

Military Recruiting: The Lawsuits

IN THE WAKE OF new military recruiting practices on campus, sharp differences of opinion continue to fuel exchanges about the right way to defend Harvard's policy of prohibiting discrimination on the basis of sexual orientation. The University has sought to engage the Pentagon in discussion about reconciling the institutions' conflicting policies. In the meantime, students and a majority of the faculty at Harvard Law School (HLS) have joined litigation opposing the government's position.

In November, President Lawrence H. Summers informed HLS Lambda, a gay student social and political group, that Harvard would not pursue the "quintessentially adversarial act" of litigating against what he called "un-sound and corrosive public policy" (see "Recruiting vs. Rights," January-February, page 65). At issue is the Pentagon's decision, in 2002, to reinterpret the 1996 Solomon Amendment so the federal government would cut off research funding to universities if their law schools in any way limit recruiting of students—by holding interviews off campus, for example, or in informal venues, rather than through the schools' placement facilities. (In 1998, the army determined that recruiting on campus at the invitation of groups such as the Harvard Law School Veterans Association satisfied the requirements of the amendment.)

Thomas Parry '74, president of the Harvard Gay & Lesbian Caucus, promptly protested. In a letter to Summers dated December 3 on behalf of 3,200 member alumni, faculty, and staff, he criticized "your failure to defend Harvard's policy against discrimination on the basis of sexual orientation" as a violation of principle and policy and a "particular affront to your own gay and lesbian students." Parry asked the president "to actively challenge the Solomon Amendment."

Policies requiring employers to affirm that they do not discriminate

as a condition of using career-services offices are in place at several Harvard professional schools, Parry wrote. He noted that the caucus had no objection to accommodating military recruiters visiting the campus at the invitation of student groups. He urged Summers to permit HLS to join the Forum for Academic and Institutional Rights (FAIR), a coalition of 15 law schools challenging the

Solomon Amendment, or to initiate Harvard litigation against the current recruiting practices.

Summers replied on December 19, agreeing with much of the caucus's substantive argument, but disagreeing with its recommended means. He reiterated his judgment that the Solomon Amendment as now interpreted and enforced is "bad public policy. It is a means to enforce an underlying policy on eligibility for military service—the 'don't ask, don't tell' policy—that is offensive to human dignity and to principles of nondiscrimination." The University's pre-2002 practices, he noted, conformed to the letter and spirit of the amendment as the Pentagon then interpreted it.

In pursuit of the "common goal: that before long...the nation's military will benefit from the talents and education of all citizens without regard to their sexual orientation," Summers wrote, the University prefers persuasion to litigation. "[I]n recent weeks," he announced, Harvard has "secured the agreement of Pentagon officials to enter into discussions with the University's General Counsel designed to achieve the twin objectives of enabling the law school to uphold its policies on nondiscrimination and ensuring that the military continues to have effective access to our students."

Second-year law student Amanda Goad, president of HLS Lambda, expressed doubt that new discussions would be more fruitful than those that preceded the Pentagon's 2002 policy change. Unless the military alters its regulations or the University cedes federal research funding (more than \$400 million per year), she said, "I don't see how this round will come out any differently than the last round." Writing for the caucus, Parry replied to Summers on January 20, asking that alumni be included in or regularly updated on the discussions. (Further, he requested that Harvard articulate a general ban from campus of employers who discriminate "on any basis prohibited by Harvard's nondiscrimination policy," except as required by the Solomon Amendment or as a matter of free speech.) Mean-



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while, on January 12, HLS Lambda filed an amicus brief, along with several other groups, supporting FAIR's standing to challenge the Solomon Amendment.

The same day, 55 HLS professors—including Dean Elena Kagan, in her professional capacity—filed their own brief, challenging the amendment on substantive grounds and urging the U.S. Court of Appeals for the Third Circuit to issue an injunction suspending the amendment's current enforcement. Rather than attacking the recruiting practices on First Amendment grounds, as FAIR has done, the HLS faculty members' brief raised more pragmatic issues.

