Justice Talking
Radio Transcript

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

The U.S. Supreme Court will soon decide the constitutionality of the Solomon Amendment, a federal law that permits the government to deny federal funding to colleges or universities if they prohibit military recruitment on campus. Law schools across the country have challenged the law, arguing that they have a First Amendment right to deny recruitment because the military's "don't ask, don't tell" policy discriminates against gay, lesbian and bisexual soldiers. On this edition of Justice Talking, we look at Congress' power of the purse and ask how far government can go to impose its views when it makes spending decisions.

MARGOT ADLER: From NPR, this is Justice Talking.

UNIDENTIFIED MALE: We feel that the military, as long as it has its "don't ask, don't tell" policy, should not come to law schools to recruit in violation of our non-discrimination policies.

UNIDENTIFIED MALE: By banning the military recruiters from campus, the schools are limiting the students' ability to get first-hand knowledge and first-hand experience about employers.

UNIDENTIFIED FEMALE: I think it does a real disservice to the military and to Harvard to not allow military recruiters on campus. If they want to have something that goes against the federal government's policy, then they don't need to take the federal government funding.

UNIDENTIFIED MALE: Even though our law school has this policy that we don't want military recruiters on our campus, the strings attached to that by the Solomon Amendment would potentially affect areas of Boston College's main campus.

MARGOT ADLER: I'm Margot Adler. Today we'll look at whether the federal government has the right to pull federal funding from universities who won't let military recruiters recruit on campus. Stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Public policy is often decided by law. But sometimes the rules and regulations we live by are made in other ways. The federal government often influences policies of states and organizations through funding, by attaching conditions and requirements to the money it doles out. This is common in many areas – in education, in health care, even transportation and highway funding. Take highways, for example. The federal government can't tell states what their minimum drinking age should be. But it can tell states if they want federal money then they'll have to play by the federal government's rules.

Later in the show, a couple of law professors weigh in on what they think of the Solomon Amendment and a lawsuit challenging it. This is a law that gives the federal government the right to deny federal dollars to universities that don't let military recruiters on campus. And we'll also hear the story of the movie "North Country," and the women iron miners who took a stand against sexual harassment.

But first, to help us get a better understanding of how the odd give-and-take of funding and policy works between the feds and the states, I called David Strauss. He is the Harry N. Wyatt Professor of Law at the University of Chicago. Welcome, David.

DAVID STRAUSS: Thank you, Margot.

MARGOT ADLER: The power to allocate federal funds is known as the power of the purse. Sometimes Congress uses this power to force states to take actions and to create policy that is mandated through funding requirements. Tell us how this works.

DAVID STRAUSS: The way it works is basically what you just suggested, Margot—that the federal government spends an awful lot of money on all kinds of things, and very frequently it says you're welcome to take our money, but if you do, you have to comply with the conditions we put on it.

MARGOT ADLER: Give us a couple more examples where we see this happening now.

DAVID STRAUSS: Well, I guess the most famous example in recent times is the 55 miles per hour speed limit, which was imposed by the federal government. It's since been relaxed, but it was originally imposed by the federal government as a condition on receiving federal highway funds. States could set any speed limit they wanted, but if they wanted federal highway funds,

the speed limit had to be 55. Every state wants federal highway funds; they really can't survive without them. So it was as if the government had simply said you have to have a 55 miles per hour speed limit. Also there's the drinking age. The federal government basically compelled states to raise the drinking age to 21 by the same mechanism, not by ordering them to do it directly but by threatening to withhold funds.

MARGOT ADLER: And I remember that well because the drinking age was 18 when I was growing up. Many of us were very upset when that happened.

DAVID STRAUSS: The good old days.

MARGOT ADLER: Exactly. Now, one of the terms that I've heard that is known to lawyers is the "unconstitutional conditions doctrine." That is, Congress attaches conditions on its funding that would be unconstitutional if they directly ordered the states or individuals to act in that way. Now, how has the government done this in various ways, in health care for example?

DAVID STRAUSS: Well the unconstitutional conditions doctrine, you're right, is an important principle of constitutional law. But it's a very tricky principle. The idea is, as you said, that there must be some limit on Congress's ability to get people to give up their constitutional rights by threatening to withhold money from them. So, for example, if Congress were to say you don't get your Social Security check if you criticize President Bush—it couldn't do that. But it's very tricky, because everyone understands Congress has some power to decide, well, we want to spend money on certain kinds of speech but not others. If you want to set up a program to discourage people from smoking, you're entitled to say: Well, here's a grant. You can use it to go out and dissuade people from smoking. And if we find you're using our money to encourage people to smoke, we're going to cut off your money.

