Texas Young Lawyer Association

2004 State Moot Court Competition

San Antonio – June 22-24, 2004

Official Competition Problem

IN THE COURT OF APPEALS
FOR
CORPUS CHRISTI
JUSTICE, TEXAS

* * *

NO. 18-01-00123-CV

* * *

DIXIE B. HERBSTER,

Appellant

VS.

ALISON WEBSTER, INDIVIDUALLY AND IN HER CAPACITY AS PRESIDENT AND CHAIRMAN OF THE BOARD OF REGENTS OF THE SOUTH CENTRAL UNIVERSITY OF TEXAS, CHRISTOPHER POWELL, INDIVIDUALLY AND IN HIS CAPACITY AS DEAN OF THE LAW SCHOOL OF THE SOUTH CENTRAL UNIVERSITY OF TEXAS,

Appellee

On Appeal from the 93rd Judicial District Court
Hidalgo County, Texas
The Honorable Paul Botros, Presiding

BEFORE KELLY, J., RUDNICKI, J., AND VOGELSANG, CJ.

VOGELSANG, Chief Justice, in which KELLY, J. joins.

This is an appeal from a district court order denying a petition for writ of mandamus. For the reasons herein set forth, we reverse the district court's denial, and remand to the district court with instructions to grant appellant's petition.

I.
Factual Background

The facts of the present case are based upon the findings of the district court, and are as follows.

The Law School

The Law School of the University of South Central Texas (the "Law School"), located in the City of Edinburgh, Texas, is one of this State's oldest and most venerated institutions for legal study. Founded as an independent law school in 1879, the Law School was incorporated into the University of South Central Texas (the "University") in 1915. The University of South Central Texas is authorized under the Education Code, which provides, inter alia, for a nine-member Board of Regents (the "Board"), the governance of the University by the Board and other related matters. The current, and at all times during the pendency of this case, Dean of the Law School is appellee Mr. Christopher Powell. The current, and at all times during the pendency of this case, President and Chairman of the Board of Regents of the University is appellee Dr. Alison Webster.

The students of the Law School represent an academically gifted and diverse bunch. Admission into the Law School's entering class of approximately 235 students is notoriously difficult, with only those applicants standing squarely in the top 90 percentile of applicants (using the various admissions standards currently in use) being offered admission.

It should therefore come as no surprise that current and former law students of the Law School are among the most employable in the nation. In order to facilitate the recruitment of the Law School's students, the Law School maintains an Office of Career Services (the "Office"). The Office's stated purpose is "to assist current students and alumni of the Law School in locating employment with law firms, various branches and agencies of federal, state and local government and public service organizations."

In 2002, the State of Texas passed the Knopwood Act (the "Act") into law providing, in pertinent part:

> In recognition of the diverse backgrounds of students at law schools throughout this State, and in keeping with other laws of this State providing for the equal treatment of its citizens, the placement services of public law schools throughout this State shall not be available to any organization or individual that discriminates in recruitment or employment against any person because of race, color, national origin, ancestry, religion, creed, age, sex, marital status, sexual orientation, handicap or Vietnam-era status.[1]

In direct response to the Act, Dean Webster instructed the Office to institute certain measures including, (1) the preparation and distribution of copies of the Act to all potential employers seeking to recruit the Law School's students, (2) the establishment of a reporting

[1] Note to competitors: This statute is fictional, and was created for the purposes of the competition problem.

policy whereby the Law School's students could report to the Office any violations by potential employers of the non-discrimination principles embodied in the Act, (3) the establishment of a certification statement to be signed by all potential employers agreeing to abide by the principles of non-discrimination embodied in the Act as a precondition to access to services provided by the Office and (4) disciplinary and exclusionary policies against potential employers who violate the non-discrimination principles in the Act or refuse to sign the certification statement.

In Fall 2003, the Office organized and administered its annual on-campus recruitment program whereby potential employers were invited to visit the campus of the Law School and conduct between ten and twelve 20-minute interviews with second- and third-year law students. Prior to their visits to campus, the potential employers were provided by the Office with a packet consisting of résumés of the students to be interviewed, information about the Law School, its curriculum and grading scales and a certification statement to be signed by the potential employer's representatives affirming the non-discrimination principles contained therein. As a prerequisite to conducting interviews, the potential employers were required to sign the certification statement, and present the signed certification statement to the Office.

