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The Internal Incoherence of the Trump Administration's Demand Letter to Harvard

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The extraordinary **demand letter** sent by the Trump administration to Harvard University on April 11 has been rigorously criticized as a serious threat to time-honored and fundamental constitutional rights, especially rights under the First Amendment. For these reasons Harvard's rejection of those demands and its determination to resist, rather than placate, the administration has in the main been greeted by substantial support.

While we do not dispute these critical concerns about constitutional overreach, we think it is also important to recognize the internal incoherence of and absence of intelligible principles within this demand letter. Whether the administration's demands are constitutional (and whether, as has been reported, the administration sent the April 11 letter prematurely, before administration officials had finalized their views), we think it is worth everyone's time to ask whether the demands in the letter (which, after all, was sent, whether mistakenly or not) make any sense, even on their own terms.

While the letter insists that Harvard do many things, a few requirements stand out:

Merit-Based Hiring Reform: Harvard must “adopt and implement merit-based hiring policies, and cease all preferences based on race, color, religion, sex, or national origin throughout its hiring, promotion, compensation, and related practices among faculty, staff, and leadership.”

Merit-Based Admissions Reform: Harvard must “adopt and implement merit-based admissions policies and cease all preferences based on race, color, national origin, or proxies thereof, throughout its undergraduate program, each graduate program individually, each of its professional schools, and other programs.”

Viewpoint Diversity in Admissions and Hiring: Harvard must arrange “to audit the student body, faculty, staff, and leadership for viewpoint diversity, such that each department, field, or teaching unit

must be individually viewpoint diverse.” Moreover, Harvard must “abolish all criteria, preferences, and practices, whether mandatory or optional, throughout its admissions and hiring practices, that function as ideological litmus tests. Every department or field found to lack viewpoint diversity must be reformed by hiring a critical mass of new faculty within that department or field who will provide viewpoint diversity; every teaching unit found to lack viewpoint diversity must be reformed by admitting a critical mass of students who will provide viewpoint diversity.”

Reforming Programs with Egregious Records of Antisemitism or Other Bias: Harvard must “audit those programs and departments that most fuel antisemitic harassment or reflect ideological capture.”

Do these ambitious demands fit together in any coherent way? The Trump administration’s fervent opposition to racial, gender, or religious preferences in hiring and admissions is grounded in its belief (one that seems to be shared by a majority of Supreme Court Justices, and most Americans, for that matter) that the pursuit of diversity along these dimensions undermines meritocratic competition. From this perspective, the only way to make merit-based decisions is to evaluate the strength of applicants as individuals, not as members of a racial, gender, or religious class. Since people of one race or gender or religion are not, by virtue of their membership in that group, inherently more (or less) capable than people of other racial, gender, or religious groups, membership in any such group should play no role in who gets hired or admitted. Thus it is not surprising that the administration’s letter lists this foundational commitment to merit-based selection as one of its first

demands.

But can this commitment to merit *uber alles* peacefully coexist with the letter's demand that every department, field, or teaching unit contain viewpoint diversity? (It bears noting here that the requirement of viewpoint diversity cannot be defended as a way to avoid ideological capture and litmus tests; those evils are separately prohibited, and so the commitment to viewpoint diversity as an absolute requirement in each department must be defended on its own merits, no pun intended.)

Certainly, no one could believe that the most renowned and impactful academic departments at American universities—the ones we would rank highest in terms of scholarly merit—are always ideologically diverse. The University of Chicago's economics department does not in our lifetimes seem to have been remotely evenly balanced across the ideological spectrum, and yet no one could reasonably deny that it is chock full of very meritorious scholars. Smaller departments, such as nuclear physics, are even less likely, because of their numerical size, to necessarily contain a great deal of ideological diversity, and yet a department of 10 conservative (or liberal) atomic physicists could easily be the best in the country. Indeed, given that faculty are hired one at a time, an insistence that merit be the overriding factor in each hire almost guarantees that for some small departments, the pursuit of ideological diversity is not orthogonal to the pursuit of excellence but instead could be directly antithetical to it. In this way, the letter's requirement that there be a critical mass of students and faculty reflecting diverse viewpoints directly contradicts the letter's insistence on merit-based decision making. In other words, even assuming that

viewpoint doesn't correlate with merit (a point to which we will return), the limitations of the law of averages, combined with the relatively small size of many departments, will virtually guarantee that a pursuit of ideological balance (while perhaps laudable for other reasons) will compromise an absolute commitment to merit.

