you can't do it if it violates free speech
18 | rights, meaning academic freedom in the university
19 | context.

20 | Now let's see if we can agree as to what
21 | academic freedom means. I want to read to you three
22 | definitions of academic freedom set down by the

1 Supreme Court, with which I tell you I agree, and
2 when I was a student long ago I certainly was very
3 active in support of that view. And since then I've
4 represented, *pro bono*, some students for the same
5 purpose.

6 These are the three quotes I want to read
7 to you, then I'm going to ask if you believe in
8 academic freedom as defined by the Supreme Court.

9 "Students must always remain free to inquire,
10 to study, and evaluate."

11 The second one, "In our system, students
12 may not be regarded as closed-circuit recipients of
13 only that which the school chooses to communicate.
14 They may not be confined to the expression of those
15 sentiments that are officially approved."

16 And the third quote from Justice Powell's
17 opinion, "Academic freedom means that there be full
18 opportunity for expression in all of its varied forms
19 to convey a desired message. Vital to this concern
20 is the corollary that there be full opportunity for
21 everyone to receive the message."

22 Now I want to know how many people here

1 | believe in academic freedom as defined by the Supreme
2 | Court. Raise your hand, if you do, please. So few,
3 | or are you just shy? I would think you all do. And
4 | if you believe in academic freedom as defined, then
5 | it is clear that the government must win this case.

6 | Law school students, in my view, are not
7 | babies. They should be allowed to think and act for
8 | themselves as adults. If they wish to hear the
9 | military employment opportunity message, the
10 | university should not put hurdles in the path.

11 | This debate right here exemplifies
12 | academic freedom; two diametrically opposite points
13 | of view with you, the students, having freedom to
14 | come and listen and decide which side you agree with;
15 | that I am speaking in a room provided by the law
16 | school, that one of your faculty members -- or is it
17 | two, I think -- is participating in this; that I
18 | understand there's going to be a wine and cheese
19 | afterward, paid for by the university does not mean,
20 | obviously, that the law school, the administration,
21 | teachers, or students necessarily endorse my view.
22 | All that it means is you're giving me a platform to

1 | convey my message to those who wish to hear it. And
2 | that's called freedom of speech. It's called
3 | academic freedom.

4 | Now at the same time, faculty and students
5 | retain their freedom of speech. They're free to
6 | proclaim their message of objection to the military's
7 | policy, provided they don't interfere by force,
8 | noise, or intimidation with free speech rights of
9 | those who wish to hear the military message. With
10 | both sides of the issue having freedom to express
11 | themselves, each individual can then decide for
12 | himself or herself, and that is what freedom is all
13 | about.

14 | Simply put, what law schools assert is,
15 | because they don't agree with the military's policy,
16 | they have the right to prevent students who wish to
17 | hear the military's message from doing so. The basic
18 | fallacy of that, if it is not apparent on its
19 | surface, is that they, the administration and
20 | faculty, see academic freedom as primarily for the
21 | benefit of the administration and the faculty,
22 | allowing them to restrict the academic freedom of

1 | students who disagree. That is simply not so.

2 | Colleges exist to educate students, with
3 | students being the primary beneficiaries of academic
4 | freedom. The administration is the fiduciary of
5 | academic freedom, of the right of academic freedom to
6 | be implemented for the benefit of students. And this
7 | isn't something I'm making up. The Supreme Court has
8 | made that clear, for example, in *Board of Education*
9 | *Island Trees v. PICO*. The Board of Education, there,
10 | said that in order to promote social and moral values
11 | in the students, the same thing that FAIR is talking
12 | about with law students, the Board decided they had
13 | to prohibit certain books in the libraries so that
14 | students who went into the library couldn't get those
15 | books. The Supreme Court said, you can control
16 | what's taught in the class but not in the library,
17 | which the Supreme Court described as the voluntary
18 | exposure to speech. The employment fair that each
19 | university has or law school has is just like that
20 | library. The students must voluntarily seek it out.
21 | As *PICO* has held, if the school administrations seek
22 | to block students' access to other viewpoints, it is

1 | the schools, not the government, which is violating
2 | academic freedom of students.

3 | And the Supreme Court has made this clear
4 | in other contexts. For example, in the library
5 | context, when the library administration wanted to
6 | control what patrons of the library -- similar to
7 | students of the school -- could read or have access
8 | to, the Supreme Court said that the First Amendment
9 | rights were not those of the institution that they
10 | had to look at, but those of the patrons, the people
11 | who were trying to get the education at the library.
12 | That's *United States v. the American Library*
13 | *Association*. The same rulings were made by the
14 | Supreme Court in the corporate context, in the
15 | broadcaster's context. It's clear.

16 | That's why I believe that FAIR, which is
17 | attacking the Solomon Amendment on the ground it
18 | violates academic freedom, exemplifies George
19 | Orwell's 1984 "doublethink". FAIR says, you can
20 | prevent a violation of academic freedom by
21 | prohibiting students' access to hear the military
22 | point of view. When universities stifle healthy

1 | discourse or indeed free expression or impede free
2 | expression or free right to hear messages, we frankly
3 | substitute academic censorship for academic freedom.

4 | And the bottom line results in the
5 | conclusion that the Supreme Court will reverse the
6 | decision below, because the *sine qua non* of it was a
7 | finding that the Solomon Amendment violated academic
8 | freedom. It clearly does not. It is the reverse.
9 | The absence of the Solomon Amendment restricts
10 | academic freedom.

11 | Thank you.

12 | PROFESSOR EASTMAN: Thank you, Gerald.

13 | Going back to our second Georgetown
14 | professor, David Cole is a professor here, a
15 | volunteer staff attorney for the Center for
16 | Constitutional Rights, Legal Affairs Correspondent
17 | for the *Nation* and a commentator on National Public
18 | Radio's *All Things Considered*. And again, I hope
19 | Georgetown doesn't hold this against him, he is a
20 | graduate of Yale University and Yale Law School.

21 | He litigated many First Amendment cases,
22 | successfully in *Texas v. Johnson* and *United States v.*

1 | *Eichmann*, which extended First Amendment protection
2 | to flag-burning, and unsuccessfully in *National*
3 | *Endowment of the Arts v. Finley*, which challenged the
4 | constitutionality of the decency restriction on
5 | federal funding for the arts. It's the line between
6 | those two cases that is at issue in this case. We'll
7 | see where the Court comes down. *New York Times*
8 | columnist Anthony Lewis has called him "one of the
9 | country's great legal voices for civil liberties
10 | today," and former CIA Director James Woolsey has
11 | called David's latest book, *Enemy Aliens: Double*
12 | *Standards and Constitutional Freedoms on the War on*
13 | *Terrorism*, the essential book in the field.

14 | David Cole.

15 | PROFESSOR COLE: Thank you. I'm delighted
16 | to be here with such a distinguished panel. I'm
17 | particularly glad to be here with Shannen Coffin, who
18 | was one of the first students I had as a professor
19 | here at Georgetown; one of the best students I ever
20 | had as a professor here at Georgetown; and one of the
21 | most challenging students I ever had. And sometimes,
22 | you know, as I was teaching criminal justice in my

1 | first year, and Shannen's hand would go up with a
2 | "but" every time I made an affirmative statement, I
3 | wondered, why did God give me Shannen Coffin? And I
4 | got the answer --

5 | PROFESSOR KAUFIN: My mother often
6 | wondered the same thing.

7 | PROFESSOR COLE: -- I got the answer from
8 | God that, well, you had Judge Bork for constitutional
9 | law. So these things skip a generation, I guess.
10 | I'm just waiting for Shannen to go into teaching so I
11 | can see what his students are like.

12 | Let me begin by saying that I think this
13 | is one of the most morally offensive pieces of
14 | legislation that I have seen in the 20 years that I
15 | have been a lawyer. It's morally offensive on two
16 | grounds; first, of course, the sort of bottom-line
17 | homophobia which underlies the exclusionary policy of
18 | the military; but second, in the tactics of Congress,
19 | which are nothing more than the tactics of the
20 | schoolyard bully.

