NOTE

A VICTORY IN DEFEAT: THE IMPLICATIONS OF *RUMSFELD V. FAIR* ON "DON'T ASK, DON'T TELL"

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I. Introduction

On March 6, 2006, the United States Supreme Court decided *Rumsfeld v. Forum for Academic and Institutional Rights*.[1] In this decision, drafted by Chief Justice John Roberts, the Court addressed the constitutionality of Congress (1) requiring universities to provide military recruiters with the same access to law school career services offices that the school would grant to other prospective employers and (2) withholding federal funding for the entire university if the law school failed to grant this access.[2] The Supreme Court held that these requirements did not violate the First Amendment rights of freedom of speech and freedom of association.[3] Although this case, which pitted thirty-six prestigious law schools against the Secretary of Defense, failed in its constitutional challenge, it succeeded in bringing attention to a larger public policy concern: the United States government's continued implementation of the controversial policy of "Don't Ask, Don't Tell."

[1] Rumsfeld v. Forum for Academic and Inst. Rights, Inc., No. 04-1152, slip op. at 1 (U.S. Mar. 6, 2006) [hereinafter *FAIR*].
[2] *Id.* at 6.
[3] *Id.* at 20.

II. The Solomon Amendment

In 1993, Congress enacted "Don't Ask, Don't Tell" (DADT), a policy that banned openly gay men, lesbians, and bisexuals from serving in the military.[4] This provision codified a fifty-year-old practice that allowed any statement by a soldier about his or her sexual orientation to *anyone* at *any* time to be reasonable grounds for dismissal from service.[5] Due to the implementation of the DADT policy, law schools began to marginalize or even disallow military recruiters on campus.[6] The Association of American Law Schools (AALS) requires its member schools to adopt a nondiscrimination policy that includes sexual orientation. This policy limits the availability of a school's facilities and resources to those employers that comply with the AALS statement on equal opportunity employment.[7] Due to DADT, military recruiters were unable to meet the requirements of AALS's nondiscrimination policy, and they were denied access or were granted limited recruiting access by AALS schools.[8]

In response to the restricted access for military recruiters, Congress adopted the Solomon Amendment in 1996 as a part of the National Defense Authorization Act.[9]

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[4] 10 U.S.C.A. § 654 (1993).
[5] *E.g.* NALP, Solomon Amendment Information, www.nalp.org/content/index.php?pid=81&printer-friendly=true (last visited June 4, 2006) [hereinafter *NALP*].
[6] *Id.*
[7] *E.g.* Memorandum from Carl Monk, Association of American Law Schools, Executive Committee Policy Regarding "Solomon Amendment" (Jan. 24, 2000), www.aals.org/deansmemos/00-2.html (last visited June 6, 2006).
[8] *See* Remarks at the Georgetown Federalist Society Symposium: Solomon Amendment: Can Congress Condition Benefits to Colleges and Universities on Their Willingness to Allow Military Recruiters on Campus 9 (Oct. 20, 2005) (transcript available at Georgetown Law Center) [hereinafter *Georgetown Symposium*].
[9] 10 U.S.C.A. § 983 (1999).

This amendment prohibited the allocation of funds from the Department of Defense to colleges or universities that barred ROTC and military recruiters from access to campus or career services.[10] In 1999, the Solomon Amendment was modified in the Omnibus Appropriations Act to withhold funds from the Departments of Defense, Labor, Health and Human Services, and Education.[11] When the Solomon Amendment was enacted, if a department of a university (i.e. the law school) denied access to a military recruiter, federal funding would be terminated for that department. The 1999 modification expanded these sanctions by permitting all federal funding to an entire university to be withdrawn if military recruiters were denied access to a single department within the institution.[12] Congress approved a final expansion of the Solomon Amendment in 2004 to clarify and strengthen the policy by stating that military recruiters *must* have the same access as other employers and by increasing the potential penalty for noncompliance by adding to the list of federal agencies that could deny funding to the offending schools.[13]

III. *Rumsfeld v. FAIR*

After the 2004 revision of the Solomon Amendment, thirty-six law schools, along with other affiliated groups and individual plaintiffs, united to challenge the constitutionality of the Solomon Amendment through a new organization entitled the Forum for Academic and Institutional Rights (FAIR).[14] FAIR asserted that the So-