On or about September 16, 2003, Lieutenant Commander Adam Fowle, United States Navy Judge Advocate General Corps, the designated JAG Corp. recruiter for the State of Texas, received his employer packet from the Office. Unlike the other potential employers, however, Lt. Cdr. Fowle was provided with a packet consisting exclusively of the Office's certification statement enclosed via transmittal letter from the Office. That letter stated:

> As you are aware, the Office of Career Services of the Law School of the University of South Central Texas, pursuant to the laws of the State of Texas and the policies of the Law School, does not make its services available to any organization or individual that discriminates in recruitment or employment against any person because of race, color, national origin, ancestry, religion, creed, age, sex, marital status, sexual orientation, handicap or Vietnam-era status. We have determined that the policy of the Armed Forces to exclude gay and lesbian citizens from military service constitutes a violation of the laws of the State of Texas and the policies of the Law School. As such, we inform you that we are holding all résumés of students interested in interviewing with your organization until such time as you sign the certification enclosed herein, and present such certification to the Director of the Office of Career Services. Further, you shall not be allowed to conduct interviews with such students on September 18, 2003, your designated on-campus interview date, if the Director shall not have received a signed certification statement by such date.

In spite of this letter, Lt. Cdr. Fowle arrived at the Law School's campus on September 18, 2003. Upon his arrival, he met with Nicholas MacLuckie, the Director of the Office, informed him that pursuant to the provisions of the Solomon Amendment, 10 U.S.C. § 983, the Office could not restrict his ability to access students' information and demanded access to the records of those students interested in interviewing with JAG Corp. Mr. MacLuckie refused Lt. Cdr. Fowle's demand.

On March 31, 2004, the Secretary of the Navy sent a letter to President Webster, pursuant to 32 C.F.R. 216.1 et seq., which read in pertinent part:

I understand that military recruiting personnel have been refused student recruiting information [FN1] on students from the South Central University of Texas Law (the "Law School") for the purpose of military recruiting, by a policy or practice of the Law School. Current law [FN2] prohibits funds by grant or contract (including a grant of funds to be available for student aid) from appropriations of the Departments of Defense, Transportation (with respect to military recruiting), Labor, Health and Human Services, Education and Related Agencies to schools that have a policy or practice of denying military recruiting personnel entry to campuses, access to students on campuses, or access to student recruiting information. Implementing regulations are codified at 32 Code of Federal Regulations, part 216 (the "Regulations").

This letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of the Law School. I understand that the Law School may have issued policies in conjunction with the passage of the Knopwood Act (the "Act"). Such policies may be within the scope of 32 CFR 216.4(c)(7), which provides that the provisions of current law shall not apply to a school if the Secretary of Defense determines that the school is prohibited by the law of any State, or by the order of any State court, from allowing Federal military recruiting on campus. In order to abate any enforcement of current law by Department of Defense officials, I offer you the opportunity, within the next 30 days, to issue a written policy statement of the institution with respect to access to campus and students, and to student recruiting information by military recruiting personnel. Such written policy should also include a certification [the "DOD Certification"] stating that you are prohibited from complying with current law because of the constraints of the Act.

Based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract. That decision may affect eligibility for funding from appropriations of the Departments of Defense, Tranportation, Labor, Health and Human Services, Education and Related Agencies. Should it be determined that the Law School is in violation of the aforementioned statutes, such funding would be stopped, and the school would be ineligible to receive such funds in the future.

[FN1] Student recruiting information refers to a student's name, address, telephone listing, age (or year or birth), level of education (e.g., freshman, sophomore, or degree awarded for a recent graduate), and major.

[FN2] 108 Stat. 2663 and 110 Stat. 3009.

Upon receipt of the letter, President Webster called a special meeting of the Board of Regents of the University to consider the issues presented in such letter. Present at the meeting, among others, was Dean Powell. Dean Powell iterated that, although it was factually possible to make the DOD Certification, the Board should suspend any action on the matter pending the Law School's filing, and the ultimate disposition, of a motion for permanent injunction to be filed in the United States District Court for the Southern District of Texas. Dean Powell stated that the lawsuit would challenge the constitutionality of the Solomon Amendment on First

Amendment and states' rights grounds. The Dean further stated that should such permanent injunction issue, the Secretary of Defense would be enjoined from enforcing the Solomon Amendment and restricting any federal grants currently received by the University. The Board decided, by unanimous vote, to suspend any action on the matter until such time as a permanent injunction would issue.