21 | Congress is essentially acting here like
22 | the kid who owns the football, who says, unless you

1 | play by my rules, I'm going to take the ball away.
2 | And by the way, my rules are that I get eight downs
3 | to make a first down and you get four. And it's not
4 | simply that they're going to take the ball away,
5 | they're going to take the whole football field away
6 | because what's at stake for schools like Yale or
7 | Harvard is \$300 million. And I realize that's chump
8 | change for Yale and Harvard, but for the academy
9 | nationwide, what's at stake is \$35 billion in federal
10 | funds. 35 billion dollars in federal funds.

11 | But the question, of course, as Gerald
12 | Walpin suggested, is not whether this is morally
13 | offensive but whether it is legal. I'm going to
14 | suggest that it's not legal for two reasons. First,
15 | the military's actions against these universities are
16 | not statutorily authorized by the Solomon Amendment.
17 | And second, if it were statutorily authorized, the
18 | Solomon Amendment is unconstitutional.

19 | It's true, as Mr. Walpin says, that we
20 | have the live under the law, but of course Congress
21 | has to live under law as well, and DOD has to live
22 | under the law as well, and no one here is arguing

1 | that universities should be able to flout the law.
2 | What they're saying is that DOD and Congress have
3 | flouted the law, and it's the Court's role to rule on
4 | that.

5 | The statutory argument, which I think is a
6 | serious one not addressed by the lower court but made
7 | by two *amicus* briefs in the Supreme Court, is that
8 | what the Solomon Amendment requires is equal
9 | treatment. Equal treatment. But what the military
10 | is demanding from the law schools is not equal
11 | treatment but special treatment. In fact, the law
12 | schools treat the military equally. They are equally
13 | subject to the general, neutrally applicable rules
14 | that apply to all recruiters. And any recruiter that
15 | complies with those rules, including when you're
16 | going to recruit, where are you going to recruit, how
17 | many students you can talk to, and whether you can
18 | discriminate against some of the students or not,
19 | every recruiter that abides by those rules gets
20 | access to the university. It is an equal policy. It
21 | does not target the military; it targets the
22 | discriminators.

1 And the military is seeking special
2 treatment to say, we want special treatment so that
3 we can discriminate and nonetheless have access.
4 It's almost as if the military were saying we want to
5 be able to interview during exam time and overnight.
6 And even though your neutral, generally applicable
7 rules say you can't interview then, no one can
8 interview then, we have to be able to do that, and if
9 you to let us do that, we're going to take \$300
10 million from your school.

11 What the *amicus* briefs point out is that
12 the Solomon Amendment doesn't actually require the
13 special treatment that the military is demanding.
14 What it says is that "federal funds will be denied if
15 institutions have a policy or practice that either
16 prohibits or in effect prevents military recruiters
17 from gaining access to campuses or to students on
18 campuses in a manner that is at least equal in
19 quality and scope to the access to campuses and to
20 students that is provided to any other employer."
21 And the argument is straightforward: the military is
22 being given access in a manner that is at least equal

1 | in quality and scope to the access to campuses and
2 | his students that is provided to any other lawyer.
3 | Every employer is given the same access. If you
4 | follow the road you get access; if you violate the
5 | rules you are denied access.

6 | So, the Solomon Amendment does not require
7 | the schools to give the military a special exemption
8 | from this neutrally applicable general prohibition on
9 | discrimination. On its face, it simply requires that
10 | they be treated like all other employers, and they
11 | are. And the Court can therefore affirm the lower
12 | courts without getting into the constitutional
13 | thicket that Shannen and Chai and Gerald have already
14 | set out so nicely for us. So, that's the first
15 | argument. It's simply not statutorily authorized.
16 | This is a special treatment exemption case, not any
17 | equal treatment case.

18 | But suppose the Court reads the Solomon
19 | Amendment to require that the military be given a
20 | special exemption. Then the question is, can the
21 | government constitutionally penalize the university
22 | by taking all of its federal funds if it refuses to

1 | grant the military an exemption from a neutral non-
2 | discriminatory policy? I think you start with the
3 | proposition that the Solomon Amendment clearly
4 | imposes a penalty. And Chai laid this out. Under
5 | the Court's analysis, it is a penalty when the
6 | government goes beyond restricting the use of its own
7 | money, and instead seeks to restrict the activities
8 | of the recipient outside of the program that is being
9 | funded. So here, if you get some money for cancer
10 | research, they're restricting not what you can do
11 | with the money for cancer research, but they're
12 | restricting what the law school can do in terms of
13 | its recruiting policies. That is clearly a penalty.
14 | Clearly a penalty.

15 | And therefore, unless the government could
16 | impose this sort of restriction directly by making it
17 | a crime to fail to give the military a special
18 | exemption from a neutral non-discrimination policy,
19 | or by imposing a civil penalty on such conduct, it
20 | can't do it through funding. And the sort of litany
21 | of, well, they're just being asked -- it's not
22 | compulsory because they're just being asked to give

1 up some funding, is not admissible argument because
2 the nature of the condition here is a classic
3 penalty. It doesn't just condition how the money
4 that the government gives is used; it seeks to impose
5 a restriction on the recipient outside of that
6 particular federally funded program.

7 So the question is, could the government
8 impose this kind of restriction directly? Of course
9 that's the answer to Title IX and Title VI. Congress
10 could make it an offense, could prohibit sex
11 discrimination on all campuses, and therefore it can
12 deny funding for sex discrimination from those
13 campuses that engage in it. It's a lesser form of
14 compulsion. It's a form of compulsion, but it's a
15 legitimate form of compulsion because there's no
16 right to discriminate on the basis of sex. But there
17 may well be a right to adopt a neutral non-
18 discrimination policy and to apply it where it
19 furthers the essential message and meaning of the
20 university setting.

21 So here, I think there are two reasons
22 that the government could not impose this directly,

1 | and therefore can't impose it through a funding
2 | condition. The first is that it does compel law
3 | schools to affirmatively support speech with which it
4 | fundamentally disagrees. The government is asking
5 | for more than just access. In fact, in an earlier
6 | version that's all that was required was access. But
7 | now they want more than access. They want the school
8 | to have to assist them affirmatively in every way
9 | that it assists any employer who follows and abides
10 | by its non-discrimination policy.

11 | So if it makes announcements about who's
12 | coming to interview, if it distributes the literature
13 | of law firms, it has to distribute the literature of
14 | the military, it has to make announcements about the
15 | military, even though the military's policy is
16 | directly contrary to the school's commitment to non-
17 | discrimination on the basis of sexual orientation
18 | against any of its students. So, it is compelling
19 | speech by requiring the school to affirmatively
20 | support the message that it is okay to discriminate.

21 | Secondly, it's compelled association. And
22 | here, I think as Chai I suggested, there is a very

1 | close analogy to the *Dale* case. In the *Dale* case,
2 | the Court found that admitting a gay member,
3 | requiring a scoutmaster to be admitted to the Boy
4 | Scouts, would interfere with the Boy Scouts'
5 | expressive associational rights because the Boy
6 | Scouts was committed to being against gays.

7 | Here, the schools are committed to
8 | tolerance of all students and to opposition to
9 | discrimination on the basis of race, sex, religion,
10 | and sexual orientation. The Solomon Amendment
11 | requires a school to affirmatively support the
12 | efforts of recruiters that stand for exactly the
13 | opposite proposition, that it is okay to restrict and
14 | exclude and discriminate on the basis of sexual
15 | orientation.

16 | Now the government says, and Shannen
17 | suggested, that it's different here because it's not
18 | about membership within the school, it's just about
19 | temporary access to a recruiting forum. But I don't
20 | think that *Dale* would have come out differently if
21 | the Boy Scouts were required to allow an organization
22 | promoting gay identity to speak at the Boy Scout

1 | Jamboree. I think the Boy Scouts would have had the
2 | same claim, the Court would have come out the same
3 | way, because in both instances the requirement
4 | imposes upon the entity an obligation to associate
5 | itself with the views of another which it finds
6 | repugnant.

7 | Finally, this does arise in the context
8 | of academic freedom. But I take a very different
9 | view of it than Gerald Walpin. It is not a denial of
10 | academic freedom to exclude discriminators from the
11 | school. You know, if it was a denial of academic
12 | freedom to exclude discriminators, people who believe
13 | in race discrimination, sex discrimination, sexual
14 | orientation discrimination from the school, then
15 | Title IX would be unconstitutional as an infringement
16 | on academic freedom, and certainly Mr. Walpin doesn't
17 | believe that.