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[10] *Id.*
[11] *See NALP*, *supra* note 5.
[12] 10 U.S.C.A. § 983 (2006).
[13] *Id.*
[14] *Georgetown Symposium*, *supra* note 8 at 10-11; *see* Brief for the ACLU et al. as Amici Curiae Supporting Respondents at 3, Rumsfeld v. FAIR, No. 04-1152, slip op. (U.S. Mar. 6, 2006) [hereinafter *Brief of ACLU*].

lomon Amendment violated the First Amendment rights of free expressive association and free speech through compelled speech and viewpoint discrimination.[15]

The U.S. District Court in New Jersey held that there was no violation of free speech, because the law schools had adequate opportunity to express their own opposition to the military policy of DADT while still protecting the government's interest in allowing military recruiters on campus.[16] Additionally, the court determined that requiring military recruiters on campus comported with the standard set in *United States v. O'Brien*.[17] *O'Brien* determined that a compelling government interest in maintaining the availability of draft cards outweighs one's right to noncommunicative conduct.[18] With regard to the Solomon Amendment, this precedent allows the government "[to] regulate conduct even if such regulation entails an incidental limitation on speech."[19] Furthermore, the district court held that the expressive conduct of allowing military recruiters on campus was merely secondary to the primary economic purpose of supporting the armed forces.[20] According to the district court, the compelling government interest in raising an army balanced against the law schools' ability to reject the recruiters, albeit at the cost of losing their funding, failed to infringe on the constitutional rights of free speech and free association.[21]

The Court of Appeals for the Third Circuit disagreed, determining that it was unconstitutional to force a law school to choose between First Amendment rights and

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[15] *Brief of ACLU*, *supra* note 14 at 5; FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 274-75 (D.N.J. 2003).
[16] *See FAIR*, No. 04-1152, slip op. at 3.
[17] *FAIR*, 291 F. Supp. 2d 296 at 314.
[18] *See* U.S. v. O'Brien, 391 U.S. 367, 381-382 (1968) (holding that burning a draft card is noncommunicative conduct).
[19] *FAIR*, 291 F. Supp. 2d at 312 (citing *O'Brien*, 391 U.S. at 375).
[20] *Id.* at 308.
[21] *Id.* at 312.

funding under the unconstitutional conditions doctrine.[22] The Court also held that the *O'Brien* analysis did not apply because the Solomon Amendment explicitly restricted expressive conduct, making the amendment unconstitutional on alternate grounds.[23] The Court reversed and remanded the decision to the lower court to issue a preliminary injunction against application of the Solomon Amendment.[24] The Supreme Court granted Certiorari.[25]

IV. Statutory v. Constitutional Argument

The first struggle that came to fruition for FAIR and the parties who opposed the Solomon Amendment concerned their methodology in approaching the Court. Harvard Law professors, along with many of their colleagues, filed amicus briefs arguing for a statutory, rather than a constitutional, approach to eliminating the Solomon Amendment. This challenged the language in the statute which indicated that recruiters be granted access "at least equal in quality and scope to the access . . . that is provided to any other employer."[26] Under this language, the professors argued that AALS members and other schools that prohibit military recruiters are doing so in compliance with the Solomon Amendment, because they are treating the military the same way that they would treat other employers who failed to adhere to the non-discrimination policy.[27] Thus, the schools would not be specifically targeting the military, but rather, all parties who discriminate. This ar-

[22] FAIR v. Rumsfeld, 390 F.3d 219, 246 (3rd Cir. 2004).
[23] *Id.* at 243-44.
[24] *Id.* at 246.
[25] Rumsfeld v. FAIR, 544 U.S. 1017 (2005).
[26] 10 U.S.C.A. § 983(B)(1) (2006).
[27] Daniel J. Hemel, *Future of Campus Military Recruiting Hangs in the Balance at High Court*, THE HARVARD CRIMSON, Dec. 4, 2005, www.thecrimson.com/article.aspx?ref=510278 (last visited June 8, 2006).

gument presents the premise that schools are complying with the Solomon Amendment as written, but Congress is still withholding funds until special, rather than equal, treatment is given to military recruiters.[28]

