The Commentator

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Pilon Argues For Expansive View of Freedom of Association in Solomon Amendment Talk at NYU Law

BY NICHOLAS KANT '06

At a recent event sponsored by the Federalist Society of New York University School of Law, Roger Pilon advocated a unique view of the infamous "Solomon Amendment."

The Solomon Amendment allows the United States government to cut funds to universities that exclude military recruiters from campus. On December 6, the Supreme Court will decide whether the law is constitutional.

However, Pilon, the Cato Institute's Vice President for Legal Affairs, argued for a different distinction than the Law School versus Military argument. Instead of either cutting funds to any university that excludes military recruiters, or letting every university do as it chooses, Pilon argued that, "private entities should be free to discriminate in any way they wish, for public entities, just the opposite," he said.

NYU Law's Federalist Society sponsored Pilon's discussion on the Solomon Amendment. He spoke Thursday, November 3, to a crowd of about 30 in Vanderbilt Hall 216.

The Cato Institute is a Washington, D.C. based libertarian think-tank. Pilon is also the director of the Cato Institute's Center for Constitutional Studies and a graduate of the George Washington University School of Law.

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> **Of course, the public schools discriminate heavily.**

In 2003, the Forum for Academic and Institutional Rights (FAIR), a group of law schools and law school faculties, sued the Department of Defense. FAIR wanted a preliminary injunction preventing enforcement of the Solomon Amendment. The Solomon Amendment, as most are aware, conditions federal funding for universities on allowing military recruiting on campus to all schools in the university, such as the Law School at New York University.

As an aside, the law is called "Solomon" for Republican Gerald Solomon, the New York representative who introduced it, not the ancient king.

In litigation, The district court denied the injunction, with the Third Circuit Court of Appeals reversing and granting the injunction. The Supreme Court granted certiorari in what is now one of the most anticipated cases on the docket this year.

The law schools wanted to exclude military recruiters, saying that the military discriminates on the basis of sexual orientation with its "don't ask, don't tell" policy. Other schools not part of FAIR have also tried opposing the Solomon Amendment. For instance, Harvard Law School is not a part of FAIR, but the school did try to take a stand against the Solomon Amendment. However, it caved after the Pentagon threatened to cut over $400 million in federal funds.

New York University School of Law is part of the FAIR litigation, and would not allow military recruiters on campus if it were not for the threat of losing funds for the entire university through the Solomon Amendment.

Pilon said the Cato Institute has argued for what he called a moderate course, discrimination in turn. "That means if you discriminate on 'don't ask, don't tell,' the law schools can also discriminate," he said.

The Constitutional right of freedom of association is central to the case. "The idea is that this right of freedom of association is one that ought to be protected in the private sector. But the law does not work that way," said Pilon.

There are many grounds upon which private entities are not allowed to discriminate. Pilon argued that if you are free to associate with whomever you want, that also means you should be free to *not* associate with whomever you want.

Public schools should not be able to discriminate, according to Pilon, because they are "public." But if a school is "private," that school should be able to receive government money while still enjoying freedom of association, which also means freedom to discriminate, Pilon said.

"If the government will engage in a program whereby it funds activities, it must be equal. The government can't force [someone] to give up constitutional rights in return for money he is otherwise entitled to," Pilon said.

But if two schools are both receiving government money, how do you know which one is private and which one is public? That distinction is of paramount importance, as it dictates which school can discriminate. Pilon said you can look at a school's history and charter to find out. "I don't care how much money NYU gets from the government, it could be gobs of money, it's still a private entity," he said.

Roger Pilon argued on November 3rd that private entities shoudl be allowed to discriminate in accord with their Constitutional Freedom of Assoication

But if private schools can discriminate on any basis, does that mean public schools can't discriminate on any basis at all? Of course public schools discriminate heavily on the basis of grades and test scores.

"You're in a second-best world. To discriminate is to choose, and you choose on the basis of reasons. We speak of a 'discriminating person,' someone who makes good choices. Doesn't the kid who doesn't make it, who doesn't even come close, pay taxes too?" Pilon asked.

Attorney for Lynne Stewart, Attorney Convicted of Aiding Terrorist, Speaks

NICHOLAS KANT '06

There is nothing that prosecutors in the Southern District of New York would rather do than prosecute lawyers, according to a speaker brought to New York University School of Law by law school's chapter of the ACLU.

And in light of that, the issue becomes how zealously defense lawyers will represent their clients, and how much defense lawyers will decide to censor themselves, argued the speaker, Susan Tipograph.

Susan Tipograph is the attorney for Lynne Stewart. Stewart recently made international headlines when she was indicted for helping convicted terrorist Sheik Omar Abdel-Rahman send messages from his jail cell.

Stewart has since been convicted, and on October 25, U.S. District Court Judge John Koeltl upheld the conviction, finding that, "The First Amendment lends no protection to participation in a conspiracy." Stewart is scheduled to be sentenced by Koeltl on December 22. She faces up to 30 years in prison.

Tipograph spoke and answered questions for a crowd of about 30 students at lunchtime on Thursday, November 10, in Golding West. Tipograph spoke about Stewart and issues of criminal defense in America today.

"We live in a climate, and most of you know this, if you read the newspapers, watch television, use the internet, you know that there are thousands of people who are jailed, held by the United States authorities in this country and around the world, who have been denied the benefit of counsel," she said.

Attorney Lynne Stewart

Tipograph referenced the discussion to her own experiences. "I had the opportunity to be appointed by the court in the Southern District of New York to represent Jose Padilla's mother. Jose Padilla was the American citizen arrested in O'Hare Airport and has been held essentially incommunicado for the last three or four years. He has some access to counsel, but he has not been charged with a crime and he has never been convicted of a crime. And when we would talk to people about that case, people would say 'Well, but he was coming to the United States

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