18 | So I think the fact that it's in the
19 | context of universities only makes the First
20 | Amendment arguments here of compelled speech much
21 | more critical because the Court has recognized over
22 | the course of history that First Amendment freedoms

1 | are especially important in the academic setting, and
2 | that government has historically sought to use
3 | funding to try to infringe on academic freedom. And
4 | I think it's doing the same thing here.

5 | Thank you.

6 | PROFESSOR EASTMAN: Carter Phillips is
7 | managing partner in the Washington, DC office of
8 | Sidley Austin Brown and Wood. He served as a law
9 | clerk for both Judge Robert Spector and Supreme Court
10 | Chief Justice Warren Berger. He served as Assistant
11 | to the Solicitor General for three years during which
12 | time he argued nine cases on behalf of the federal
13 | government -- so one might think he's leaning toward
14 | the federal government here -- but in private
15 | practice, he has argued 37 cases before the Supreme
16 | Court, for a grand total of 46 appearances. I dare
17 | say, a good number of them have been against the
18 | federal government. *American Lawyer* described him as
19 | the "go to" guy for large corporations looking for
20 | help from the Supreme Court. He's a member of the
21 | American Academy of Appellate Lawyers, the American
22 | Law Institution and the American College of Trial

1 | Lawyers, among other things.

2 | Carter Phillips.

3 | MR. PHILLIPS: Thank you, Professor
4 | Eastman. Actually, the reason they picked me was
5 | because when you're done listening to my remarks,
6 | you're not going to be able to determine exactly
7 | which way this was tilted. As I said to the panel
8 | when we set this meeting up in the first place, I
9 | feel very strongly both ways, and I'll try to reflect
10 | that.

11 | Actually, I think the reason I was invited
12 | was more to provide at least some insights into what
13 | I think will happen at the argument and how I think
14 | the Court, or at least some members of the Court,
15 | will react. Or at least, if that wasn't the reason I
16 | was invited in the first place, that's what I'm going
17 | to talk about. So we'll see how that turns out.

18 | I think this Court's going to be
19 | frustrated by this case, candidly, and you've seen it
20 | in the presentations so far here, because you've got
21 | an overheated rhetoric on both sides. You know, it's
22 | all well and good to scream about forcing the law

1 | schools to associate with a particular expression
2 | etc., but the truth is the law schools are perfectly
3 | happy to allow the military recruiters on campus. I
4 | mean, they bought into that; they accepted that. If
5 | you read the brief of FAIR, it's not clear to me that
6 | they challenge that in any sense. So, it's a much
7 | more nuanced kind of analysis, but it also takes away
8 | at least a little of the moral outrage because if
9 | you're prepared to let them come onto your campus in
10 | any event, then your ability to say we don't allow
11 | anybody to come in here who discriminates loses a lot
12 | of its force.

13 | Now, I don't think Professor Cole would
14 | necessarily embrace that first step. I don't know.
15 | I mean, he certainly took a more aggressive position.
16 | But it's going to be important from the Court's
17 | perspective to recognize that it's a narrower issue
18 | that's presented here.

19 | Second, it is pretty clear to me that this
20 | is a more serious problem in terms of the cut-off of
21 | funding than anything I've seen before. This is not
22 | just *Rust v. Sullivan*. When you condition funds

1 | across the board, regardless of the source or what
2 | their purpose is, that's a pretty serious issue. In
3 | fact, I'm surprised -- I didn't read all of the
4 | amicus briefs; somebody may well have made the
5 | argument -- but I would've thought somebody might
6 | have made the pitch that this exceeds the Spending
7 | Clause authority, that you cannot condition funds
8 | under these circumstances.

9 | We know that Congress has broad power to
10 | do that. That's in the *Dole* case in South Carolina.
11 | But it's not unlimited power, and my guess is there
12 | will be at least some members of the Court who will
13 | certainly ask that question, and I submit they'll ask
14 | the Solicitor General how far can they go down this
15 | path? Wouldn't this be a little easier to swallow if
16 | we were just talking about Department of Defense
17 | funding, or something along those lines.

18 | Structured the way it is, I have a hard
19 | time concluding that this is just a mere
20 | "associate with my money, you to associate with me"
21 | kind of a position. This is a pretty aggressive
22 | vision. So, I think at the end of the day the way

1 | this case is going to turn out is going to be
2 | essentially as Professor Cole laid it out, which is,
3 | could they do this directly? And I think the answer
4 | at the end is probably going to be, yes, but not for
5 | the reasons that Professor Cole adopted.

6 | I think this is not like *Dale*. This is a
7 | stretch, to argue that requiring people to come in
8 | episodically to participate in one program or another
9 | program on an equal basis is the same as telling
10 | somebody who you're going to have as the leader of
11 | your organization. And to say it that way, which is
12 | the way I think the Court's going to view it, or at
13 | least a majority will view it, is to recognize that
14 | there is a fundamental difference between this and
15 | *Dale*.

16 | Second, with respect to compelled speech
17 | it's very difficult, at least for me, to understand
18 | precisely what the speech is. If it's not, "we don't
19 | want these people on our campus, because that doesn't
20 | seem to be what people are complaining about," it's
21 | "we don't want to give them any additional
22 | protections." Well, that's pretty attenuated speech.

1 On the other hand, there may be aspects of
2 this case -- and it's important to understand this,
3 it comes in an interrogatory posture. It was a
4 request for preliminary injunction denied by the
5 district court. In a reversal by the court of
6 appeals, everything stayed. So, it's very difficult
7 to know precisely what the metes and bounds of the
8 problem would be. I think there may be a serious
9 issue if law schools are compelled somehow to
10 associate directly with the provision of information.
11 That looks a lot closer to some of the compelled
12 speech in cases than just simply allowing somebody to
13 come on campus in order to conduct interviews.

14 So, I think what this case is going to
15 ultimately look like to at least the middle of the
16 Court will be an *O'Brien* kind of situation, where
17 this is largely conduct that has some expressive
18 components to it. I have a hard time with the
19 government's position that this doesn't rise to the
20 level of *O'Brien*. And I think they've got a second
21 problem, which is that they didn't argue that below.
22 I think the Court's going to be a little skeptical

1 | about not accepting *O'Brien*.

2 | Then, and this goes right to Shannen's
3 | point about where will to Kennedy be on this. And I
4 | think where you want to look then is at *Turner*,
5 | because that's the clearest expression of *O'Brien*.
6 | And there, they put Congress to its paces, or at
7 | least the federal government, by insisting that there
8 | be pretty clear evidence about the nature of the
9 | claims and the relationship between the methods that
10 | were selected and requirements in that context, and
11 | what we have in order to sustain the
12 | constitutionality of it. And this case does come up
13 | in an awkward posture from the federal government's
14 | point of view because there isn't a whole lot of
15 | evidence on the federal government side. I don't
16 | think anybody disputes that there's the compelling
17 | state interest involved here, but the nexus is a
18 | little unclear and I could certainly see the Court
19 | vacate and remand for some further findings because
20 | that is the way this Court tends to resolve most
21 | issues anyway. Kind of, come in with programs like
22 | this, where everybody gets to shout on both sides and

1 | tell you it's the end of the world either way, and
2 | the Court comes out with a decision that has meaning
3 | for 30 minutes. So that wouldn't surprise me.

4 | I think I would end with two observations.
5 | One, I love the statutory argument but it strikes me
6 | that it's just too cute by half because it's quite
7 | clear what Congress intended to accomplish here, and
8 | the idea that the Court would punt this case away on
9 | a statutory interpretation, knowing that Congress
10 | will change that statute 30 seconds later and it
11 | comes right back up again, I don't think they're
12 | going to go down the hill just to go back up the hill
13 | again. So I don't think that's going to happen.

14 | And then the last observation I'd make is
15 | it will be very interesting to see how the new Chief
16 | Justice reacts to this. It's absolutely clear to me
17 | how the old Chief Justice would've voted. This one
18 | wouldn't have given him 30 seconds worth of thought,
19 | I don't think. And he would've been perfectly
20 | comfortable, I think, with the argument that you can
21 | condition funds completely, and there's no punishment
22 | there at all. But I'm not sure how the new Chief

1 Justice will respond to it. It will be very
2 interesting to see what kinds of questions he asks
3 and how he reacts to it because, you know, this will
4 be a real test of how he wants to decide what is
5 obviously a highly charged situation and bring a fair
6 amount of visibility to it. I suspect we'll read a
7 whole lot about the questions he asks during oral
8 argument.