The law schools attempted to sidestep the constitutional issue by presenting the argument that they could implement their nondiscrimination policies while giving separate, yet equal access to military recruiters. Had FAIR only taken a statutory approach and won, it is conceivable that Congress might have immediately amended the statute to provide for special treatment of military recruiters, thereby re-launching the issue into a constitutional debate.[29]

Although not included in FAIR's brief, the Court did address this issue in its opinion. The Court determined that the intent of Congress in enacting the Solomon Amendment was not in the *content* of the Amendment, but rather, the *result*.[30] Therefore, because access is the intended result, when other employers have greater access than the military, the schools are in violation of the amendment. The Supreme Court interpreted the statute to imply that it is not sufficient to treat the military the same way as other employers who violate the nondiscrimination policy.[31] The military must be granted the "same access as those who comply with the policy" in order to act in accordance with the intention of Congress.[32]

V. Unconstitutional Conditions Doctrine

The next element of this debate addressed by the Supreme Court was whether Congress placed an unconsti-

[28] *Georgetown Symposium*, *supra* note 8 at 45.
[29] Hemel, *supra* note 27.
[30] Rumsfeld v. FAIR, No. 04-1152, slip op. at 7 (U.S. Mar. 6, 2006).
[31] *Id.* at 8.
[32] *Id.*

tutional condition on its allocation of funding.[33] In *Grove City College v. Bell*, the Court indicated that funding could be conditioned because universities are not obligated to accept that funding.[34] This is seen most often, as it was in *Grove City*, in Title IX gender discrimination cases. Despite Congress' ability to condition funding, *Speiser v. Randall* determined that it is unconstitutional for Congress to condition funding unless Congress would be able to directly mandate that action.[35] In this case, if Congress had the power to directly order that recruiters be permitted on university campuses, then they could condition the funding. This gives the Spending Clause of the Constitution, which determines how Congress may allocate funds, equal breadth with those powers that can be directly required by Congress. *United States v. American Library Associations* determined that funding cannot be limited if the burden placed on the accepting group infringes on constitutional rights.[36] FAIR argued that the Solomon Amendment placed an unjust burden on speech. The Court disagreed.

The Court determined that it would be constitutional for Congress to directly mandate that military recruiters be allowed on campus. This mandate is permitted because the government interest in supporting the military should be given deference.[37] FAIR's First Amendment challenges are outweighed by the compelling government interest in sustaining national defense. The Court has used and indicates it will continue to use the argument of a compelling government interest in national defense in challenges against

[33] *See id.* at 9; *see generally* Grove City College v. Bell, 465 U.S. 555 (1984).
[34] *See, e.g.*, *Grove City College*, 465 U.S. 555 at 575-76.
[35] *See* Speiser v. Randall, 357 U.S. 513, 526 (1958); *see also Georgetown Symposium*, *supra* note 8 at 25-26.
[36] *See, e.g.*, United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 210 (2003).
[37] Rumsfeld v. FAIR, No. 04-1152, slip op. at 8 (U.S. Mar. 6, 2006).

the military under Title IX or Title VI.[38] By asserting this position, the Court shows its commitment to uphold and give deference to military policies despite the possible discriminatory effect on gender, race, or sexuality.[39] Therefore, it is inconsequential whether the condition is attached to funding, because the Court validates the condition as a compelling government interest.[40] If a condition can be directly mandated, then it can be attached to funding through the Spending Clause.[41]

VI. Speech

The next constitutional question addressed by the Court was whether the Solomon Amendment violates the First Amendment right to freedom of speech. The district court determined that "the inclusion of an unwanted periodic visitor did not significantly affect the law schools' ability to express their particular message or viewpoint."[42] The Court of Appeals disagreed, stating that speech was involved in promoting the recruiters and that this speech forced colleges to host the military's message, as well as compelled the schools to sponsor the recruiters through their resources.[43] The Supreme Court rejected this position. According to the Court's decision in *Johanns v. Livestock Marketing Assn.*, citizens may challenge compelled private speech but have no First Amendment right not to fund government speech.[44] Therefore, there is "no First Amendment right not to fund government speech as the representatives of the United States military."[45] Any