MARGOT ADLER: A little later in the program we'll have two advocates discussing a new Supreme Court case involving the Solomon Amendment, a federal law which lets the government deny federal funds to schools that refuse to allow the military to recruit on campus. Do the cases that you've been telling us about apply to the Solomon Amendment?

DAVID STRAUSS: Yes, very much so. The Solomon Amendment presents this issue—I was going to say it presents this issue very directly. There is one wrinkle in the Solomon Amendment case. As I understand the case, it's not clear that the Solomon Amendment interferes with universities' speech. There is an argument that it does. But there's an argument that in fact when a university allows or doesn't allow the military to recruit, the university is not speaking. And if the court accepts that argument, then it will actually be a relatively easy case. I'm sure the people attacking the Solomon Amendment are saying—and I think there's a lot to what they're saying—that the Solomon Amendment really requires the university in various ways to indicate it's approval or at least to refrain from indicating its disapproval of the military recruiters. And then it really does present this issue of whether Congress can influence speech by using the power of the purse.

MARGOT ADLER: David, thanks so much for talking with me.

DAVID STRAUSS: My pleasure, Margot.

MARGOT ADLER: David Strauss is a professor of law at the University of Chicago.

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MARGOT ADLER: The Solomon Amendment was first passed in 1994 to force colleges and universities to give equal access to military recruiters on campus. A number of law schools refused to allow recruiters on campus because of the military's "don't ask, don't tell" policy, which they felt was in direct conflict with their anti-discrimination policies. As a result, the federal government threatened universities with the withdrawal of millions of dollars in federal funding. Independent producer Rachel Gotbaum brings us this report.

RACHEL GOTBAUM: New York Law School is located in the heart of Manhattan's financial district. For 30 years the school has had an anti-discrimination policy that includes protection for gays and lesbians. But in the wake of 9-11, the faculty at New York Law School had to make a choice. Rick Matasar is the school's dean.

RICK MATASAR: We were, at that time that fall, believe it or not, asked by the military to interview on campus. We told them our policy was against discrimination by the military or by any other organization. They at that point threatened us to place us on the list of non-compliant schools. And we felt at the time it was just one of those things that would have been extremely difficult for our institution to bear on the heels of 9-11, being labeled as an unpatriotic law school.

RACHEL GOTBAUM: The law school decided to suspend its anti-discrimination policy, and allow military recruiters on campus, rather than face penalties by the Department of Defense. Under the Solomon Amendment, which was created by Congress in 1996, schools that do not give equal access to military recruiters can have their federal funding pulled. Since 1990, law schools have been required to include sexual orientation in their non-discrimination policies, in order to become members of their trade association. The military's "don't ask, don't tell" policy, which openly bars gay people from serving in the armed forces, is in direct conflict with the school's non-discrimination policies, says Rick Matasar.

RICK MATASAR: The problem is that they're trying to enforce that policy on us, forcing us essentially to comply with a set of wishes that are theirs and not our own.

RACHEL GOTBAUM: In 2003, New York Law School joined a coalition of other law schools, law professors and law students who sued the federal government because they claim that the Solomon Amendment violates their right to free speech. New York Law School doesn't stand to lose millions of dollars by violating the Solomon Amendment, because the school is independent and not attached to a university. But law schools that are part of colleges and universities have a lot more money at stake.

On a recent Sunday evening, law students gather to study in Harvard Law School's cafeteria. Harvard Law banned military recruiters from campus until last summer when the Department of

Defense threatened to pull more than $300 million dollars of the university's federal funding. This fall, military recruiters came back to campus. This group of first year law students is discussing rights of access for a property class. It happens to be the same case the plaintiffs are using in their argument against the Solomon Amendment. In this case, the Supreme Court ruled that the Boy Scouts of America did not have to admit a gay scoutmaster because the group had a constitutional right to freedom of association. The law schools are arguing that they have that same right, and should not be forced to allow military recruiters onto their campuses.

ADAM SORKIN: I think it's dishonest to say that you have a non-discrimination policy if discrimination happens on campus.

RACHEL GOTBAUM: That's Adam Sorkin. He's a second-year law student at Harvard, and also a member of Lambda, a campus group that supports gay and lesbian rights and supports the plaintiffs in the case.

ADAM SORKIN: We feel that the military, as long as it has its "don't ask, don't tell" policy, should not come to law schools to recruit in violation of our non-discrimination policies. If you can violate it for one group of students, who is to say that in the future you can't violate it for any group of students?