9 In any event, my prediction is that I
10 think the Court is going to end up deciding this on
11 *Turner* grounds, and I think more likely than not to
12 vacate rather than confirm at this point. But that's
13 why we're here, just have fun before the arguments.

14 Thanks.

15 PROFESSOR EASTMAN: We've decided to give
16 our panelists a round of back-and-forth with each
17 other. Let me begin that round by posing a couple of
18 questions to each of them to maybe guide the
19 discussion a little bit.

20 Shannen, let me ask you. Where exactly is
21 the coercion breakpoint under *South Dakota v. Dole*?
22 You know, \$300 million, even for Harvard, seems like

1 | an awful lot of money.

2 | MR. COFFIN: I have less problem with
3 | this, with the fit, than Carter and my fellow
4 | panelists have.

5 | I tend to agree and it's interesting here,
6 | that the government actually did not raise *South*
7 | *Dakota v. Dole* in its brief. It's something that we
8 | did in the district court. But at the end of the day
9 | it does come down to whether this can stand on its
10 | own two feet. And I think that under *O'Brien*, the
11 | funding issue actually plays in, in what Professor
12 | Feldblum called narrowly tailored analysis, that's
13 | been defined a little less restrictive than that.
14 | It's whether it's less effectively achieved absent
15 | regulation. And I think that the fact that this is
16 | not a direct regulation, that it is the funding
17 | restriction, is a thumb on the scale for the
18 | government there.

19 | PROFESSOR EASTMAN: Does anybody else want
20 | to weigh in on that before I go to the next question?

21 | PROFESSOR FELDBLUM: Well, I just want to
22 | say that it was not at all by happenstance that at

1 | least those of those who were challenging the Solomon
2 | Amendment did not raise the Spending Clause argument.
3 | Just so the audience understands, the federal
4 | government is a government of limited powers. The
5 | Federalist Society, of all, should know about that,
6 | and be committed to that. Well, one of the powers
7 | the government has of the Commerce Clause power, and
8 | the other is the Spending Clause power. Just
9 | speaking for myself, I have not been happy with the
10 | Supreme Court's Commerce Clause jurisprudence over
11 | the last ten years. I think it's been wrongheaded
12 | and has restricted the scope of Congress's power
13 | unnecessarily, and I definitely would not like to see
14 | restrictions on Congress's Spending Clause power.
15 | Obviously, *South Dakota v. Dole* establishes the
16 | framework, and that's the framework they have
17 | operated under. So its was a very definite decision
18 | not to argue that because of the nexus issue, that
19 | there was a Spending Clause problem. That, to me, is
20 | not a problem. The problem is, as I said, can the
21 | government do this directly?

22 | I think one of the most interesting things

1 | was Carter saying, tell us about whether somebody's
2 | going to be a leader, a scoutmaster. I mean, just
3 | saying it is different from whether someone gets to
4 | be at your recruiting table. And I think he had it
5 | exactly right in terms of how some of the justices
6 | might think. I will tell you that they do that.
7 | That, to me, is going to be one of the most saddening
8 | parts of it because the Supreme Court was incredibly
9 | deferential to the Boy Scouts about the message they
10 | were trying to convey, how having Dale there would
11 | undermine it. I mean, the Boy Scouts had not sent
12 | out in their literature that they believed
13 | homosexuality was immoral and horrible. They hadn't
14 | done that widely. But they got up before the Court
15 | and they said, this would undermine our message, and
16 | the Supreme Court just bought it.

17 | And having seen how the gay students here
18 | are upset when Georgetown has to in fact allow the
19 | military to recruit, it hurts. It does undermine the
20 | school's message. And I just don't know whether
21 | we're going to get the same deference that the Boy
22 | Scouts got.

1 MR. PHILLIPS: I want to say, I think
2 Shannen may be right in some respects, if the Court
3 applies an *O'Brien* analysis, then the funding rather
4 than direct prohibition might be considered a thumb
5 on the scale. But the thumb is so heavy here that I
6 don't know that at the end of the day it really makes
7 that much difference.

8 I mean, what's the difference between
9 imposing a fine, which would not likely be in the
10 neighborhood of \$300 million on Yale, if they
11 violated this amendment, and say we're going to take
12 away \$300 million that we've given you because you've
13 won it through grant competitions because you're
14 doing the best work in cancer research, or what have
15 you? To the university, there really isn't any
16 distinction between a civil penalty and this kind of
17 consequence. In fact, this kind of consequence is
18 probably far worse. So when you actually look at the
19 character of the funding condition here, the scope of
20 the funding condition, I think it's very, very close
21 to a penalty.

22 On the point about whether it's different

1 | to be forced to have a scoutmaster versus be forced
2 | to tolerate a discriminator to come in and recruit
3 | where it's openly discriminating against some of your
4 | own students, I agreed that there is a difference in
5 | degree there. I'm not sure that it's ultimately
6 | determinative. I mean, you think about *Hurley*. All
7 | the parade organizers were asked to do there was to
8 | allow one float to go into the parade, and the Court
9 | found that was an impermissible intrusion on their
10 | ability to express their homophobic views.

11 | So, if we're so willing to protect the
12 | rights of Boy Scouts and of the Irish paraders to
13 | express homophobic views, shouldn't we also be
14 | willing to protect the rights of law schools to
15 | promote non-discrimination, a principle that
16 | certainly is much more consistent with our bottom-
17 | line principles than homophobia?

18 | MR. WALPIN: I just want to comment on the
19 | non-specific nature of the condition which covers all
20 | federal funding. I find it very interesting that it
21 | was not argued below in either of the two courts, and
22 | for good reason. It is a very simplistic argument.

1 | In the decisions of the Supreme Court, they have
2 | talked about and used the word broad conditions being
3 | allowed to further the federal government's purpose.
4 | And moreover, what are they doing -- if this is said
5 | to be -- it had to be specific for each
6 | appropriation, all that Congress can do, will do, is
7 | condition every single appropriation with a paragraph
8 | statement that we couldn't have any of these
9 | activities in the government without the military
10 | protecting us in a good manner. And if they did
11 | that, then it would be specific conditions on each
12 | appropriation and it wouldn't alter the picture at
13 | all. And I believe it would clearly do away with
14 | this suddenly thought of argument in the Supreme
15 | Court that this isn't specific.

16 | PROFESSOR EASTMAN: Professor Feldblum,
17 | let me ask you this. Doesn't the unconstitutional
18 | conditions doctrine distinguish between targeted
19 | grants, even \$300 million ones, and generally
20 | available benefits that are open to everybody, access
21 | to a park, access to a parade route? And if so,
22 | isn't this case on the grant side rather than on the

1 | benefit side?

2 | PROFESSOR FELDBLUM: Now I feel like one
3 | of the students in my class saying, what did she ask
4 | me? If you go to *Speizer v. Rendell*, it's, if you
5 | want to get this benefit, you have to act a certain
6 | way. Actually, here's Congress saying when they
7 | passed the law, these colleges and universities need
8 | to know that their starry eyed idealism comes with a
9 | price. If they are too good or too righteous to
10 | treat our nation's military with the respect it
11 | deserves, then they may also be too good to receive
12 | the generous level of taxpayer dollars presently
13 | enjoyed by many institutions of higher education in
14 | America. So I think Congress was very clear that
15 | they were giving out this money; this was their prize
16 | that they got to give out. And if universities
17 | thought that they were just too good for that, then
18 | they should just not be able to get that money.

19 | So that to me is like we've got a property
20 | tax exemption. It's a benefit, this property tax
21 | exemption, just like it's a benefit that we're going
22 | to give you this, our hard-earned federal money, and

1 | in return, there's a price. It's quite clear, I
2 | think. And I think the government, in its brief,
3 | didn't argue against unconstitutional conditions that
4 | this is the price. And instead. the question is, is
5 | it a price that you can exact because you could
6 | actually exact it, if you did it directly. Like, you
7 | could pass Title IX directly so -- or you can pass a
8 | law prohibiting sex discrimination in universities
9 | directly, so then you can also condition it on
10 | getting those bonds but only because the underlying
11 | law is itself constitutional.

