

**Episode 2,370: Time to Slay the Diversity, Equity, Inclusion (DEI) Dragon**

**Guest: Josh Hammer**

**WOODS:** All right, let's start off, because I just have to. I did an episode with, I think it was the head of the Federalist Society at Stanford, about what happened (I don't know how many months ago it was, but not too terribly long ago) when a federal judge was supposed to speak there, Kyle Duncan.

He was not able to speak because – we all know why, because of the way these people act. And he at one point asked for a dean.

Oh, they gave him a dean, all right. But they gave him what I consider to be a fake dean, the "diversity, equity and inclusion" dean, who got up there and scolded him rather than the students who were disrupting his presentation.

I mean, it really is something out of a Kafka novel, really. Well, there is a, at least – I don't know what's going to become of that dean ultimately. But in the immediate run, I think, a deliciously satisfying conclusion to that story. And so, I'll let you tell it.

**HAMMER:** Well, I also did a whole episode on my own podcast, The Josh Hammer Show, on this horrible affair that happened at Stanford Law School back in March.

And like you, I was very happy to see a modicum of justice come in the way of the Stanford Law School DEI dean Tirien Steinbach's "resignation". I mean, it's probably a bit of a forced resignation, if I had to guess. But a modicum of justice has been rendered in that particular situation.

This was a truly, truly terrible affair that happened at Stanford back in March. I referred to it as a possible turning point in the long-standing warfare against on-campus radicalism. The "on-campus woke jihad" is kind of the colorful phrase that I think I use. Whatever you want to refer to it.

And it involved a federal judge who actually personally know. So, I know Kyle Duncan, because that is the court that I myself clerked on. So, I'm actually a lawyer by training. I clerked on the US Court of Appeals for the Fifth Circuit for Kyle Duncan's colleague, Judge Jim Ho.

It was actually the year that both Jim Ho and Kyle Duncan both became Fifth Circuit judges. So, I've known Kyle Duncan for years. I think very highly of the man on both a personal level and a jurisprudential level.

So, this thing really hit me like a ton of bricks when it happened at that time. When you had these galling video clips that went viral of Tirien Steinbach getting up there and reprimanding this esteemed federal appellate judge on behalf of this frothing-at-the-mouth woke mob of mini-Robespierres who really just wanted Kyle Duncan's head, saying just all sorts of disgusting stuff.

By the way, Tom, I don't know if you remember just the absolutely vile things that were coming out of these students' mouths. As Kyle Duncan actually wrote in his own *Wall Street Journal* op-ed that was recounting the story, he said how one of the students literally said: *I hope your daughter gets raped*.

I mean, like, what the hell? I mean, this is Stanford Law School. Like, the nation's number two ranked law school, according to *US News and World Report*. So, I was really happy to see that Tirien Steinbach is no more at Stanford Law School.

She was the culprit of all in this horrific affair that happened in Stanford. Now, no one at Stanford really ought to get off scot-free. It is necessary, but insufficient, I think, what happened to Steinbach. I would like to see more happen to the actual students who were involved here.

I would like, ideally, to see them precluded from membership at the bar when it comes time to apply for a bar. So, as someone who myself is barred, I'm barred in Texas. I know that you had to go through a character and fitness qualification when you apply for a state bar.

And ideally, in my mind (and I've seen others argue) these horrible, horrible actors, these students, ought to be barred from being barred. That's a bit of a double entendre. But they should be barred from being barred on grounds of character and fitness.

That ideally would be the next step here. But let's take some good news where good news is due. And Tirien Steinbach is, thank goodness, no more at Stanford.

**WOODS:** When you say that it might have been a forced resignation, do you think that some of the remarks we were hearing from judges saying: *You will not be able to clerk for me if I find that you're a Stanford graduate. And I have to do this as a way of trying to preserve the integrity of the law schools. There have to be consequences, and one of them is that.*

Do you think that affected the law school? Or do you think there was some other motivation behind this?