The Solomon Amendment

The Solomon Amendment provides, in pertinent part:

[. . .]

(b) Denial of funds for preventing military recruiting on campus.-- No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--

(1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) Exceptions.-- The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that--

(1) the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

(2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

(d) Covered funds.--

(1) The limitation established in subsection (a) applies to the following:

(A) Any funds made available for the Department of Defense.

(B) Any funds made available in a Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

(2) The limitation established in subsection (b) applies to the following:

(A) Funds described in paragraph 1.

. . .

(e) Notice of determinations.-- Whenever the Secretary of Defense makes a determination under subsection (a), (b) or (c), the Secretary--

(1) shall transmit a notice of the determination to the Secretary of Education and to Congress; and

(2) shall publish in the Federal Register a notice of the determination and the effect of the determination on the eligibility of the institution of higher education (and any subelement of that institution) for contracts and grants.

(f) Semiannual notice in Federal Register.-- The Secretary of Defense shall publish in the Federal Register once every six months a list of each institution of higher education that is currently ineligible for contracts and grants by reason of a determination of the Secretary under subsection (a) or (b).

10 U.S.C. § 983. 32 C.F.R. § 216.61 et seq. serves the implementing regulations of the Solomon Amendment.

Appellant

Appellant Dixie B. Herbster is a first-year law student at the Law School. Ms. Herbster, like many of her fellow students, funds her law school education with the Federal Stafford Loan and the Perkins Grant, both of which are within the "grant of funds to be available for student aid" defined in the Solomon Amendment. Although she does not profess any interest in gaining employment with the Armed Forces, she fears that the Law School's policies, including its refusal to sign the DOD Certification, would result in the termination of federal grants funding her law school education. Ms. Herbster specifically contends that appellees' failure to sign the DOD Certification jeopardizes federal grants for the Fall 2004 Term.

II.
Procedural Background

The procedural background of the instant case is as follows. On May 1, 2004, appellant filed (and simultaneously provided notice to appellees) with the 93rd Judicial District Court a petition for writ of mandamus requesting that the court order appellee to send to the Secretary of the Navy the written statement and DOD Certification requested of it in the Navy's March 31, 2004 letter. On April 7, 2004, Appellee filed a plea in abatement. The 93rd Judicial District Court, Botros, J., denied Appellant's petition.

III.
Discussion

Standard of Review

We review appeals from a proceeding for a writ of mandamus initiated in the district court in accordance with the standards generally applicable to trial-court findings and conclusions. See University of Texas Law School v. Texas Legal Foundation, 958 S.W.2d 479, 481 (Tex.App.--Austin 1997, no writ) (citing Anderson v. City of Seven Points, 806 S.W.2d 791, 794 at n.2 (Tex.1991)). "That is, we review findings of fact for legal and factual evidentiary support ... and we review conclusions of law de novo." Id. at 481; City of Austin v. Austin Professional Fire Fighters Assn'n, 935 S.W.2d 179, 181 (Tex.App.--Austin 1996), judgment vacated pursuant to settlement, No. 97-0077 (Tex.1997)). We note that "[a] determination of factual matters is within the sound discretion of the trial court, and the appellate court may not substitute its judgment for that of the trial court." Texas Farmers Ins. Co. v. Stem, 927 S.W.2d 76, 78 (Tex.App.--Waco 1996, no writ) (citing Walker v. Packer, 827 S.W.2d 833, 840 (Tex.1992)). However, we give much less deference to the trial court's legal analysis, and review it de novo. See id. at 78 (citing Walker, 827 S.W.2d at 840).

Writ of Mandamus

The district court's power to grant a writ of mandamus is found in Sections 24.007 and 24.011 of the Texas Government Code (the "Code"). Section 24.007 of the Code gives district courts the "jurisdiction provided by Article V, Section 8, of the Texas Constitution." Article 5, § 8 of the Texas Constitution provides that "District Court judges shall have the power to issue writs necessary to enforce their jurisdiction." Section 24.011 of the Code provides that "[a] judge of a district court may, either in termtime or vacation, grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, and supersedeas and all other writs necessary to the enforcement of the court's jurisdiction." Rule 694 of the Civil Code further provides that "[n]o mandamus shall be granted by the district or county court on ex parte hearing, and any peremptory mandamus granted without notice shall be abated on motion."