12 | I mean, *South Dakota v. Dole* said that
13 | too. One of the things is obviously the condition on
14 | spending can't violate an independent constitutional
15 | right. That's what we're discussing here. Does it
16 | violate an independent constitutional right?

17 | AUDIENCE PARTICIPANT: I guess this
18 | question will be mostly towards Professors Cole and
19 | Feldblum. It strikes me that the we are neglecting
20 | to ask the question, why does the federal government
21 | give universities money in the first place. And
22 | Professor Feldblum pointed out that if this were

1 | *Rust*, it would be fine. I'll say quite candidly, I
2 | think *Rust* is ridiculous. But *Rust* is a repudiation
3 | of the unconstitutional conditions in that it thinks
4 | that a government program, however one defines that,
5 | the government gets to call the shots, much like it
6 | recently said in government speech situations for
7 | agricultural marketing orders.

8 | But the line between a government program
9 | and a government sponsored forum -- or in this case,
10 | a government generically available benefit -- is
11 | notoriously difficult to find and is invariably
12 | determined based upon what the government intends,
13 | just as non-public forums are based on what the
14 | government intends, and it can therefore viewpoint
15 | discriminate in a truly private forum, whereas it
16 | couldn't possibly do that in a non-public but not
17 | private forum.

18 | So the question is, if what they're doing
19 | in paying all this money to universities is educating
20 | people to become better citizens, or more importantly
21 | to become better government servants -- and by the
22 | way, Carter, this is why you were invited, because

1 | your brief in the affirmative action case, which
2 | suggested that universities have a role in educating
3 | people to go into the military, which I find somewhat
4 | analogous to this -- if that's why we're giving them
5 | so much money, not merely to the law schools, but in
6 | general, it doesn't seem that there is that far a
7 | jump to say, therefore, we have to get a return on
8 | our dollars, which is decent access -- not just
9 | equal; I'll say better access -- to those students,
10 | or we'll take all of your money away. That's the
11 | nexus question.

12 | So, it strikes me that the Spending Clause
13 | issue, slash the nexus question, slash *Rust* is the
14 | question. If there is a close-enough nexus between
15 | the dollars being conditioned and the condition
16 | imposed, this works just fine. It sounds like *Rust*
17 | to me. If it's not, and it may not be, then it's not
18 | and I'd like to hear your reactions to that.

19 | PROFESSOR EASTMAN: I think that the
20 | unconstitutional conditions doctrine, if it's to have
21 | any bite at all, cannot be predicated solely on how
22 | the government defines the program. That takes away

1 | any bite from the doctrine. Imagine the situation,
2 | and here's I think the difference. Well, let me say
3 | two things.

4 | First of all, I do not think it's a fair
5 | characterization of why the government spends \$35
6 | billion educating its citizens, that the reason for
7 | that is to turn them into warriors. I just don't
8 | think that even passes the laugh test. It's because
9 | we realize that education is an important value for
10 | an engaged citizenry. It's important to our economy.
11 | It's important to a whole range of things. But it's
12 | certainly not directed at the military. And the
13 | nexus between funding cancer research at Yale and
14 | producing people who can fight on the battlefield, I
15 | think is completely nonexistent.

16 | Secondly, I think that in the
17 | unconstitutional conditions area, there are special
18 | areas where there's an increased obligation on the
19 | government to remain neutral, and one of them is
20 | universities. So, for example, I think it would be
21 | of questionable constitutionality for the government
22 | to say we will fund science programs only if you

1 | teach creationism. Even though that would be limited
2 | to the federal program, it would be only saying what
3 | the federal money is about, I think in the academic
4 | freedom context there's a serious question about
5 | whether that would be constitutional. And that's the
6 | sense in which I think the academic context here
7 | plays into this.

8 | The academy plays an important role in
9 | democracy from a First Amendment perspective in being
10 | a voice of opposition. I'm sure the Federalists
11 | among us know there's been a lot of press recently
12 | about how the law schools are filled with people who
13 | give money to the Democrats rather than to the
14 | Republicans. And a lot of people cry about how
15 | that's not fair. Well, you've got the rest of the
16 | world. We've got the academy. I would trade you.

17 | But the point is that the academy is an
18 | important place in which opposition can be voiced.
19 | And if we allow the government through funding
20 | restrictions to constrain that freedom, then there's
21 | a tremendous cost our democracy.

22 | So I think both because this restriction

1 | goes far beyond the actual goal of getting good
2 | fighters and because it is imposed on an academic
3 | context where a special obligation of neutrality is
4 | required and recognized, the argument doesn't work.

5 | PROFESSOR FELDBLUM: One thing to add to
6 | the 35 billion is that, in fact, a lot of it is for
7 | research. I mean, this is how the federal government
8 | carries out its job. Sometimes it does it directly
9 | through NIH and sometimes it does it by giving it to
10 | universities. But it's really about the government
11 | carrying out its job generally.

12 | But I think you also raised an interesting
13 | thing about the responsibility of universities, and
14 | that was a lot of what Gerald talked about. And so I
15 | just want to take a moment to talk about that point,
16 | about the responsibilities of universities,
17 | especially to be open to all points of view, just as
18 | Gerald was talking when he started, right, that here
19 | we are and we have different points of view, and
20 | Georgetown is sponsoring it by paying for this room.
21 | I think it's very important to distinguish between
22 | what are universities doing in terms of having an

1 | open dialogue of ideas, and what are universities
2 | doing when it is in a sense acting as a facilitator
3 | to employers.

4 | And here's what I would want to think
5 | about. Imagine there was a law firm that decided
6 | that it was just going to stop hiring women. You're
7 | going to have to postulate there's no Title VII
8 | protecting discrimination based on sex. But it just
9 | wasn't worth it anymore. They'd come for three
10 | years, and they'd get pregnant, then they'd want to
11 | go part-time. It's just not worth it, so they're
12 | just not going to hire women. So imagine that the
13 | law school says, well, I'm sorry that we're not going
14 | to facilitate -- and it's a great law firm; people
15 | really want to work there. They do great work
16 | generally. And they say to the guys, I'm really
17 | sorry but this means they're not going to be in the
18 | same program and be easy, but we're just not going to
19 | facilitate that. Now that doesn't mean though that
20 | you couldn't have dialogues here with that law firm
21 | coming and explaining why it's not worth it. And if
22 | women want to be in a law practice, they have to

1 | figure out a different way, or whatever. There's a
2 | difference between the exchange of ideas and a
3 | university deciding it doesn't want to affirmatively
4 | assist someone.

5 | And it's not about the guys that can't get
6 | access to that recruiter. I mean, that law firm can
7 | still recruit up the storm if they want. But it
8 | won't be facilitated by the school. So I think
9 | that's the difference.

10 | PROFESSOR EASTMAN: Gerald.

11 | MR. WALPIN: I want to make two points.
12 | One is that we've heard a parade of horrors -- race
13 | discrimination, sex discrimination. The difference
14 | between it and what we have here is that those are
15 | statutorily declared illegal. The *don't ask, don't*
16 | *tell* policy, the opposite is true, that the
17 | discrimination which that policy set forth against
18 | gays is the law of the land and has been upheld by
19 | every court that has considered it. Now I don't
20 | believe that anybody would suggest that the
21 | universities are required to bring into the law
22 | schools people who violate the laws of the land and

1 | want to recruit on the basis of discrimination that
2 | has been declared illegal.

3 | If you want to change the law with regard
4 | to gays in the military, change the law. Go to
5 | Congress and get it changed. Or, as somebody has now
6 | done, brought another lawsuit. And I applaud that.
7 | But don't bring it into the Solomon Amendment.

8 | I will take two more minutes. We've heard
9 | a lot about cases. Most of those that we've
10 | discussed here unfortunately have been older cases.
11 | I want to bring to your attention two more recent
12 | cases. In *United States v. American Library*
13 | *Association*, a 2003 case of the Supreme Court, the
14 | unconstitutional condition doctrine was not defined
15 | as has been discussed here but was said to be, it is
16 | only constitutional if, and I quote with a paraphrase
17 | to put the law school in there, "If the condition
18 | that Congress mandates would be unconstitutional if
19 | performed by [the law school] itself," obviously the
20 | law school could if it wanted, and it does, if it
21 | wants to avoid giving up money, allow the military
22 | in.