RACHEL GOTBAUM: Students at Harvard are not all in agreement about whether the Solomon Amendment is a good idea. Susan Bernabucci is a third-year law student, and one of the people who signed on to an amicus brief that supports the government's position.

SUSAN BERNABUCCI: I think it does a real disservice to the military and to Harvard to not allow military recruiters on campus. As far as the school's anti-discrimination policy, I think it's completely fine that a school like Harvard have a policy like that. But if they want to have something that goes against the federal government's policy, then they don't need to take the federal government funding.

RACHEL GOTBAUM: Daniel Polsby agrees. He is dean of George Mason University's School of Law. He says the case against the Solomon Amendment has nothing to do with free speech.

DANIEL POLSBY: The argument that this violates the first amendment rights of the respondents is bogus. They retain all the right of free speech and association that they ever had.

RACHEL GOTBAUM: Polsby says Rumsfeld vs. FAIR is actually a case about Congress's constitutional power to raise and support armies.

DANIEL POLSBY: This is a very broad power that Congress has. And in this case it's being deployed to do what? To force law schools to entertain military recruiters? Not at all. It's giving them an incentive to do it. It's taking money away if they don't do it. It isn't forcing them to do anything. It isn't keeping them from exercising any First Amendment right that they have. They can speak against the Solomon Amendment if they want. They can speak against

the military if they want. They can speak against the war in Iraq if they want, without losing a single thing.

RACHEL GOTBAUM: The law schools fighting the Solomon Amendment say that if the court rules against them it won't just mean that they'll be forced to open their doors to military recruiters, but the decision could give the government more latitude to use its power to quell dissent. For Justice Talking, I'm Rachel Gotbaum.

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MARGOT ADLER: Coming up, the Congressman who co-wrote the Solomon Amendment tells us why he thinks the law is needed, particularly in a time of war. And we'll hear from a law student at Boston College who says the government is preventing free speech on college campuses. Stay with us.

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

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

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

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

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

KENT GREENFIELD: Well, of course there are some things that the military has to make judgments about. But of course the "don't ask, don't tell" policy is something that is subject to a

lot of debate these days. What the law schools are saying is that you can run your own military, but just don't tell us how to run our law schools. Within our own community, we hold that discrimination against gay men and lesbians is something that we oppose and want to fight against. You should not be using your federal benefits as a club to force us to discriminate.

MARGOT ADLER: Joe?

JOE ZENGERLE: I guess there is an irony going on here, as Kent has indicated. The irony that I see—there are many of them, but one of them is that a fundamental teaching of law schools rests on abidance with the rule of law. Everyone obeys the law. When Kent says "the law schools" he is talking about law schools on his side of the case. We have representatives of 30-plus law schools on our side of the case in the amicus curiae brief we filed. We would say that what the law schools are doing on the other side of the case, Kent's side, the FAIR side of the case, is punishing the military for complying with a federal statutory obligation. The military has no choice in this. And the complainants in this, the FAIR group, repeatedly say it's the military's policy. It's really not the military's policy; it's a congressional policy. Congress has revisited the Solomon Amendment several times to amend it. Indeed it has done so sometimes without the initiative or the acquiescence of the Defense Department.

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

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

KENT GREENFIELD: We make two primary arguments. Our first is a compelled speech argument, and the second is an expressive association argument. And they're both straightforward. The compelled speech argument goes like this: One of the premiere doctrines of the First Amendment is that the government cannot force people to speak. And the one thing that's clear in this case—and the government admits it in their briefs to the Supreme Court—is that the law schools as a part of the Solomon Amendment are forced to host and carry government messages, government messages that the law schools disagree with. We're forced to post their posters, send emails on their behalf, and facilitate meetings between the recruiters and students. We're forced to accept them and assist them on our campuses. And the compelled speech doctrine in the First Amendment area is very strong, and it says that the government can't force people to speak. So, as a condition of the Solomon Amendment, we are in fact forced to speak. The second branch of the First Amendment doctrine that we're relying on is expressive

association. As a part of First Amendment doctrine, the Court has said for decades that groups have a right to organize themselves around core principles. And we say that law schools define themselves in part through their long-standing commitment to non-discrimination. The Solomon Amendment forces us to assist discriminatory employers, contrary to our own core beliefs.

MARGOT ADLER: I would imagine that Joe has many responses to this, but I first want to ask him a question. Law schools do have a history of refusing to allow law firms that discriminate to recruit on campus, as Kent argued before. And many have argued that before these policies were put in place many law firms simply didn't hire blacks or women. And when the recruiters were barred from campus the law firms quickly changed their tune and began hiring women and minorities. So clearly the law schools are trying to do what they're doing to effect change for gays. What is your argument against that?

