

The Defense Department vs. Free Speech on Campus

Proposed regulations about military recruiting and ROTC threaten key academic values, writes John K. Wilson.

By [John K. Wilson \(/users/john-k-wilson\)](/users/john-k-wilson)

// June 25, 2007

The U.S. military hasn't had much luck in occupying Iraq, but now it's planning to invade more territory often deemed hostile to its interests. No, not Iran. We're talking about American colleges.

Last month, the Defense Department announced [a proposed rule \(http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-8662.htm\)](http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-8662.htm) for implementing the 2005 Solomon Amendment, requiring access to colleges receiving federal funds. The rule represents an extraordinary attack on academic freedom and institutional autonomy, and goes far beyond the text of the Solomon Amendment or [the ruling of the Supreme Court last year in *FAIR v. Rumsfeld* \(https://www.insidehighered.com/news/2006/03/07/supreme\)](https://www.insidehighered.com/news/2006/03/07/supreme) that supported it. If this proposed rule is not changed, colleges will be forced to give the military extraordinary access to campus, to allow ROTC programs without any restrictions, and to ban all protests against military recruiters.

The Solomon Amendment prohibits a college from receiving federal funds if it bans military recruiters, prevents the military "from maintaining, establishing, or operating" an ROTC unit at that college, or prohibits a student from enrolling at an ROTC unit at another college.

But what does it mean to establish an ROTC unit? For example, no college prohibits any students from enrolling in ROTC at another college. Likewise, to my knowledge, there is no college that has actually banned the military from renting space on campus like any other group and holding ROTC training sessions. The proposed rule explicitly rejects the concept of equal treatment; instead, the military is demanding special rights to control curriculum and faculty that no other outside group is ever granted.

It's common to refer to campuses "banning" ROTC, but it apparently never happened. For example, in 1969, Yale University never "abolished" ROTC; it simply denied ROTC academic credit and faculty rank, and the military chose to withdraw under these conditions. In 1970, Stanford's Faculty Senate voted to end academic credit for ROTC courses because the courses were not open to all Stanford students, and the military (instead of Stanford) chose the teachers.

The proposed rule not only prevents a college from prohibiting ROTC, but also bans a campus from doing anything that "in effect prevents" an ROTC unit from operating. This would include neutral

rules applied to everyone on campus, such as nondiscrimination rules, faculty control over the curriculum, or academic freedom. According to the proposed rule, "The criterion of 'efficiently operating a Senior ROTC unit' refers generally to an expectation that the ROTC Department would be treated on a par with other academic departments." Since in other academic departments, professors are given faculty rank and students receive college credit, this provision would effectively revoke faculty and campus control over the curriculum. It appears likely that the military will demand academic credit for ROTC classes (including those held at other campuses) and faculty rank for instructors who are selected and controlled by the military. Yet there is nothing in the Solomon Amendment to require this.

If colleges allow students in ROTC classes to receive credit, they should be careful to impose the same conditions offered for all other classes: the faculty must be appointed by the college, not the military; the faculty, not the military, must determine the content of the classes; and all qualified students, regardless of sexual orientation or enrollment in the military, should be able to take the class. Nothing in the Solomon Amendment reverses these common rules, and if it did so, it would be unconstitutional, as this proposed rule is. In *FAIR v. Rumsfeld*, the Supreme Court ruled that allowing military recruiters on campus did not affect academic freedom; plainly, the same cannot be said about the freedom to determine course content and faculty hiring.

The *FAIR v. Rumsfeld* case challenged only one part of the Solomon Amendment -- the least objectionable part about allowing military recruiters on campus. Thus, the reasoning used by the Supreme Court about military recruiters cannot be equally applied to ROTC units or used as an excuse to ban student protests. The Supreme Court based its decision on "the difference between speech a school sponsors and speech the school permits because legally required to do so." As the Supreme Court noted, "recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students-not to become members of the school's expressive association. This distinction is critical." The Supreme Court declared, "In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions." But clearly, colleges (and their faculty) are speaking when they hold classes and offer credit.