1 The other thing I want to bring to your
2 attention is a case this year which I think may well
3 be controlling. And that is the case of *Johannes v.*
4 *Livingston Marketing Association*, a decision earlier
5 this year. It was a case requiring the government
6 maintain subsidization of advertising for a
7 government message. And it was held not to be
8 compelled expression. And it was held that the
9 government message or the government position is
10 exempt from First Amendment scrutiny. There, as
11 here, the plaintiffs objected that it
12 "unconstitutionally compelled them to subsidize
13 speech to which they object, and provide their
14 seeming endorsement to promote a message with which
15 they do not agree". The Supreme Court had no problem
16 with that in saying that that was constitutional.
17 What is the difference?

18 PROFESSOR EASTMAN: I had actually skipped
19 over an opportunity for the panelists, after
20 answering my own questions, to engage each other.
21 Does anybody want to add -- or, or are you getting
22 your piece in along the way?

1 MR. COFFIN: Well, first of all, what
2 David filed to say is that it usually took me a week
3 to come back to him to challenge him because I
4 couldn't figure out what the hell he was talking
5 about.

6 PROFESSOR COLE: And the same is true this
7 evening.

8 MR. COFFIN: But I think there are some
9 practical limitations, David, on your statutory fix.
10 First of all, ripeness -- the issue really hasn't
11 been teed up but the statute was actually amended
12 after the district court --

13 PROFESSOR FELDBLUM: After the district
14 court.

15 MR. COFFIN: -- yeah, I think it was after
16 the District Court.

17 PROFESSOR FELDBLUM: In 2004.

18 MR. COFFIN: Yeah, I think the great thing
19 about being in the government is when something is
20 broke, you can actually fix things midstream. And
21 there were concerns about the interpretation of the
22 prior statute, and we told DOD to fix it and they got

1 | it fixed.

2 | But having said that, the important thing
3 | to note is that DOD hasn't cut off a penny of funding
4 | to anyone at this point. So while there has been an
5 | incredible back-and-forth, especially with Yale,
6 | there's never been a secretarial decision saying, you
7 | know, here's how I interpret the statute, and as a
8 | result you're funding is cut off. So I think the
9 | issue is really not ripe, and even if it were, I
10 | think the Secretary would give a fair amount of
11 | deference in his interpretation of the statute, to
12 | the extent you're speaking about an ambiguity which I
13 | actually don't think is there. I think the courts
14 | would be hard-pressed to second-guess that one.

15 | The only case I wanted to mention or to
16 | rejoin, and I think it's probably the easiest case to
17 | deal with, is *Hurley*, which you've heard of a lot
18 | about. *Hurley* made it very clear on its face, that
19 | the case was about a parade, and the Court said that
20 | a parade is a fairly expressive activity. And that's
21 | what the case was all about. It's just hard to see
22 | how a recruiting fair and a job fair is anything but

1 | secondarily expressive. I mean, the purpose of it is
2 | to facilitate an economic transaction, and *Hurley*
3 | just doesn't fit this sort of case.

4 | PROFESSOR COLE: Let me talk a little
5 | about the statutory argument for a second. My
6 | initial reaction was that it was a little cute as
7 | well. I think on the face of the statute, it's the
8 | most natural reading of the statute. The statute
9 | does not require equal access. It requires access on
10 | the same terms and conditions essentially as applied
11 | to all other employers. And that's being provided.
12 | And the fact that the statute was amended after the
13 | litigation was enacted -- it's the statute that's in
14 | place now that is that issue. And the fact that the
15 | government has not actually taken money away, I don't
16 | think that makes the case not ripe, where the threat
17 | is that we're going to take \$300 million away. You
18 | know, there are lots of cases saying that where
19 | there's a realistic threat of significant pecuniary
20 | harm, the Court can go ahead and decide the case.

21 | And the bottom line is that if the Court
22 | is troubled, if it's troubled by this law but it's

1 | also uncomfortable with the constitutional arguments
2 | that are made, it's a way to duck it. Carter
3 | suggested another way to duck it. But this is a way
4 | to duck it, and this is a court that likes to duck
5 | these cases.

6 | I mean in the *NEA v. Finley* case, which I
7 | lost, the Court took a completely counter-textual
8 | reading of the decency condition in order to avoid
9 | the constitutional claims that were made. So, that's
10 | a very common tactic. So I think if there's enough
11 | concern raised, it might be a way that the Court
12 | would avoid it.

13 | But the last point is that I think it's an
14 | important point because it underscores that this is
15 | not the case about treating the military equally. It
16 | is a case about demanding special treatment for the
17 | military, and that is significant. If you read the
18 | government's brief, it uses the word "equal" I think
19 | 52 times. They are sort of trying to use the rubric
20 | and the normative valence of equality to defend the
21 | military's claim but it is not a claim of equality.
22 | If you have two employers that that discriminate

1 | against gays, and one is a law firm and the other is
2 | the military, then the law firm can be excluded. The
3 | military must be admitted. That's not equal
4 | treatment. That's special treatment.

5 | MR. WALPIN: But the problem with that,
6 | David, is that it is a question of which condition,
7 | which obligation, the university puts on each
8 | employer. If I want to take your argument to an
9 | extreme, and it may happen in some places, a school
10 | that does not believe in abortion insists that all
11 | employers who will come before their school to
12 | recruit students must sign an agreement, it will not
13 | employ any one who has had an abortion. Now that's
14 | obviously ludicrous, but it is as much a condition
15 | that would grant equal treatment to everyone. So
16 | this is a very simplistic argument. The condition
17 | required is one that affects the right of students to
18 | hear what they want to hear. And the condition,
19 | which I suppose somebody, if they really have an
20 | evidentiary hearing, would find was put into the law
21 | schools' and colleges' conditions because they were
22 | targeting the military, and that's the reason.

1 PROFESSOR FELDBLUM: Let me just say
2 something about the statutory provision, because this
3 was something that's made in two amicus briefs, as
4 David says. One is from the Harvard law professors
5 that Walter Dellinger wrote. And when I got to page
6 3 of the brief, I wrote to somebody else involved in
7 the case, am I dreaming? This idea of saying that
8 that statute just requires equal treatment, you know,
9 clearly not what Congress had intended. However, I
10 now think it's certainly an interesting brief to have
11 because, number one, without a doubt, the plain words
12 -- if you did pure plain meaning, this statute just
13 requires the military to be treated like anyone else,
14 subject to the same conditions, and that's how
15 they're being treated.

16 I agree with Carter that it would take
17 about 30 seconds for Congress to go ahead and re-pass
18 the statute. So for those of us that deal with
19 Congress, that's not a particularly positive prospect
20 for us. But I think it does surface the fact that
21 there is this general condition. And then you'll be
22 interested to know, Gerald, that in fact, it wasn't

1 | that there was a special thing for the military. All
2 | the schools had this requirement that they wouldn't
3 | assist employers who discriminate. In fact, the
4 | military had been discriminating for some time
5 | without the neutral role being applied to them. And
6 | as awareness of that grew, as gay students had more
7 | of an allowance to say, "what are you doing," then
8 | the neutral rule was applied to the military.

9 | PROFESSOR EASTMAN: Shannen.

10 | MR. COFFIN: There is a fairly simple
11 | answer to this statutory issue. The statute requires
12 | access. The conditions that the law schools are
13 | putting on the Defense Department, the Defense
14 | Department can't comply with. They're statutorily
15 | prohibited from signing a pledge that they wouldn't
16 | discriminate on the basis of homosexuality.

17 | MR. PHILLIPS: But one branch can't say,
18 | well, you know, we can't comply because another
19 | branch just told us we can't. That's not a defense.
20 | It's like saying, well, if I'm a private lawyer, I
21 | can't comply because my boss said so. No. The
22 | federal government, the military, is being excluded.