A party is entitled to mandamus relief when there is a legal duty to perform a nondiscretionary act, a demand for performance of that act, and a refusal. See Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177, 178 (Tex.1988); see also Harris County v. Walsweer, 930 S.W.2d 659, 667 (Tex.App.-Houston [1st Dist.] 1996, writ denied). Further, a party is entitled to mandamus relief to compel a public official to perform a ministerial act. See Anderson, 806 S.W.2d at 793; see also Walsweer, 930 S.W.2d at 667. An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. See Anderson, 806 S.W.2d at 793; see also Walsweer, 930 S.W.2d at 667. By contrast,

> a writ of mandamus will not issue to compel a public official to perform an act which involves an exercise of discretion. However, there is one exception: a writ of mandamus may issue in a proper case to correct a clear abuse of discretion by a

> public official. Id. Therefore, while the district court's jurisdiction is not used to substitute its discretion for that of the public official, the performance of a clear statutory duty that is ministerial and nondiscretionary should be mandated by the district court.

Walsweer, 930 S.W.2d at 668 (internal citations omitted).

The issue before this court, then, is whether appellees' refusal to issue the certification when demanded by appellant constituted the refusal to perform a ministerial, legal duty. In other words, the issue is two-fold: (1) whether appellees have a legal duty to comply with the Solomon Amendment, and (2) if so, whether the issuance of the DOD Certification is merely ministerial and not discretionary.

Legal Duty

Appellees contends that they have performed their duty, as public officials under the State of Texas, with respect to the Knopwood Act. They further contend that the Solomon Amendment imposes no express duties upon them as state officials. Appellant contends that even though appellees are state public officials, they are bound under the Supremacy Clause of the United States Constitution to carry out their duties under the Solomon Amendment. Appellant further contends that the Knopwood Act is preempted by the Solomon Amendment such that appellees duties are exclusively under the Solomon Amendment, or at least to the extent of conflict. We find appellant's arguments persuasive.

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Texas Courts are bound by the Supremacy Clause which makes federal statutes the law in every state and fully enforceable in state courts. See Alden v. Maine, 527 U.S. 706, ----, (1999). "A state law is preempted and 'without effect' if it conflicts with federal law." Hyundai Motor Co. v. Alvarado, 974 S.W.2d 1, 4 (Tex.1998) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). Congressional intent determines whether a federal statute preempts state law. See Worthy v. Collagen Corp., 967 S.W.2d 360, 366-67 (Tex.1998) ("We are ... bound to give effect to the will of Congress."). Preemption may be determined by the express provisions provided by Congress. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992). It may also be implied if the statute's scope indicates that Congress intended federal law to occupy the field, or when state law actually conflicts with federal law. See, e.g., Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); see also Geier v. American Honda Motor Co. Inc., 529 U.S. 861, 884 (2000); Great Dane Trailers, Inc. v. Estate of Wells, 52 S.W.3d 737, 741 (Tex. 2001). A state law presents an actual conflict with federal law when "it is 'impossible for a private party to comply with both state and federal requirements' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " Myrick, 514 U.S. at 287, 115 S.Ct. at 1487 (quoting, respectively, English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

In the instant case, although the Solomon Amendment does not expressly provide for its supremacy over state law matters such that the doctrine of express preemption would apply, the Solomon Amendment nevertheless preempts the Knopwood Act under the doctrines of implied, field preemption and actual conflict.

The Solomon Amendment represents a tangible expression of Congress's exercise of its army powers under Article I, Section 8 of the United States Constitution. That Article provides, in pertinent part:

> The Congress shall have Power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval Forces; . . . [and] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const., art. I, §8. That the federal government maintains supremacy in the area of military affairs has been often noted by the United States Supreme Court. See Perpich v. Dept. of Defense, 496 U.S. 334, 351 (1990); see also United States v. O'Brien, 391 U.S. 367, 377 (1968)("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."); Holmes v. United States, 391 U.S. 936, 946 (1968)("In express terms Congress is empowered to 'declare war,' which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and 'to raise . . . armies,' which necessarily connotes the like power to say who shall serve in them and in what way.")(quoting United States v. Macintosh, 283 U.S. 605)(internal citations omitted).