The Pentagon's enforcement provisions of 2002 and after, the brief argued, "would require universities to grant the military a preferential exemption from neutral and generally applicable rules regarding recruiting," a step not authorized by the Solomon language, which "does not compel colleges and universities to exempt the military from evenhanded antidiscrimination rules." The school's policy, the brief argues, is not an "anti-military" policy that singles out the military for "special disfavored treatment," the subject of the original legislation. Moreover, the Solomon Amendment requires that recruiters have "entry" and "access," but not "equal

access." Again, in the professors' opinion, the military policy exceeds statutory authorization.

The court is expected to rule on some of the issues in mid March, and further litigation is in prospect. In the meantime, discussion within the Harvard community, and between the University and the Pentagon, is likely to continue—a new and intense exploration of the positions aired during the 342nd Commencement exercises in 1993, when honorand and speaker General Colin Powell, then chairman of the Joint Chiefs of Staff, was greeted with thousands of pink "Lift the Ban" balloons.

THE UNDERGRADUATE

The Prankster's Secret

by LEE HUDSON TESLIK '05

THAYER. 2 A.M. Six freshmen, clad in muted grays, stocking-caps, and ski-masks, review, for the umpteenth time, their plot. Lock-pick kit? Check. Map? Check. Camera? Frantically, one of the conspirators searches his seemingly countless overcoat pockets. Finally, a Kodak disposable emerges. Check!

Once more: "We enter outside C___. Down the ladder. Last man down closes the grate. Clear the immediate vicinity as quickly as possible—we will trip the alarm. Head south—follow your map. Don't touch the pipes. Avoid puddles. Exit by M__, across the river. Clear out at first sign of cops. Nearest exit and scatter. Are all watches synchronized?"

Murmurs and nods. They are ready to go.

These are not the first Harvard students to crash the University's strictly *verboten* steam tunnels. But each surreptitious venture into the campus's balmy bowels brings with it new intrigue—and familiar risk. Any one of these six could still pull out, turn back, go home. But their plan has been months in the making and "punking" now would be unthinkable.

They file out of Thayer. Casually, they case the prospective crime scene. Then they pounce. In an instant, they have popped the sidewalk grate—and activated the silent alarm. A light blinks on a computer at a nearby police station. A dispatcher radios a University policeman on patrol. The six perpetrators, meanwhile, quietly disappear below.

WELCOME, literally and figuratively, to the underground of Harvard prank history. Just beneath the surface of a university keyed to unlock *Veritas*, here is its inverse—a world where imagination, rumor, and misinformation reign supreme. There are ibis down here, they say. A shock of red hair catches the corner of your eye. Perhaps that was Conan O'Brien '85. A rabbit runs by. John Updike '54, Litt.D. '92, must be around somewhere.

A warning sign reads: "All Ye Concerned with 'Facts' Need Not Proceed." Not that you *could* pin down the truth of this place, were you so inclined. Prank history is usually oral and is wont to warp as it passes from class to class. Nor can news reports be entirely trusted, dis-

torted as they sometimes are by industrious, media-savvy pranksters, or by duplicitous student journalists, who may themselves be involved in the very pranks they report.

These ambiguities accepted, however, the legends of Harvard pranksters past provide a starting point to help us place our six freshmen—now brazenly gallivanting about the steam tunnels—amid the historical mayhem.

Enter one notorious prankster, the aforementioned Conan O'Brien, once president of the *Harvard Lampoon* and now a late-night talk-show host on NBC. Legend has it that O'Brien spent a night in jail following a stunt he pulled as an undergraduate. (On "advice of counsel," O'Brien declined to comment.) Having procured a jack-hammer as well as several hard hats and other construction-related paraphernalia, he and a group of fellow students cordoned off a section of street in downtown Boston and went to work, as it were, tearing up the pavement.

O'Brien then reported his own crime to the Boston police: college students dressed as construction workers were