We do not claim to know how viewpoints might skew interest and demonstrated ability in various fields. But if the strongest faculty candidates (and student applicants for admission) under some merit-based criteria in the Entrepreneurship Department within a Business school tend or happen to be libertarian, and the best faculty candidates (and student applicants for admission) in the School of Social Work tend or happen to be progressive—and if merit is the be-all-end-all of decision-making—why should faculty or students with less meritocratic promise be favored over other, stronger, faculty and student candidates simply in order to achieve viewpoint diversity? To put things more pointedly, why is hiring or admitting a critical mass of less-qualified (on some meritocratic scale) faculty or students because of their viewpoint any less antithetical to a commitment to excellence than hiring or admitting a critical mass of African Americans who may not fare as well on whatever meritocratic scale is used? To carry the argument to its ultimately absurd conclusion, do we really need a critical mass of viewpoint diversity among the faculty in the music department, or should the most renowned and creative musicians be the ones we want?

The internal irrationality of the commitment to ideological diversity becomes even more pronounced when we consider that the administration that wrote the Harvard letter has, in innumerable other

contexts, made clear that it believes people who adhere to ideas on one end of one important ideological spectrum, political liberals, tend not to be thoughtful, wise, or effective. Why would an administration that thinks Leftist ideas generally lack rigor and commonsense want to make sure that every academic department has at least some Lefties, when the overall and overriding goal is to have each department operate at the highest meritocratic level?

The letter's demand for viewpoint diversity is problematic not just because it so flagrantly contradicts the letter's purported commitment to merit-based selection; the viewpoint-diversity mandate also lacks intellectual rigor when examined in isolation. Take the word "viewpoint." It has a commonsense meaning, but it also happens to be a legal term of art. For constitutional law purposes, any perspective or opinion on a topic, no matter how irrational or invidious such opinion may be, is considered to be a viewpoint. Is the administration's letter seriously demanding that there has to be a critical mass of faculty and students of literally all viewpoints in every department in the University?

White Supremacy is a viewpoint. So is antisemitism, a viewpoint the letter rightly deplores. Does the African-American Studies Department have to hire a critical mass of faculty who believe slavery was a positive good? Does the Jewish Studies Department need to hire a critical mass of faculty who believe in antisemitic conspiracy theories or that Jews are forever damned for committing deicide? Marxism is a viewpoint. Does the Economics Department have to hire a critical mass of Marxist faculty or admit a critical mass of Marxist students? We certainly hope

not.

The letter's demands become increasingly complex and convoluted with regard to its requirements relating to religion. The letter demands the end of any preferences in hiring based on, among other things, religion. Here, religion seems to be equated with identity and immutable characteristics like race and national origin. Religion in this sense should not be taken into consideration in faculty hiring decisions.

But while religion is an identity, religion is also more than an identity. It is a system of beliefs. More importantly for the purposes of understanding the administration's letter, religion can also be a viewpoint of speech. As a factual matter, the reality that religion expresses a distinct kind of message, a religious viewpoint, can hardly be denied. Religion is a major voice in American public discourse. Religious exercise is often expressive in nature. Sermons, prayer, religious books and pamphlets, proselytizing missionaries are all expressive activities and cannot reasonably be characterized as viewpoint neutral.

Indeed, in many, many cases, the Supreme Court has held that religion is a viewpoint for speech purposes, such that governments cannot disfavor religious individuals or organizations because doing so would constitute impermissible viewpoint discrimination.

This reality creates another contradiction. Religion should not be taken into consideration in hiring because it is inconsistent with merit-based decision making. But under the requirement of viewpoint diversity,

departments must hire a critical mass of faculty who hold different religious viewpoints.

Recognizing that religion is a viewpoint also reinforces the inescapable impracticality of the letter's demands. There are hundreds of religious denominations in the United States. Must universities include faculty adherents of all of these beliefs to achieve the required viewpoint diversity? Further, there are numerous divisions within religious denominations. Is the government going to decide which denominations are sufficiently similar such that having a member of one faith on a faculty is inclusive of the viewpoints of other faiths, which may in fact reject any such affinity of belief?

For the record, one of us attended Harvard Law School. Both of us have been highly critical of that university although we recognize the value of the education that Harvard offers. And both of us are clear in our view that this administration's letter should never have been delivered to Harvard as written, and that Harvard had no choice but to reject its demands in their present form.

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