Given the United States Supreme Court's notation of the plenary and broad powers afforded to Congress by Article I, § 8, it must have been intended that Congress's power to raise armies occupy that field. Moreover, the Knopwood Act, as applied, creates an actual conflict in its operation vis-a-vis the Solomon Amendment. Under the Myrick test, actual conflict exists when "it is 'impossible for a private party to comply with both state and federal requirements' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " Myrick, 514 U.S. at 287, 115 S.Ct. at 1487 (quoting, respectively, English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Although appellees are not private parties, the test nevertheless remains viable. Hypothetically, if a private law school or university were required to comply with the Knopwood Act, it would be unable to provide student information to military recruiters under the Solomon Amendment. Likewise, the public Law School and the University could not comply. And that the Knopwood Act stands as an obstacle to the accomplishment and execution of the Solomon Amendment in that it restricts the provision of student information to military recruiters, is equally clear.

As such we conclude that appellees, as public officials of the State of Texas, nevertheless have a legal duty to comply with the Solomon Amendment under the Supremacy Clause of the

United States Constitution. We further conclude that appellees' legal duties under the federal Solomon Amendment supersede any contrary duty contained under the State's Knopwood Act.

Ministerial Duty

Having concluded that appellees have a legal duty to comply with the Solomon Amendment, we now turn to whether that duty is discretionary or ministerial. If the duty is of the former type, then no writ of mandamus should issue. If by contrast, appellees' duties are ministerial, then the writ of mandamus is an appropriate remedy.

Appellant contends that appellees' failure to provide the DOD Certification is a ministerial, not discretionary act. Appellant argues that since appellee can make the DOD Certification truthfully, (i) the making of the DOD Certification is merely ministerial, not discretionary and (ii) even if the making of the DOD Certification constitutes a discretionary, not ministerial act, appellees' refusal to make the DOD Certification constitutes an abuse of that discretion. We agree.

Justice Rudnicki, in dissent, opines that the performance of the Solomon Amendment is inherently discretionary because "it cannot be said in good conscience that any act to be taken by a public official under the Solomon Amendment is ministerial when it fails to clearly spell out the duty to be performed by that official with sufficient certainty that nothing is left to the exercise of discretion" and "the nature of the Solomon Amendment itself is inherently one involving discretion" in that "any public official under any covered school could choose either to comply with the Solomon Amendment or reject compliance." Post at 12. Simply stated, her dissent misses the point. Our focus of inquiry is not whether the Solomon Amendment, taken as a whole, meets the standards of what constitutes a ministerial duty. Rather, in the context of this case, we need only concern ourselves with whether the provision of the DOD Certification is a ministerial act, or whether the refusal to provide that certification constitutes an abuse of discretion.

In the context of this case, appellee need only perform one action to abate enforcement of the Solomon Amendment-- provide the DOD Certification. It is noteworthy that the DOD Certification does not require that the Law School comply with the Solomon Amendment, nor that the Law School state that it will ever comply, the latter of which would be a policy judgment solely within the discretion of the appellees. The DOD Certification asks for no judgments, opinions or objections. Instead, the DOD Certification merely states what is an indisputable fact, and one that the Office has already profferred-- that the Knopwood Act prohibits the Law School from complying with the Solomon Amendment. The Navy's letter clearly spells out the duty to be performed with sufficient certainty that nothing is left to the exercise of discretion-- the making of the DOD Certification.

Even if the making of the DOD Certification constitutes a discretionary act, appellees' failure to make that certification would clearly constitute an abuse of that discretion. As the DOD Certification requires the statement of a truthful fact, and the making of the DOD Certification would abate any enforcement by the Department of Defense of the Solomon Amendment, we cannot construe any reason to not make such certification.

Justice Rudnicki further contends that mandamus is inappropriate since appellant has an adequate legal remedy. Post at 12. But, "[i]n some cases, a remedy at law may technically exist; however, it may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate." Smith v. Flack, 728 S.W.2d 784, 792 (Tex.Crim.App.1987) (citing Houston & T.C. Ry. Co. v. City of Dallas, 98 Tex. 396, 84 S.W. 648, 656 (1905); City of Highland Park v. Dallas Ry. Co., 243 S.W. 674, 681 (Tex.Civ.App.--Dallas 1922, writ ref'd)). Given that the Navy's letter, by its terms, sets forth a very short time frame for the making of the certification, appellant's other potential legal remedies are closed off to her.

