

Dear Friends,

Even as our thoughts are with the men and women representing the US in uniform tonight, I write to update you on the Law School's stance toward military recruiting and efforts to challenge the Solomon Amendment, the federal law that as currently interpreted requires a cutoff of all federal funds to a university if any "subelement" of that university bars military recruiting.

As you know, Stanford Law School does not provide Office of Career Services support to employers who discriminate based on race, ethnic background, religion, national origin, gender, age, disability, veteran status, or sexual orientation. The United States military, because it excludes from service those who reveal that they are lesbian, gay, or bisexual, thus does not participate in the Law School's on-campus interviewing program. We have instead referred JAG Corps recruiters and law students who wish to talk with them to the University's career services program. The University, unlike the Law School, provides assistance to military recruiters, because it excludes only those employers whose discrimination is "unlawful," and the military's antigay discrimination has not yet been held unlawful. Unlike other law schools including Yale and Harvard, Stanford has not been found by the military to be out of compliance with the Solomon Amendment. Because both the University and Law School utilize the new Career Development Center facility for interviews, the JAG Corps interviews law students alongside and on the same footing with other law employers.

Even though we are not in noncompliance, I asked our faculty Career Services Committee this year (Professor Simon, chair, and Professors Fisher, Gilson and Goldstein) to explore possible bases for legal challenge to the Solomon Amendment. Professor Fisher took the lead in crafting a very thoughtful draft argument drawing on the Supreme Court's long line of "unconstitutional conditions" cases as follows:

1. The University has a right of expressive association that includes the right to enforce the principle of assessment based solely on merit in its teaching, research and student service operations, including career services.
2. A requirement that the University admit military recruiters who discriminate against meritorious gay candidates would violate that right if imposed on the University directly.
3. What the federal government may not do directly here, it may not do indirectly as a condition on federal funding:
 - a. The government may earmark federal funds for a particular use, but it may not use the leverage of federal funding to penalize the University's exercise of constitutional rights in areas that are nongermane to that federal funding. For example, the government need not fund abortion, but may not deny food stamps to women who have had abortions, for abortion is irrelevant to the purpose for which food stamps are funded. Similarly, the government need not fund cancer research or experiments in particle acceleration, but it may not deny funds for those endeavors to a University that in its entirely separate career services program excludes non-merit-based employers, for nondiscrimination in employment is irrelevant to the purpose for which such scientific research is funded.
 - b. The government may tell the University how to spend its federal dollars, but it may not use the leverage of federal funding to tell the University how to spend its private dollars. For example, if a public broadcaster accepts some public funding and otherwise relies on private

donations, the government may not restrict the speech it engages in with private dollars. Similarly, if the University accepts federal funding at the Medical or Engineering schools, the government may not restrict the expressive association of the Law School, which is physically and financially separate from those other units and which does not receive federal funding.

c. The government may offer financial inducement to the University to comply with federal policies inconsistent with its own, but it may not offer inducements "so coercive as to pass the point at which 'pressure turns into compulsion.'" For example, withdrawing merely 5% of federal highway funds from states that refuse to raise their drinking ages to 21 was held not to deprive the states of autonomy over liquor regulation. By contrast, threatening to withdraw all \$800 million of federal funding from a University based on its law school's policy on military recruiters is so grossly disproportionate that it must be regarded as coercing the University to surrender its right of expressive association.

On the advice of the Career Services Committee, I met with Stanford University President John Hennessy, General Counsel Debra Zumwalt (SLS '79), and Deputy General Counsel Thomas Fenner (SLS '76) earlier this year to present this draft strategy and to ask whether they might authorize the Law School to pursue it further. They were extremely courteous and attentive in hearing our argument and considered our memorandum carefully. But the General Counsel recently wrote me the following reply: "We reviewed the impressive arguments put forth to challenge the Solomon Amendment as it applies to the law school. While these arguments have merit, Stanford University does not want to challenge the constitutionality of the Solomon Amendment at this time. We believe we are currently in compliance and do not want to go out of compliance or invite the government to find the university out of compliance, which would be necessary to challenge this law. I am sorry we cannot accommodate you on this, but we do not believe it is in the university's best interests to make such a challenge. Perhaps one of the other universities that has been told it is not in compliance would be willing to challenge the law."

Professor Fisher has accordingly shared our draft litigation memo with the deans of Columbia, Harvard, NYU, USC and Yale Law Schools, which have been found out of compliance, for their possible use.

Let me close by reiterating what I wrote you last fall: while we are very proud to count military officers and veterans among our student body and alumni, including those representing the US tonight, and while reasonable men and women can differ on the merits of the military's policy of excluding gay service members, that policy offends the Law School's commitment to assess our students solely on their merit. Gay soldiers, sailors, flyers, marines and JAG Corps members are even now giving heroic public service on behalf of our nation. I look forward to the day when such service is acknowledged and permitted on an equal basis, and the government no longer uses such instruments as the Solomon Amendment to coerce adherence to discriminatory policies.

I of course welcome your comments or questions,

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