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

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

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

KENT GREENFIELD: I think that's an area where Joe and I can agree. I do think the underlying problem is "don't ask, don't tell." But while "don't ask, don't tell" is on the books, the law schools have a First Amendment right in our view to not be a party to the discrimination

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

MARGOT ADLER: But the second point that he made I'd really like to hear you weigh in on. He is talking about how many federal funding programs condition the receipt of federal dollars on the adoption of non-discrimination policies. He mentions Title IX and non-discrimination on the basis of race and gender. Aren't you trying to have it both ways? It's okay for the government to use its monies to enforce policies you like, but not policies you don't like?

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

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

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

MARGOT ADLER: Like foot soldiers?

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

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

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

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

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

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

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

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

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

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

DAN SULLIVAN: Yes, I am. Hi Margot.

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

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

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

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

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

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

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

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

JOE ZENGERLE: Absolutely they are tied.

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

DAN SULLIVAN: Sure.

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

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

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

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

to give up your First Amendment rights or Fourth Amendment rights or what have you. And for 50 years, the Supreme Court said that Congress cannot condition benefits on the signing of loyalty oaths, the refusal to protest, or etcetera. And that's what this case is, in our view.

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

Similarly today, don't blame the warriors for the personnel policy. That shouldn't be put on their backs. That's something that should be properly directed to the judicial capacity to assess the constitutionality of the "don't ask, don't tell" requirement, or put in the political process directly. Put it to Congress: Do you want to adopt this policy? In the last 12 years, have things changed sufficiently in the culture to change that policy? But don't do it indirectly like this and try to work it into some kind of a constitutional right on which money is being conditioned. Because I don't think that's this case at all.

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

KENT GREENFIELD: My pleasure.

JOE ZENGERLE: Thank you.

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MARGOT ADLER: Tobias Barrington Wolff is a law professor at the University of California at Davis. He's worried about how the Supreme Court might rule in the Solomon Amendment case.

TOBIAS BARRINGTON WOLFF: In the Supreme Court case pitting law schools against the Department of Defense, what happens on campus during next year's recruiting season is much less important than what may happen to freedom of speech around the country. The law schools have argued that the Solomon Amendment violates the First Amendment. As it happens, I disagree. Although I strongly oppose the "don't ask, don't tell" policy, which is unconstitutional and a national embarrassment, I do not think that requiring equal access at law school job fairs abridges anyone's freedom of speech.

But the White House has gone beyond simple disagreement in responding to the law schools' arguments. Even if the Solomon Amendment abridges free speech, the White House says, courts should stay out of it. The president is asking the Court to give him power to restrict speech in our schools, on the streets, even in the media, whenever he plans to have a military reason for doing so. At a time when the White House has labeled all of America a front line in the war on terror, this request takes a dangerous step toward tyranny.

Courts are usually quick to step in when the government passes laws that abridge the freedom of speech, and properly so. The protection of dissent, especially unpopular or controversial dissent, is one of our deepest constitutional commitments. If courts did not protect unpopular speech, society would be deprived of vital perspectives on issues of public importance. The democratic character of our government would suffer.

One of the few exceptions of this commitment to free speech principles has come when the government restricts speech inside the military. The Supreme Court has given the military much more leeway to regulate the speech of soldiers than would ever be permissible in civilian life. The reasons offered for this deference to the armed forces in free speech cases, the special character of the military and its special role in society, are open to debate. I, for one, would argue that it is important for soldiers to have free speech rights as well. Either way, the Court has never suggested that government can restrict speech in civilian life, simply by asserting some military priority. In FAIR vs. Rumsfeld, however, that is precisely what the Bush administration is contending. The White House has used this case to argue that the Department of Defense should have broad powers to suppress free speech, even in civilian life here at home, whenever it claims that there is a military reason for doing so. If the Court accepts that argument, the effects will extend far beyond this largely symbolic disagreement over the outdated and unjust "don't ask, don't tell" policy.

Whatever it decides about recruiting on law school campuses, the Supreme Court must not allow this case to undermine our most basic liberties. In a free society, the military must always remain under the control of the people. A strong First Amendment remains one of our greatest safeguards.

MARGOT ADLER: Tobias Barrington Wolfe writes about free speech and the First Amendment, and is a visiting professor at Northwestern. He usually teaches at the University of California at Davis. The Supreme Court most likely won't make a decision for some time. We'll be sure to keep you updated.