[38] *Id.*
[39] *See Georgetown Symposium*, *supra* note 8 at 27.
[40] *See id.* at 26.
[41] *FAIR*, No. 04-1152, slip op. at 3.
[42] *Id.*
[43] *Id.* at 10.
[44] Johanns. v. Livestock Mktg. Ass'n., 544 U.S. 550, 562 (2005).
[45] *Id.*

speech expounded by the recruiters is considered government speech. In addition, the Supreme Court held that the assistance provided to the military recruiters was minimal and not of a monetary nature; therefore, the subsidy issue was not pertinent to the outcome of this case.[46]

The next speech issue under consideration by the Court was compelled government speech. The Court held that cases such as *West Virginia Board of Education v. Barnette* and *Wooley v. Maynard* do not govern *Rumsfeld* because, despite the fact that there are elements of speech in disseminating notice of the recruiters' presence on campus, the speech used to comply with the Solomon Amendment does not include a required government pledge or specific content that the school must endorse.[47] Requiring schools to include recruiters on event schedules or employment fair flyers does not approach the type of speech protected by *Wooley* or *Barnette*.

Like compelled speech, the type of speech required by the Solomon Amendment fails to meet the standard set forth in cases dealing with hosting or accommodating another group's message. To meet the burden of these cases, the Solomon Amendment would have to inhibit the school's own message and force the college or university to accommodate the military's message instead of their own, or the conduct would have to be of such an expressive nature that the message of the school would be compromised by the inclusion of the recruiters.[48] The Court held

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[46] *FAIR*, No. 04-1152, slip op. at 11 n.4.

[47] *Id.* at 11-12. *See generally* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that a state law requiring school children to recite the Pledge of Allegiance and salute the flag was unconstitutional); *see generally* Wooley v. Maynard, 430 U.S. 705 (1977) (holding it was unconstitutional for New Hampshire to require that drivers display "Live Free or Die" on their license plate).

[48] *FAIR*, No. 04-1152, slip op. at 15. *See generally* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (holding that the public accommodation law as applied to a private

that allowing recruiters on campus is not inherently expressive, because assisting a student in obtaining employment is not expressive.[49] Furthermore, the message of the school is not suppressed through this statute. Colleges and universities are free to voice their opposition to DADT or any other military policy. The colleges may post signs where the recruiters are located or speak out on the issue without ramifications under the Solomon Amendment. The Court rejected the argument that simply by having the recruiters on campus, the school would be viewed as endorsing the military's policies.[50] As the Court decided in *Board of Education of Westside Community Schools v. Mergens*, high school students are capable of distinguishing between speech that a school sponsors and speech that a school permits; Chief Justice Roberts contended, "Surely students have not lost that ability by the time they get to law school."[51] Since colleges and universities are still free to express their views on military policies and the message of the school is in no way compromised by the Solomon Amendment, the Court determined that there is no infringement on speech.

VII. Expressive Conduct

Conduct can be recognized as symbolic speech when its inherently expressive nature merits First Amendment protection.[52] The Court determined that the conduct governed by the Solomon Amendment is not inherently

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parade can alter the expressive nature of the conduct and violates the First Amendment protection of choosing one's own message); *see generally* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding that you cannot interfere with a speaker's intended message).

[49] *FAIR*, No. 04-1152, slip op. at 15.

[50] *Id.* at 10.

[51] *FAIR*, No. 04-1152, slip op. at 15. *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

[52] *See O'Brien*, 391 U.S. 367; Texas v. Johnson, 491 U.S. 397 (1989).

expressive.[53] Since the message that universities are sending when they exclude military recruiters is unclear without the accompanying speech, the conduct alone is not expressive.[54] The Court held that since explanatory speech is needed to accompany the conduct, *O'Brien* does not govern the issue.[55] Moreover, a minor burden on speech is permissible under *O'Brien* if the government regulation at issue promotes a substantial government interest that would be more difficult to attain without the existing policy.[56] Raising and supporting a military is a substantial government interest, and the effectiveness of this action is altered when schools hinder the military's ability to recruit. Although alternative methods for recruiting can be implemented, the Supreme Court has deemed this the responsibility of Congress rather than of the courts.[57] Since the Solomon Amendment does assist in the effectiveness of military recruiting and is the chosen method of Congress, the policy will withstand the challenge under *O'Brien* and does not constitute a violation of the First Amendment right to freedom of speech.[58]

VIII. Freedom of Association

The First Amendment goes beyond the right of speech, in that it also protects the freedom of association. One important recent case on the freedom of expressive association is *Boy Scouts of America v. Dale*.[59] In *Dale*, the