1 | The military is a creature of the federal government.
2 | It's regulated by Congress and if its regulations are
3 | a problem in terms of its ability to gain access to
4 | recruiting services, then Congress can change those
5 | regulations. It doesn't matter that --

6 | MR. COFFIN: -- but they're not --

7 | MR. PHILLIPS: -- Congress can change the
8 | statute. Congress can -- there's no difference --

9 | MR. COFFIN: -- but then you have a
10 | university micromanaging the government.

11 | MR. PHILLIPS: No. All it's saying is
12 | that you don't get special treatment; you get equal
13 | treatment, and you're entitled to equal treatment.
14 | You just change the role.

15 | MR. COFFIN: No, you're entitled to equal
16 | access, and the word "access" could very well be
17 | interpreted to mean physical access on campus. And
18 | there's no doubt that the Secretary would be entitled
19 | to deference under *Chevron* for that interpretation.
20 | So, I do think it's a creative argument. It's
21 | something that we've certainly thought about. But
22 | when the Secretary actually adopts that

1 | interpretation, which he hasn't done in any final
2 | form, I think it's one that won't pass muster.

3 | PROFESSOR EASTMAN: Good. Let me go back
4 | to some more questions. Here.

5 | AUDIENCE PARTICIPANT: John Vecchioni,
6 | Shepherd, Mullen, Richter and Hampton, and Georgetown
7 | 1989. My question is, does Georgetown allow the
8 | Society of Jesus to recruit to its all-male Catholic
9 | priesthood here on campus? And if it does, isn't
10 | this whole thing just a sham against the military?
11 | And if it doesn't, I'm also a Georgetown alumni board
12 | member and I'm sure that the Board would like to hear
13 | about that.

14 | So that's the first question, is this
15 | whole thing a sham, or is it you can't recruit for
16 | the Society of Jesus on campus either. And second of
17 | all, this is the military grade, and I haven't heard
18 | the argument here that maybe the Court should just
19 | punt this because whether they agree with Mr. Cole or
20 | whether they agree with Mr. Coffin, this is a
21 | military matter. We're in a war. Maybe the little
22 | nuances of what law professors think on either side

1 | shouldn't rule this right now. Thank you.

2 | PROFESSOR EASTMAN: There's another side?

3 | What about the Georgetown recruiting
4 | policy?

5 | PROFESSOR FELDBLUM: Let me put your mind
6 | at rest. You know, if the Society of Jesus wants to
7 | come on and recruit law students to be priests, they
8 | can certainly come on and recruit. I mean, we have a
9 | placement office that is geared toward getting our
10 | students law jobs. So that's what the placement
11 | office does. Law jobs tend to pay more in terms of
12 | payment of tuition, and that's what they're hoping to
13 | do. So it's a placement office for law jobs. But
14 | you know, the Society of Jesus could certainly come
15 | on.

16 | Well of course this is going to be the
17 | perfect storm, because, look, I think if they don't
18 | give deference to the law schools' concerns, I am
19 | sure that their concern about the military is
20 | certainly going to be guiding them. You know,
21 | legally I don't think they can -- they have to come
22 | with an analysis as to why this is different from

1 | *Dale*, different from *Hurley*, and they certainly heard
2 | the back-and-forth on that. Of course that's going
3 | to be in the back of their minds.

4 | But the thing is, the military opposed the
5 | Solomon Amendment when it was first offered. They
6 | wrote to the members of the armed services to say we
7 | don't need this type of amendment. It was clearly a
8 | symbolic message that Solomon and some of the other
9 | folks wanted to send. This is all just coming up on
10 | preliminary injunction. But there were never any
11 | comments to Congress over the last 10 years -- oh my
12 | God, our recruiting is really suffering, etc.

13 | And I think that the respondents, FAIR and
14 | the others, will make it very clear that no one
15 | disagrees that there's a compelling government
16 | interest in recruiting but that the narrowly tailored
17 | piece here, why they have to be treated exactly the
18 | same, really is about symbolism.

19 | And by the way, the ACLU brief, which is
20 | all about a speech, talks about the *Johannes* case and
21 | explains how that's actually different. You know,
22 | your money going to the government that then is going

1 | to do things is different from the government saying
2 | you have to convey a certain message because you have
3 | our money.

4 | PROFESSOR COLE: I think the Court could
5 | take judicial notice of the fact that military
6 | recruitment has suffered, but I think it has more to
7 | do with Iraq than Yale Law School.

8 | MR. WALPIN: Well, that was *ad hominem*. I
9 | didn't know we were going to get into a discussion of
10 | the reason we were in Iraq and the merits of it.

11 | PROFESSOR EASTMAN: Carter.

12 | MR. PHILLIPS: I can't speak to the
13 | policies of Georgetown with respect to who they allow
14 | on campus, although I'm not sure you can pass that
15 | one off quite as easily because presumably you would
16 | ask that organization, do you discriminate on the
17 | basis of some unfortunate category, and they would
18 | not be in a position to sign something that that says
19 | they don't discriminate.

20 | PROFESSOR FELDBLUM: Yeah, because they
21 | wouldn't be part of the placement office. What I was
22 | explaining to you is that we have student groups here

1 | who have positions. Christian Legal Society, let's
2 | say, will have a position on homosexuality that may
3 | be different from the American Constitution Society.
4 | But the fact is student groups often invite people
5 | on, and if part of what they want to do is, recruit,
6 | that's the academic freedom piece. But Georgetown's
7 | placement office is not going to help the Society of
8 | Jesus recruit; before they even get to homosexuality
9 | they're not going to help them recruit because
10 | they're not recruiting for legal jobs.

11 | AUDIENCE PARTICIPANT: I can't imagine
12 | that the Society of Jesus went down and said, you
13 | know, we're going to have a booth at all the great
14 | things about being a Jesuit. I can't imagine
15 | Georgetown Law Center could say no.

16 | MR. WALPIN: John, I think you're really
17 | punting on the question, with all due respect. Do
18 | you think that Georgetown should put a condition on
19 | speakers coming to the campus that (a) they have to
20 | not express the view that is limited to one religion,
21 | or (b) that it is for or against abortion, or any
22 | other issue you want to talk about because if you

1 | agree, that would be a violation of academic freedom
2 | and that the students should decide what they want to
3 | hear, which I assume you would take the position,
4 | then the same thing is here true that the military
5 | message -- and it is a military message -- is
6 | something that you shouldn't put a condition on to
7 | prevent students from hearing.

8 | PROFESSOR FELDBLUM: Well, I think I'm
9 | very clear on both. I think someone can come and
10 | talk about their position, and that's very different
11 | from having the school affirmatively assist them in
12 | conveying that message. But back to Carter, whose
13 | time we took hear.

14 | MR. PHILLIPS: No, the only thing I was
15 | going to say with respect to the sort of special
16 | status of the military, certainly the government's
17 | brief spends a fair amount of time on that. But my
18 | own take on that is that you can't use that to get
19 | out of figuring out what the First Amendment requires
20 | in the first instance. It will help you what you get
21 | to the point of deciding whether there's a compelling
22 | interest or a significant state interest, and how

1 | much tailoring, you need. So if I'm right, this sort
2 | of goes down and *O'Brien* or *Turner* path, then at that
3 | stage, I think, you know, even more on the thumb on
4 | the scale in favor of the government will be the fact
5 | that is a military problem, probably even more so
6 | than the fact that this is a spending condition.

7 | PROFESSOR EASTMAN: Okay. Question here,
8 | and then the next one will be up here.

9 | AUDIENCE PARTICIPANT: My question is for
10 | [off mic] bit of question of fact. They said it told
11 | me as a new private recently inducted that gays are
12 | not prohibited from the military but homosexual
13 | conduct is prohibited, which did not (inaudible) they
14 | can that military but they're actually restricted.
15 | One, that's something the controlling case is about
16 | *Don't ask, don't tell* turn on this question, and why
17 | it has been held to be the law of the land now.

18 | What I guess I'm wondering is, is that
19 | part of one of the reasons you think a Court might
20 | punt on this because they could sustain everything
21 | about *Don't ask, don't tell* and avoid the question of
22 | having to go to underlying discrimination?

1 PROFESSOR COLE: Let me add to that at the
2 Harvard law professor's statutory argument is too
3 clever by half, can't the military just come back and
4 say, we actually don't violate Harvard's and
5 Georgetown's anti-discrimination policy, everybody's
6 allowed in the military. Heterosexual or homosexual,
7 you don't get to engage in homosexual conduct?