Of course, this does not mean that ROTC units are banned from campuses, nor should they be. ROTC units can be run by the military using facilities rented from a college. Or they can be created as registered student organizations open to all and run by students, or departments run and controlled by universities. But decisions about academic credit and faculty appointments cannot be removed from colleges and handed over to the military. Forcing colleges to give academic credit for courses at other colleges run by the military without academic supervision is a clear violation of higher education's autonomy; forcing colleges to create academic programs controlled by the military is an even worse violation.

The military seems unwilling to give up control over the selection of ROTC faculty and the curriculum. The choice of faculty and content for courses must remain the authority of faculty at

each campus, and not be handed over to the government. Decisions on whether a particular department or course is legitimate must be determined by the faculty, not by a government fiat.

Nor should military recruiters be exempt from protest or criticism. The proposed rule makes it a violation if the college "has failed to enforce time, place, and manner policies established by the covered school such that the military recruiters experience an inferior or unsafe recruiting climate, as schools must allow military recruiters on campus and must assist them in whatever way the school assists other employers."

It is essentially impossible for any college to prohibit an "inferior ... recruiting climate" for military recruiters without banning all such protests. Obviously, if military recruiters are being protested, then their recruiting climate is inferior to recruiters who are not being protested. And according to the Department of Defense, that's justification for withdrawing all federal funds. If a college has any kind of time, place, or manner policies -- and essentially all of them do -- these rules would force the colleges to ban anti-recruiter protests.

In *FAIR v. Rumsfeld*, the Supreme Court reported that even the solicitor general acknowledged that a university "could help organize student protests." Now, the Bush Administration is seeking to ban these very same student protests.

FAIR v. Rumsfeld allows the institution to engage in criticism of the military policy. The colleges that lost this case over military recruiters should continue their resistance in the face of the far more serious threats to academic freedom from this proposed rule. But they should go further in protecting the right of protest and counterspeech. Colleges should pass policies protecting the right of students to peaceably protest recruiters of any kind, and to allow anyone to provide potential recruiters with counterspeech. Colleges should also adopt a "Truth in Recruiting Policy" that requires any recruiters who engage in discrimination to fully disclose this fact in all recruiting materials.

Some critics may contend that since colleges can simply give up federal funding (the rules don't apply to student financial aid), there's nothing wrong with these rules. However, colleges are effectively obligated to obey these rules because the federal government's funding is so essential to higher education. A college cannot ethically ban all government grants, because to do so would affect the academic freedom of scholars who need these grants for their work. And the government cannot impose unconstitutional conditions on its grants.

Another problem with the proposed rule is its enforcement. In interpreting these rules, the "decision authority" is the "principal deputy under secretary of defense for personnel and readiness." It is inappropriate for the military to serve as the judge of all disputes between the military and colleges. Plainly, one would expect the military to win all such arguments and unilaterally order federal funds to be cut off to colleges that disagree with it. A far better solution would be to have an independent

committee comprised of leading scholars and some retired military officials who would deal with disputes to offer a kind of arbitration in order to avoid endless litigation over enforcement and interpretation.

The Solomon Amendment (especially as interpreted by *FAIR v. Rumsfeld*) was a massive expansion of federal power over private individuals and corporations. If you sell any product or service (such as research, or education) to the federal government or receive any subsidy, according to the court in *FAIR v. Rumsfeld*, the government can now order you to be their propaganda agent and use your property for the government's recruitment purposes. Conservatives, seething in their hatred of universities, didn't seem to notice or care about this attack on the sanctity of private property.

The flaws of the Solomon Amendment and the Supreme Court's interpretation of it need to be addressed with legislation and further judicial challenges. But there is no excuse for the Defense Department to go far beyond these legislative boundaries with an unprecedented attack on academic freedom and free expression.

John K. Wilson is the founder of the [Institute for College Freedom](http://collegefreedom.org) (<http://collegefreedom.org>) and the author of *Patriotic Correctness: Academic Freedom and Its Enemies* (Paradigm Publishers, fall 2007). To comment on the proposed rule, go to [Regulations.gov](http://www.regulations.gov/fdmspublic/component/main) (<http://www.regulations.gov/fdmspublic/component/main>) and search using the keyword DoD-2006-OS-0136. Comments must be received by July 6, 2007.

Read more by

By John K. Wilson (</users/john-k-wilson>)

Copyright Inside Higher Ed | insidehighered.com