[53] *FAIR*, No. 04-1152, slip op. at 16.
[54] *Id.* at 16-17.
[55] *Id.*
[56] *See id.*
[57] *Id.* at 18.
[58] *Id.*
[59] *See* Boy Scouts of America v. Dale, 530 U.S. 640, 655-59 (2000) (holding that the Boy Scouts were an expressive association in which the forced inclusion of a homosexual would significantly affect their

government of New Jersey was forcing the organization to "accept members it did not desire."[60] Unlike *Dale*, under the Solomon Amendment, schools are not compelled to associate with military recruiters in this fashion; the schools are simply required to interact with the recruiters for a limited time and purpose, which fails to inhibit the school's message.[61] There is neither forced inclusion nor an effect on the schools' right to expressive association, because they are still free to convey their disapproval of the military's message. Likewise, according to the Court, there is no effect on the attractiveness of membership in the university simply because of the presence of military recruiters.[62]

Through this analysis, the Court held that there was no infringement on the First Amendment protections of freedom of speech, expressive conduct, or association. There was also no violation of the doctrine of unconstitutional conditions. Therefore, the Solomon Amendment is constitutional and should continue to be upheld.

IX. Why FAIR Lost the Battle

FAIR and numerous other organizations and legal scholars disagree with the Supreme Court's decision in *Rumsfeld*. The first point of contention is how the Court treated speech. For FAIR, et al. the definition of speech may have been more narrowly construed than was expected. Email and written notices, as well as providing the recruiters with space and access to students, were actions too broad to be considered as speech by the Court. Renowned constitutional scholar, Erwin Chemerinsky, who personally filed his own amicus brief, wrote, "Never before

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expression. The states interest did not justify the intrusion; therefore, it violated the organization's First Amendment rights).

[60] *FAIR*, No. 04-1152, slip op at 19.

[61] *Id.*

[62] *Id.* at 20.

has the Supreme Court held that the government can compel speech as long as the speaker can disavow the compelled message later."[63] He cited *Hurley v. Irish- American Gay, Lesbian and Bisexual Group of Boston, Inc.* as illustrating that compelled speech was not excused only because the parade organizers could have expressed their disapproval of the group.[64] By limiting what is considered protected speech, the Court diminished the effectiveness of the FAIR supporters' contentions.

Not only was the argument about the form of speech curtailed, but other scholars contend that the Court undervalued the significance of the non-discrimination message. Non-discrimination, to the extent it is valued by these universities, is a momentous expression. By denying recognition of this policy as speech, the Court not only affected challenges to the Solomon Amendment but many fear their decision spoke to the new Roberts Court's approach to equality and discrimination issues.[65]

In addition to altering what was previously acknowledged as speech, this Court also took a new approach to the nature of freedom of association. For the first time, freedom of association was limited to those groups with membership.[66] The Court had previously ruled, "the government cannot compel association in a manner that is inconsistent with a group's expressive message."[67] Application of the Solomon Amendment to universities forces association by compelling interaction with military recruiters. It may have been unforeseen by FAIR and its supporters that "interaction" would be construed differently than

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[63] Erwin Chemerinsky, *The First Amendment and Military Recruiting*, TRIAL, May 2006, at 79.
[64] *Id.*
[65] *See* David L. Hudson, *Law Schools Told to Allow Military Recruiters*, ABA JOURNAL E-REPORT, Mar. 10, 2006.
[66] Chemerinsky, *supra* note 63.
[67] *Id.*; *see* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

"association" thereby negating their freedom of association claims.

A final misjudgment by FAIR may have been their choice of challenging the Solomon Amendment, rather than going to the root of the problem. DADT is bad public policy and is the origin of the challenges to the Solomon Amendment. Although DADT conflicts with the schools' non-discrimination policies, many scholars, even those who vehemently oppose DADT, thought the First Amendment contentions against the Solomon Amendment were obscure at best. With a growing trend on the Court towards strict textualism, supporters acknowledged that it would be difficult to mold the law schools' concerns into a First Amendment case.[68] On the surface, the statutory challenges were more substantiated than the constitutional claims, despite their easy correction by Congress through a minor change in the language. However, the Court struck these challenges down as well. Notwithstanding, their overwhelming defeat in this case, FAIR and their supporters still have other fronts on which they can voice their opposition to the Solomon Amendment and DADT.