8 PROFESSOR FELDBLUM: Yeah, that's so
9 interesting, they told you that in your briefing.
10 Actually, you can go -- you can go to Solomon
11 response.org, where we actually have the *Don't ask,*
12 *don't tell,* Don't Pursue statute. And what it says
13 is that if you engage in homosexual conduct, you're
14 out of the military, unless you can actually prove
15 that you're actually heterosexual and that the
16 homosexual conduct was an aberration. So there was
17 that out.

18 And two, if you say that you are
19 homosexual, they will presume from that statement
20 that you are engaged in homosexual conduct, which as
21 a lesbian, we like to have conduct as well is be gay,
22 because it's really boring if you just get to be a

1 | lesbian. So, what they say is, if you say I am a
2 | lesbian or gay, you will get kicked out of the
3 | military because they will resume conduct. They also
4 | say they know there are a lot of gay people serving
5 | all the time -- killing people; getting killed; you
6 | know, going places -- and so they say so long as you
7 | don't tell us that you're gay, you can stay in the
8 | military. You just can't say that you're gay.
9 | That's the whole point. *Don't ask, don't tell.* So
10 | the point is that the discrimination at the law
11 | school feel is that the only person who can go into
12 | the military if they're gay is, one, someone who will
13 | never say that they're gay, and two, never in fact
14 | been gay. Right? Because if that same sort of thing
15 | of, if we ever find that that you're having conduct
16 | that you're out. You know, that's just not the way
17 | to live a life. So it is discrimination, if you are
18 | gay. It's only that you can get out of it, if the
19 | military never finds out. And that's no way to live
20 | a life.

21 | MR. COFFIN: Yeah, I can probably -- I
22 | mean, the way I would answer the question is that

1 | there's something in the record that says that one of
2 | the students showed up, I think it was at Southern
3 | Cal, who apparently had long wanted to be in the JAG
4 | Corps, identified himself as gay, and was told you're
5 | not eligible to be considered, on that basis alone.
6 | So that seems to me, you can to construct the
7 | argument that you talked about but it's not
8 | particularly consistent with the record at this
9 | stage.

10 | PROFESSOR EASTMAN: The gentleman in the
11 | white striped shirt there.

12 | AUDIENCE PARTICIPANT: You know, being a
13 | student here now for three years, you know, when this
14 | case came up, and also being a military member, I
15 | don't see that this case makes that much difference
16 | practically, both in terms of the military getting
17 | good law students to join the JAG Corps, and also in
18 | terms of the university's expressive speech and
19 | expressive messaging. On practical terms, I don't
20 | see that it makes that much difference.

21 | My question to the panel is, assuming that
22 | they get to the First Amendment question, and

1 | assuming they talk about expressive speech and they
2 | compare this case to *Dale* and analogize this to *Dale*,
3 | and they say that law schools have shown this is a
4 | significant burden on their expressive speech, what
5 | does that mean for the next case? And where does
6 | this going to go? It seems to me that the law
7 | schools don't want to be associated really with the
8 | *Dale* message. That's not really in terms of where
9 | the doctrine has gone, not so much in terms of the
10 | outcome but where the doctrine is going and how much
11 | do we really want to make this expressive speech
12 | doctrine be a lot broader, and won't that open up the
13 | outcomes to things that are not favorable to things
14 | like people like FAIR would espouse?

15 | PROFESSOR COLE: That is a great question,
16 | and I think it is a dilemma for FAIR in relying on
17 | *Dale* the way that they do. I mean, I think there's a
18 | -- I haven't really thought this through, but I do
19 | think that there is a difference -- but that won't
20 | stop me from saying it. I do think that there's a
21 | difference between what the Court recognized in *Dale*
22 | was an affirmative right to be exempt from a neutral

1 non-discrimination law. That's a pretty remarkable
2 thing. And what the law schools are asking for here,
3 which is the right to apply and neutral non-
4 discrimination law, not to seek some special
5 exemption, but not to be required to create a special
6 exemption. And if they're -- you know, if that's a
7 distinction that makes a difference, then a ruling in
8 favor of the law schools in this case might be --
9 might not have kind of untoward consequences that
10 you're suggesting. If it has the consequence of
11 saying, anyone who says I have an expressive belief
12 in discriminating gets to discriminate, then I think
13 it's -- it does raise those concerns.

14 But to me, there is a difference between
15 those two and *Dale* may have been wrongly decided for
16 that reason.

17 PROFESSOR FELDBLUM: I think it's very
18 good to have David answer first, and then me. And by
19 the way, this is going to be -- we're videotaping
20 this and it will be on the website Solomon
21 response.org, so you can listen to yourself again.
22 But --

1 PROFESSOR COLE: For those who are real
2 gluttons for punishment.

3 PROFESSOR FELDBLUM: -- because I'm not as
4 uncomfortable as David is with the assumption of the
5 *Dale* decision on the burden of First Amendment, and
6 that might be because of the work that I do with
7 moral values and the fact that I sincerely understand
8 that there are people who believe that homosexuality
9 is immoral and sinful, and it should be resisted like
10 you resist alcoholism. You know, there are people
11 who believe that strongly. And if they want to come
12 together with a group and convey that point, I think
13 it is a First Amendment burden on them, if you have
14 to have someone there who is an openly gay, openly
15 happy, adjusted gay person.

16 My -- which was not -- I mean, that's not
17 the sort of classic gay rights response to *Dale* was
18 sort of the dissent in *Dale*, which was what do you
19 mean having an openly gay person who's not talking at
20 all about being gay, that doesn't undermine your
21 message, and that never really do with me. I didn't
22 really know whether the Boy Scouts had really

1 | conveyed that message clearly enough, but assuming
2 | they had -- I do think there is some bit of giving
3 | deference to what people say they care about. That
4 | didn't bother me.

5 | What bothered me was this. After you have
6 | a burden in a First Amendment right, you have to see
7 | whether the government law is nevertheless narrowly
8 | tailored to a compelling government interest.

9 | And in *Dale*, Justice Rehnquist, after
10 | saying we have already concluded that a state
11 | requirement that the Boy Scouts retaining *Dale* as an
12 | assistant scoutmaster would significantly burden the
13 | organizations right to oppose or just they were
14 | homosexual conduct -- i.e., there was a burden --
15 | then said the state interest embodied in New Jersey's
16 | public accommodations law do not justify such a
17 | severe intrusion on the Boy Scouts' right to freedom
18 | of expressive association. That being the case, we
19 | hold the First Amendment prohibits it. That being
20 | the case? That's the whole analysis of the state's
21 | compelling interest? I mean, that's outrageous.

22 | SPEAKER: That's Justice Rehnquist.

1 PROFESSOR FELDBLUM: You know in Grove
2 City where they raised the First Amendment claim,
3 Grove City College didn't actually raise a First
4 Amendment claim to discriminate against women. They
5 were raising a First Amendment claim against being
6 forced to sign this assurance. They said we comply
7 with Title IX; we just don't want to sign this
8 assurance. The Court just dismissively said, you get
9 federal funding, we're just not going to deal with
10 your First Amendment right.

11 I'm thinking post-*Dale* if somebody really
12 had to -- going back to your hypothetical, if someone
13 had a strong believe about women and women shouldn't
14 be in athletics because of nurturing and this, that
15 should be shown that that burdens their First
16 Amendment right, and now let's talk about whether
17 there's a compelling government interest nevertheless
18 giving women equal rights in athletics. I would
19 certainly hope there would be a decent analysis, and
20 you would find that there is a compelling interest
21 and that this law is the only thing that will get it.
22 It's nearly tailored.

1 But I think the Gay Rights Movement is
2 wrong to not acknowledge that for religious people,
3 for people with other moral values, homosexuality
4 feels -- it's sinful, and a law that forces them to
5 comply with that burdens their First Amendment
6 religious rights. And then I think we need to
7 explain how, nevertheless, there's a compelling
8 government interest for those laws.

9 PROFESSOR EASTMAN: We are at the witching
10 hour, and more importantly, the wine drinking hour.
11 I want to thank our panelists, so please join me.

12 (Panel concluded.)