**HAMMER:** It's a good question. It's always hard to say exactly what the motivating factor for any given decision was. I am proud of the fact that Judge Jim Ho, who I just mentioned earlier, he was the man that clerked for.

Judge Jim Ho was the one who led the charge on boycotting law clerk hiring from Stanford Law School, along with Lisa Branch of the 11th Circuit another esteemed and excellent conservative jurists on that particular appellate tribunal.

So, Judges Ho and Branch had previously announced a boycott of hiring law clerks from Yale Law School after a similar incident happened there last year involving Kristen Waggoner of the Alliance Defending Freedom.

And it's actually kind of similar, when I think about it, Tom. Because what happened at Yale was after Judge Ho and Judge Branch announced their boycott there, you had kind of a slight ruffling of the feathers internally at Yale.

And then actually Judges Ho and Branch went to Yale to do an event there with the dean. And I'm not sure that we've reached kind of a full modus vivendi of sorts. That would be overstating it. But there was at least some action taken at an official level at Yale to try to mollify some of the critics.

It stopped short of firing anyone. Which, Stanford – again, she wasn't technically fired, but she probably was fired. So, Stanford, regardless, has done a little more than Yale did. So, hard, again, to kind of directly trace the cause-and-effect timeline.

Especially when, as was the case here, I think Judge Ho announced his boycott of hiring law clerks from Stanford – I think was in late March, if I'm not mistaken. It was either late March or early April. So, it's been a number of months now. It's been, like, three and a half, four months or so.

So, hard to say that correlation equals causation in any given time, but I think it definitely helps to put pressure. I do feel strongly about this. Ideally, more judges would have joined at that time.

I think it is tragic that it was only Judge Ho and Judge Branch, to my knowledge, who had announced these law clerk hiring boycotts from Yale and Stanford.

I'm not sure why the rest of the federal judiciary has been so timid when it comes to this. Because if you think about the way the law clerks are hired, the judges themselves wield enormous, enormous power to shape the markets, to shape the supply and demand curves as to what the law clerk hiring marketplace looks like there.

And I just thought it was deeply principled and admirable for judges Ho and Branch to do what they did. And I imagine that it definitely had some effect, at a bare minimum, on what happened to Tirien Steinbach at Stanford.

**WOODS:** Do you mind if I ask what year you graduated from law school?

**HAMMER:** 2016 University of Chicago Law School.

**WOODS:** Okay, so it's seven years. And yet – it's funny. When I think back to my graduating from undergrad, which is (ahem) more than seven years, 1994, I feel like the undergraduate landscape has been completely transformed.

I don't even want to go give speeches on college campuses anymore. It's radically different during that time frame. But do you think the situation, even just in the – because I think in the country at large, just over the past seven years, things have gotten much worse.

What's your instinct about the state of the law schools? And then we'll get into the DEI question.

**HAMMER:** Yeah, I think it's gotten demonstrably worse, and I have lived that out firsthand. I mentioned University of Chicago, where I went to law school. So, Chicago famously has the Chicago Principles, which was actually kind of codified while I was there.

It's kind of adjacent to the Calvin Report, which is a creature of the late 1960s, if I recall, And it kind of stands for University of Chicago's fairly unadulterated, straightforward, and vigorous institutional commitment to free speech and free inquiry, which is, of course, admirable.

And that was my law school experience. I mean, I went through my three years there feeling that, and there was never really any kind of institutional pressure. But things really did start to go downhill fairly quickly.

I think it was November 2016 where Trump obviously had the upset over Hillary Clinton. I think it was after that election where I read some alumni headline on some listserv about how some student group at the law school had organized a cry-in session.

And there were various other incidents over the past few years after that. There was an incident in 2018 involving a conservative student group that was I was involved with where it was just horrible. All the left-leaning student body basically tag teamed with the administrators to try to kick that group off campus.