X. Why *Rumsfeld v. FAIR* May Be a Turning Point in a Greater War

The Solomon Amendment is only a symptom of a greater quandary. If DADT were repealed, law schools would not need to exclude the military, because there would be no conflict with the Solomon Amendment. *Rumsfeld v. FAIR* could act as a symbolic expression of a growing majority who oppose the military's discriminatory policies. Bringing attention to challenges like *Rumsfeld* promotes messages of equality and the repeal of DADT.[69]

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[68] *Georgetown Symposium*, *supra* note 8.

[69] *See* SolomonResponse.org Home Page, www.SolomonResponse.org (last visited June 10, 2006).

In upholding the Solomon Amendment, the Court endorses a policy that forces schools to relent on their messages of non-discrimination. The outcome of *Rumsfeld* has inspired others to further scrutinize DADT, the policy on which the decision was grounded.[70] Even with unanimous defeat in *Rumsfeld*, DADT and the Solomon Amendment have been thrust into the public forum bringing attention to what many Americans would consider unfair and discriminatory policies. Once the issue reaches the forefront, new measures can be advanced and considered in defining a viable strategy to overturn these policies.

Given that the Solomon Amendment and DADT are statutory, there are two methods to defeat them. The first is for the courts to deem them unconstitutional. The second is for Congress to repeal them.[71] Currently, two challenges to DADT await litigation that could eliminate the policy.[72] Chemerinsky contends that *Rumsfeld* may have only a narrow impact as precedent or as a guide to policy because the longstanding tradition of deference to the military by the Supreme Court. This continuing deference, coupled with decisions like *Dale* and *Hurley*, which are discriminatory to the gay and lesbian community, may limit the Court's application of this case as future precedent.[73]

The second means of eliminating DADT, through Congressional repeal, is also gaining momentum. As more attention is brought to the millions of dollars spent to oust more than 10,000 homosexuals from the military, some members of Congress are taking action.[74] Representative

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[70] Posting of Sharon Alexander, Deputy Director of Policy, Servicemembers Legal Defense Network, to American Constitution Society Blog, www.acsblog.org/guest-bloggers-2672-guest-blogger-losing-the-battle-but-winning-the-war.html (Mar. 9, 2006, 2:15 PM EST) [hereinafter *Alexander*].
[71] *Id.*
[72] *Id.*
[73] Chemerinsky, *supra* note 63.
[74] *Alexander*, *supra* note 70.

Marty Meehan of Massachusetts introduced the Military Readiness Enhancement Act, which would repeal DADT.[75] The bill, which currently has 114 co-sponsors in the House, is awaiting further discussion in the Military Personnel Subcommittee.[76] Interested parties are also working on finding bipartisan co-sponsors in the Senate to introduce similar legislation.[77] As support grows in Congress, increased attention will be brought to the dangers of discriminatory policies and their effects outside the military in places like universities.

XI. Conclusion

Through the above-mentioned legislative and legal methods, the cause championed by FAIR and its supporters has not been lost; continued challenges to DADT are underway. As the attack on discriminatory public policies continues on multiple fronts, *Rumsfeld v. FAIR* may prove not to be a setback, but a stepping stone to the abolition of "Don't Ask, Don't Tell."

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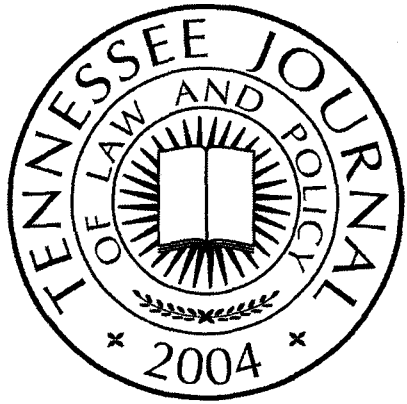
[75] *See* Press Release, Representative Marty Meehan, Meehan Introduces Legislation to Repeal Don't Ask, Don't Tell (Mar. 2, 2005), www.house.gov/apps/list/press/ma05_meehan/NR050302DADT.html (last visited June 8, 2006).

[76] *See* HR 1059, 109th Cong. (2005).

[77] *Alexander*, *supra* note 70.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