As appellees have refused to perform their lawful, ministerial duties under the provisions of the Solomon Amendment, we hereby reverse the district court's abatement of the petition of writ of mandamus and remand to the district court to issue a writ of mandamus consistent with the provisions of this judgment.

IT IS SO ORDERED.

KELLY, Justice (Concurring), in which RUDNICKI, J. joins.

Although I have joined in the majority's opinion, I write separately to note that the Solomon Amendment may be unconstitutional under the United States Supreme Court's First Amendment decisions and may constitute impermissible commandeering of state officials under the United States Supreme Court's jurisprudence under New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898 (1997).

Appellees do not, however, contest the constitutional basis for the Solomon Amendment. As such, there is no present case or controversy as to those matters which would give this court jurisdiction to hear those claims. See U.S. Const. art. III, Sec. 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States, --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."). In the absence of a case or controversy, this court is without power to render an advisory opinion on those issues. See Wessely Energy Corp. v. Jennings, 736 S.W.2d 624, 628 (Tex. 1987)(citing Firemen's Insurance Co. v. Burch, 442 S.W.2d 331, 333 (Tex. 1969)). For that reason alone, I join the majority's opinion in spite of severe misgivings as to the ultimate constitutionality of the Solomon Amendment.

RUDNICKI, Justice (Dissenting).

The scope of the court's ruling of today would expand the applicability of writs of mandamus far beyond their intended and rational result, and would disempower our public officials from making discretionary decisions well within the scope of their political duties.

As the majority has noted, a party is entitled to mandamus relief when there is a legal duty to perform a nondiscretionary act, a demand for performance of that act, and a refusal, ante at 7. Further, a party is entitled to mandamus relief to compel a public official to perform a ministerial act. An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. Not further stated by the majority is that mandamus is appropriate only where the petitioner has no adequate legal remedy, i.e., she could have brought suit in the district court.

Ministerial Duty

Justice Kelly's concurring opinion, in which I have joined, puts the legal duty of appellees under the Solomon Amendment in doubt. Nevertheless, assuming any such duty exists, it is certainly not a ministerial duty. The Solomon Amendment, by its terms, provides that if a covered school should refuse access to military recruiters, it will be denied the federal funding that it currently receives from the various Departments listed. In contrast to providing any affirmative duty to a covered school, it merely provides a monetary penalty for certain actions. In other words, the Solomon Amendment tells covered schools what not to do, but never tells them what they must do.

This distinction is notable for two reasons. First, it cannot be said in good conscience that any act to be taken by a public official under the Solomon Amendment is ministerial when it fails to clearly spell out the duty to be performed by that official with sufficient certainty that nothing is left to the exercise of discretion. In fact, quite the opposite is true. A public official seeking to comply with the act could not ascertain what affirmative acts that she might need to take under the Solomon Amendment to remain compliant with that law. She would only know what acts would render her covered school non-compliant with that law. As an aside, if she were to choose to take actions that were non-compliant, the proper remedy would be injunction, not mandamus.

Second, the nature of the Solomon Amendment itself is inherently one involving discretion. Any public official under any covered school could choose either to comply with the Solomon Amendment or reject compliance. If he chose the latter, then the ramifications would be clear, namely that the covered school would lose its federal funding. A covered school could certainly make the decision to forego its federal funding in the name of maintaining a policy or act in the nature of the Knopwood Act. It may not be fiscally sound to do so, but it is within such public official's discretion to ultimately make that choice.

Adequate Legal Remedy

Further, mandamus is unwarranted because appellant has an adequate remedy at law to obtain redress. Appellant could have filed suit against appellees or the State for a declaration that the Knopwood Act was invalid as against the Solomon Amendment. Appellant could have

also filed suit against the Secretary of Defense arguing the constitutional invalidity of the Solomon Amendment. See, e.g. Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 2003 WL 22708576*1 (D.N.J. Nov. 5, 2003). Where such alternative and adequate legal remedies are available, mandamus is inappropriate. Smith v. McCoy, 533 S.W.2d 457, 461 (Tex.App.--Dallas 1976, writ dism'd).

Because I believe the scope of the court's ruling would inappropriately expand the nature of the writ of mandamus beyond its intended and rational use, and since appellant has an adequate remedy at law to obtain redress, I RESPECTFULLY DISSENT.