 So, it's absolutely happened to an extent at University of Chicago Law School. I was actually also there in person when my friend Eugene Kontorovich was shouted down by a mob of pro-Palestinian protesters at a pro-Israel event at the law school back in April of 2019.

Although, it's worth noting that University of Chicago actually had a wonderful response to that particular endeavor, where they actually effectively expelled the student ringleader. So, they actually handled that one properly.

But in my own capacity – kind of just moving outside of Chicago for a second. I've been protested any number of times at events that I have given.

I've been protested twice at Northwestern Law School, most recently in October of 2021, where I would estimate probably 35 to 40 people all protested my law school talk wearing matching black t-shirts and holding up all sorts of juvenile signs mocking the topic that was about to speak about.

And just earlier this year, in February 2023, I was at DePaul, also in Chicago, and I was protested there. The local Federalist Society actually permitted the protesters to read this ridiculous and frankly, just patently stupid 7- or 8-minute statement, just mocking things that I had written or tweeted or whatever.

I kind of stood to the side, just not really listening, scrolling my Twitter feed. So, yeah, I mean, it's definitely gotten worse just since I graduated unfortunately.

**WOODS:** All right. Well, on a happier note, let's move on to the subject of DEI. Which is not a happy note, but maybe the trends are looking up, given the momentum that we have because of the Supreme Court affirmative action decision.

You pointed out in your article that a coalition of 13 Republican state attorneys general sent a letter to the CEOs of all Fortune 100 companies. What was that letter all about?

**HAMMER:** So, yeah, there's been a couple of major developments, I think, in the pushback against DEI. And it's worth setting the table here, Tom, just for a second, if I may.

This is all happening in the aftermath of the long overdue overturning of so-called "affirmative action" at the US Supreme Court, which happened under a month ago, still, at this point. It was towards the end of June.

And after that, the question many of us had is, okay, we have finally seen this vindication of a colorblind constitution, of a colorblind Title Six when it comes to affirmative action.

It took way too long. I mean, the road from *Brown versus Board of Education* to *Students for Fair Admissions versus Harvard and UNC Chapel Hill* took almost 70 years. 69 years, if my back of the envelope math is correct.

And the question many of us had is, okay, now this happened, what's going to come next in the fight for colorblindness and the fight against race consciousness, in the fight against racial determinism, frankly, in the fight to uphold Martin Luther King's vision that we are judged not by the color of our skin, but by the content of our characters and the fight against the Ibram X Kendi anti-racism, intersectional vision?

Which, frankly, is kind of just the bastard flip side of the same coin, if you will, of John C Calhoun's own form of racial determinism and race centricity in the antebellum years. That really, frankly, is what you saw actually from Justice Ketanji Brown Jackson in her horrible dissent in the affirmative action cases.

And to your point, I've been delighted that there's been a couple of major letters that have been written just over the past few weeks in the aftermath of the affirmative action cases. So, one was written by a coalition of 13 Republican state attorneys general.

It was led by Kris Kobach of Kansas and Jonathan Skrmetti of Tennessee. And they wrote this letter to the CEOs of the Fortune 100 companies.

And they basically (just to kind of briefly quote the letter) were trying to "remind" the CEOs of their "obligations as employers under federal and state law to refrain from discriminating on the basis of race, whether under the label of diversity, equity, and inclusion or otherwise".

And they cite Title Seven of the Civil Rights Act. And the upshot, the point of this letter, is – and Tom Cotton, the esteemed senator from Arkansas, sent a very similar letter to 51 of the largest global and national law firms, also mentioning the plain text of both Title Six and Title Seven.

So, very similar letters. That they were sent to the Fortune 100 and big law, basically, warning them about DEI.

And warning them that these roving commissars, these roving bands of diversity-crats who exist in Title Nine offices on university campuses, who exist in the HR divisions of God knows how many corporations and law firms and whatnot throughout America.