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MARGOT ADLER: While it's unclear what history will make of this case, there have been some landmark discrimination battles that have been fought, and over time afforded rights to millions of people. The country's first sexual harassment class action lawsuit was in the courts for years. A movie portraying that struggle has been released—"North Country," starring Charlize Theron, Frances McDormand, and Cissy Spacek. It tells the story of the first women hired to work in a northern Minnesota iron mine. The film is based on a book called "Class Action: The Story of Lois Jensen and the Landmark Case that Changed Sexual Harassment

Law." One of the authors of that book, Clara Bingham, is here with me to talk about this truly dramatic story. Welcome, Clara.

CLARA BINGHAM: Thanks for having me, Margot.

MARGOT ADLER: Can you briefly tell us the story of Lois Jensen, the woman who filed and won this class action suit?

CLARA BINGHAM: Lois Jensen was a single mother with one son, and she lived in the Iron Range, which is up in northern Minnesota, where the largest seam of iron ore is in the world. And she needed a job that paid more than minimum wage. And in 1975 she became one of the first women ever to work in these coveted jobs. She was a product of affirmative action; the mines were being forced to hire women for the first time in four generations. So her hiring was met with a lot of anger by both the management and the other rank and file men who worked at the mine. She started with three other women, and they all were single mothers at the time. The management hoped that this would be less threatening to the men. Not only did the men not want women there because they considered it man's work, they also didn't want women taking their jobs away. During the later 70s and early 80s there was a lot of trouble in the steel industry and a lot of layoffs. So this was also seen not just as a threat to the culture of the community up there, which it was, but also a threat to the jobs.

MARGOT ADLER: In fact, even the women were laid off and hired back and laid off and hired back, during the whole period of time.

CLARA BINGHAM: Yes, exactly.

MARGOT ADLER: Why don't you paint us a picture of what they actually faced at work, day in, day out.

CLARA BINGHAM: Day in, day out, they faced an extreme amount of graffiti on the wall that was written for them, about them; pornographic pinups were everywhere; they were grabbed. Lois on week one was grabbed in the crotch by a man who had a handful of grease, in front of a group of his friends. They were assaulted regularly, humiliated regularly. Feces were wiped all over the walls of their locker room. A man ejaculated into the sweater of Judy Jarvela in her locker three times. A woman was in a Port-O-Potty and pushed over. It was really—I mean, sexual harassment I think is really not even close. It isn't the right word for describing what happened to these women. It was really a form of mental and physical assault and intimidation.

MARGOT ADLER: This whole process, from the time that she took the job in 1975, through 11 years of legal action, took an incredible mental and physical toll. So when did Lois Jensen and her fellow plaintiffs win the case?

CLARA BINGHAM: The best victory that they had—it wasn't a clean easy win—was in 1991 when their case was certified as a class action. They therefore became the first class action ever for sexual harassment. And it is why this case is an important landmark case. They were the

first women to successfully be allowed to sue as a group. Before that it was just one woman against her corporation. And that class certification became the precedent behind other much bigger cases, like Mitsubishi and Smith Barney.

MARGOT ADLER: And as I understand from reading the book, these women's personal lives were just strewn all over, not only over the courtroom, but even in the opinions, stories of personal things, their rapes, of mental conditions, everything.

CLARA BINGHAM: It's horrible. I would argue that they were abused almost more by the legal system than they were by the men who worked at the mines. The defense attorneys employed the "nuts and sluts technique," where they tried to prove that either the women were crazy or they asked for it. And they subpoenaed every single medical record and dental record from every single woman in the class, beginning at birth, up until the case. And so if anyone had a skeleton in their closet, it was brought out. They were subjected to endless depositions and terrible cross-questionings in court. A bunch of them did drop out because it was just too much to stand. And the ones who stayed in suffered terribly.

MARGOT ADLER: What are these women doing now? Are their lives any different?

CLARA BINGHAM: Oh, much. There no longer is blatant sexual harassment first of all at the mines because of them. And some of them still work there. In fact, one woman who still works at the mine, Joan Hunholz, came to the premier of the movie "North Country." She's been working there for 30 years.

MARGOT ADLER: Clara, thank you so much for joining me today.

CLARA BINGHAM: Thanks for having me.

MARGOT ADLER: Clara Bingham is co-author of the book "Class Action: The story of Lois Jensen and the Landmark Case That Changed Sexual Harassment Law." The movie "North Country" is based on this book. Thanks for joining us. Tune in next week. I'm Margot Adler.

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