Basically warning them that to the extent these DEI offices are actually discriminating on the basis of race (which they pretty much almost all are, because that is their reason for existing) then they are flouting the law and that they are thereby put under scrutiny.

That they will be scrutinized by these attorneys general and by the members of Congress for purposes of lawsuits, investigations, subpoena power, all of the above.

And it's not clear exactly how much more we could ask for at this exact stage. Ideally, we would like to see some litigation to kind of ultimately extirpate this horrible cancer of from our nation.

But for right now, this was a heck of a start and I've been quite pleased with it.

**WOODS:** All right. Let me play devil's advocate here a little bit. I am more opposed to affirmative action than basically anybody. I mean, I yield to nobody in my opposition to it. I think it's destructive for absolutely everybody involved.

There are very, very few clear and unambiguous beneficiaries. I mean, maybe people who staff the bureaucracies of the affirmative action establishment. Maybe they benefit, but don't think anybody else really benefits from it.

But having said that, the real problem with DEI is that if I have a firm and I decide I'm going to hire exclusively on merit. And if that means that my workforce is not in direct racial proportion to the proportion of the various races in society at large, I can get in trouble.

I can wind up with the Justice Department knocking on my door, the Civil Rights Commission, or whatever it is. So, the real problem then is that I have to hire under duress, basically. I can't just consider merit.

I have to consider, well, I don't want to be sued. I don't want to lose my livelihood. I don't want my reputation destroyed. So, I have all these other considerations that go into the hiring process.

So, to me, the big problem is we have this enormous anti-discrimination bureaucracy that stifles the labor market and makes it irrational.

So, to me, I would be quite satisfied, even though I know a lot of people will still make stupid hiring decisions, if we simply said you can hire on whatever basis you want, and if it comes out that it's not exactly even, if you don't have 12% black or this or that percent of whoever, you're not going to get in trouble.

I'd be satisfied with that. But it seems like these Republican attorneys general are saying: *No, we want to keep a huge bureaucracy overseeing the hiring process all over America, except this time we're going to make sure that it conforms to our principles.*

How about we just say: *Go ahead and hire anybody you want to hire, and you have to live with the consequences.*

**HAMMER:** I mean, that's fine as a first principle. I mean, that's basically the Barry Goldwater stance in 1964. And that's a perfectly legitimate libertarian stance to take.

As a matter of political philosophy and public policy that is entirely the ambit of the Congress to make those decisions.

The ambit of the attorneys general is to enforce the law, and it is certainly the ambit of these Republican conservative attorneys general to try to enforce the law and to do their best within their own limited ambit of their own constitutional authority to try to enforce the law in a direction that will kind of nudge the polity.

That will nudge the legal culture towards a system where we do not judge people on the basis of race. And extending, if they can, the holding in the ruling and students for fair admissions in a salutary direction.

So, I mean, what you argued, I think, is a legitimate thing for the Congress to argue. I mean, I would welcome an open and robust debate in the Congress as to whether it is time to try to pare back the Civil Rights Act apparatus, to an extent.

I think it's a very healthy debate for the Congress to have at this point now that we are almost 60 years after the Civil Rights Act. Jim Crow, thank God, is a relic of memory at this point. But that's just not the job of the attorneys general in particular.

**WOODS:** Let me ask you this. Now, this will require a little bit of speculation, but it's speculation that everybody is engaged in.

After that case came down from the Supreme Court relating to Harvard and UNC – or, the very day that the decision was handed down, I got an email because I'm on Harvard's mailing list as an alumnus.

I got an email from them in which – I mean, it was, like, tearful. They were beside themselves. They hardly knew what to do. But if you read the wording of it, it was quite brazen.

In effect, what they were saying is: *We have a lot of smart people over here at Harvard. And we're going to put our heads together and basically figure out a way to get around this.*

That was the way I read it. I don't know if you saw it also. But I read it as: *We are going to figure out a way around this where technically we are in compliance, but maybe in the spirit of things and if we're being honest with ourselves, we're not.*

Do you think there's wiggle room for them? Or, what do you think they're going to try to do?

**HAMMER:** Yeah. So, I saw that same email. And it was not a good email. You are right to flag it. You are totally correct to do that.

Look, I have no doubt that there are any number of, kind of, miscreants and malefactors in higher education, which itself has increasingly become a monolithic cesspool of liberalism and elite progressivism.

I have no doubt that there are any number of people in admissions offices who are going to try to flout (or undermine more subtly than openly flouting perhaps) the rulings in *Students for Fair Admissions.*

And it's ultimately going to come not just on attorneys general, not just on prosecutors – although they certainly have a role to play here as well. But it's ultimately going to come on we, the people, to try to, to an extent, self-police.

To try to file lawsuits that could deter poor actions, bad actions by these officers, and from trying to undermine, effectively, the ruling. What I mean by that is university admissions officers – this is a key point.

And this is, kind of, why I take a glimmer of hope. It's important to note that university admissions officers post *Students for Fair Admissions*, in this new world that we are living in, they are personally liable for monetary damages under the civil rights statutes, 1981, 1983, and so forth, if they are found liable in court for actually utilizing using race when it comes to admissions decisions there.

What that means in practice is if you have a white, Christian, Asian, or Jewish plaintiff perhaps, who can show that he or she was denied a place in a university from someone who perhaps was black or Hispanic who was otherwise underqualified.

If they can demonstrate that based on the actual discovery that would take place – and admittedly that's going to be hard. I mean, maybe they just won't put it into writing. Maybe they won't have the texts or the emails.

So, yes, there are definitely some potholes here. But if those kinds of lawsuits can be shown via discovery at a trial in open court, those university admissions officers will be personally liable for monetary damages for the very simple reason that universities cannot indemnify their own admissions officers for conduct that is illegal.

And I would have liked a little more – to your point, Tom. I would have liked a little more in the opinion from Chief Justice John Roberts. It's otherwise an excellent majority opinion, probably the greatest majority opinion of his entire career, I think.

But I would have liked a little more, in his opinion, fleshing this out, what you and I are talking about right here. He does have a line kind of shooting down a snarky aside of sorts from the dissenting opinions from Sotomayor and Jackson.

He does have a snarky aside saying that: *Oh, you can't just get around this by writing an essay about race or whatever.* So, he does address it, but would have liked to have seen a little bit more of a concrete addressing.

But yes, to your question, getting back to that, I have no doubt that many will try to get around this. Perhaps some will be successful in that endeavor.

But ultimately, we're going to need some strategic litigation, both prosecutions and civil lawsuits, to try to keep these officers in line and ultimately uphold this very meaningful opinion.

**WOODS:** I remember when Ruth Bader Ginsburg died, a lot of people said things like: I admired her because she fought for what she believed in. And I would – I don't know what the word is "taunt". But let's say I would reply to people like that on Twitter.

And I would say: *That just goes to show that most people have no idea what the role of a Supreme Court justice is. It is not your role to "fight for what you believe in"*.

But I think that that kind of advocacy and activist mentality is what yields you a regime like DEI in which a lot of the courts will uphold this and pretend that it's normal and that it's perfectly okay to persecute a firm that isn't actively engaged in it.

It's that. And the idea that actually the purpose of the Supreme Court is to interpret the law. It's not to "fight for what you believe in". I mean, I know that sounds plausible, but that is not the point of it.

**WOODS:** Yeah, look, I mean, some of this is just bread and butter, separation of powers stuff. I mean, the Congress makes the law. The executive branch enforces the law. And the judiciary interprets the law.

And we've all read that famous quote from Alexander Hamilton in The Federalist 78. Where, *"The courts have neither force nor will, but merely judgment. And depend upon the efficacy of the executive branch, even for the enforcement of their own opinions."*

By the way, that's kind of why Article Three judicial opinions, or court opinions more generally, are just called "opinions". Because it is the opinion of the court and it's trying to persuade other actors in the system as to the correctness of the adjudication, as to the correctness of the ruling.

And thereby in trying to persuade the executive branch, hoping that the executive branch, due to its own good will, will choose to enforce that decision rather than to flout it like Andrew Jackson did back with the Trail of Tears and other various examples like that.

Abraham Lincoln, of course, flouted the Dred Scott ruling after he was sworn in as president. And a few other examples come to mind as well there. But yeah, look, Ruth Bader Ginsburg is actually kind of interesting.

In many ways, leftists who are decrying the direction the Supreme Court has gone over the past couple of years – and I do note that these objections as to this crazy right-wing reactionary Supreme Court are typically dramatically overstated.

If you look at the data from this past Supreme Court term, you will notice that the two justices who found themselves in the majority least often – least often! – were actually the court's two foremost conservatives, Sam Alito and Clarence Thomas.

People don't talk about that very much, do they? But if you see these folks who are arguing against the direction more broadly the court has gone in the past couple of years, I think it's worth underscoring that their own hero, Ruth Bader Ginsburg, bears a huge brunt of the blame, actually, for this.

Ruth Bader Ginsburg could have chosen to retire under Barack Obama back when Democrats controlled the Senate towards the end of his administration. She could have easily done that and they probably would have secured the court.

Well, they deftly would have secured the court for at least a little longer than they would have. When Justice Kennedy retired, he was replaced by Justice Kavanaugh. The Scalia death, and Merrick Garland, and Neil Gorsuch, all that is kind of a separate tale.

But if Ruth Bader Ginsburg had retired during the Obama presidency and Democrats had appointed her successor, we definitely wouldn't have gotten Amy Coney Barrett, that's for sure. So, it's kind of ironic.

It's kind of a bit of a twist of fate that I think many of these Democrats who so besmirch the current court and call into question its institutional legitimacy, well, they really should actually be looking at Ruth Bader Ginsburg as part of the problem there.

**WOODS:** Of course, we can't get inside her head, but it seems that the way you're describing it, what could account for her refusal to do this other than vanity? Given she's not going to live forever, there's no guarantee Obama will be succeeded by another Democrat.

And so many important issues hang in the balance here. Maybe you'd take one for the team. I don't know why I never even thought of that, actually, until you mentioned it just now.

**HAMMER:** I think vanity combined with hubris. I mean, vanity combined with just this excessive confidence that Hillary Clinton was obviously going to win the 2016 presidential election. Think back to that time.

**WOODS:** That's true.

**HAMMER:** And everyone thought that Hillary was going to win. I mean, the idea that Donald Trump – I mean, like, the *New York Times* Predictor Meter had it at, what, like 99%? I mean, everyone and their mother predicted Hillary Clinton would win that election.

So, she was probably following the news, the political prognostications, the polls, kind of just like any politically attuned person does. But yeah, I mean, the left in this country made her out to be a folk hero, the likes of which maybe no other justice in the history of the court has been made to be a folk hero: The Notorious RBG.

She had liked a documentary made about her back in 2018 or 2019, whenever that documentary came out. And it probably got to her head, to be candid. I'm sure that's exactly what happened.

**HAMMER:** Josh, how can people follow you?

**WOODS:** I'm on Twitter, @Josh\_Hammer. My syndicated column goes to many places, including Newsweek (my own publication) and a number of conservative-leaning outlets. I've also got my own podcast, The Josh Hammer Show, which is on Apple, Spotify or wherever you get your podcasts.

**HAMMER:** Well, I appreciate your time. I'm going to link to the article that we've been talking about on our show notes page. This is episode 2370. I've been at this rather a while. So, TomWoods.com/2370. Thanks so much, Josh.

**WOODS:** You bet. Thanks for having me.