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Supreme Court Argument on Affirmative Action Could Impact the United States Military

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10.2 — Other Supreme Court Cases

What is Affirmative Action

The term “affirmative action” was first used by President John F. Kennedy in a 1961 executive order instructing federal contractors to take “affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin.”³ The Civil Rights Act of 1964 was soon after signed into law, which prohibited employment discrimination by large employers, irrespective of the employer having government contracts.⁴ In 1978, the Supreme Court of the United States heard *Regents of Univ. of Cal. v. Bakke* where the Court decided whether or not UC Davis’ medical school special admission program violated the Equal Protection Clause of the Fourteenth Amendment and §601 of Title VI of the Civil Rights Act of 1964. The medical school reserved 16 of 100 seats in an incoming class for members of minority groups. Bakke was a white male who was denied admission, even though other admitted students had “significantly lower” GPAs and test scores.⁵ Ultimately, the Court held that UC Davis’ quota system was improper, but a different type of program that was designed to promote “the attainment of a diverse student body” would be considered “precisely tailored to serve a compelling governmental interest” and therefore constitutional.⁶ The Court explained “[t]he diversity that furthers a compelling state interest encompasses a far broader array of

¹ We invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

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³ AMERICAN ASSOCIATION FOR ACCESS, EQUITY, AND DIVERSITY, https://www.aaaed.org/aaaed/History_of_Affirmative_Action.asp (last visited Nov. 7, 2022).

⁴ *Id.*

⁵ *Regents of Univ of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁶ *Id.*

qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁷ Essentially, lawful affirmative action programs could take race into account in making admissions decisions as long as it was not a quota and was for a permissible reason.

How does Affirmative Action impact the Military?

In the most direct manner, affirmative action policies can impact the officer corps of the United States military through the service academies. Right now, the Army, Navy, and Air Force academies practice affirmative action and use race as a factor in admissions.⁸ In practicing affirmative action, the academies are able to boost the diversity of their student body, who are future officers of their respective branches. Each year, about 1,000 cadets and midshipmen graduate from the Air Force Academy, United States Military Academy, and the Naval Academy, respectively.⁹ Most of these newly commissioned officers are obligated to serve a period of five years on active duty, and three years inactive reserve.

Officers are also developed through public and private universities’ ROTC programs. ROTC, the Reserve Officers’ Training Corps, is a college-based training program for officers in each of the Armed Forces. Many of these colleges and universities also use affirmative action policies in their admissions procedures to help them obtain a more diverse student body. Through these ROTC programs, a student’s college tuition will be paid in exchange for a commission and service obligation following graduation. In 1964, Congress passed the ROTC Vitalization Act that authorized the DoD to pay for ROTC participants’ educational expenses.¹⁰ This statute also limits the number of participants who can receive financial assistance to 5,500 per department (Army, Navy, and Air Force).¹¹ This equals out to a maximum of 16,500 ROTC graduates annually.¹² According to the most recent report from the Congressional research Service, in Fiscal Year 2019, 5,111 active duty officers commissioned out of ROTC programs.¹³

In FY 2019, a total of 16,913 officers commissioned into the Army, Air Force, Navy, and Marine Corps.¹⁴ Of those, 3,052 were from service academies and 5,111 were from ROTC programs. Therefore, 8,163 of the 16,913 newly commissioned active duty officers, or 48.26%, were from programs subject to affirmative action policies.

⁷ *Id.* at 315.

⁸ Irene Loewenson, *If Supreme Court ends affirmative action, how will the military adapt?*, MILITARYTIMES (Oct. 26, 2022), <https://www.militarytimes.com/news/your-military/2022/10/26/if-supreme-court-ends-affirmative-action-how-will-the-military-adapt/> (last visited Nov. 9, 2022).

⁹ USNA ADMISSIONS, <https://www.usna.edu/Admissions/Apply/Class-Portrait.php> (last visited Nov. 9, 2022); DEMOGRAPHIC PROFILE OF THE INCOMING USAFA CLASS OF 2025, <https://www.usafa.edu/app/uploads/CL2025-Class-Profile.pdf> (last visited Nov. 9, 2022); NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/collegenavigator/?q=west+point&s=all&id=197036#retgrad> (last visited Nov. 9, 2022).

¹⁰ CONGRESSIONAL RESEARCH SERVICE, DEFENSE PRIMER: SENIOR RESERVE OFFICER TRAINING CORPS (2021).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

Diving deeper into the demographics of newly commissioned officers, 73.92% of newly commissioned FY2019 officers were white, meaning that 26.08% identified as a racial minority.¹⁵

Looking at the entirety of the officer corps, the most recent DoD report on the Demographic Profile of the Military Community was published in 2020. As of that report, there were a total of 234,634 officers across the Army, Navy, Marine Corps, and Air Force. Of those, 56,829, or 24.2% identify as a racial minority.¹⁶

Current Cases in the Supreme Court

At the end of October 2022, the Supreme Court heard two cases involving affirmative action. The first case, *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, addressed two issues: first, whether a **private college or university** should be allowed to use race as a factor in admissions; and second, “whether Harvard is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.”¹⁷ There was little to no mention of the impact of affirmative action policies on the military during this oral argument.¹⁸

The *Students for Fair Admissions, Inc. v. University of North Carolina* is a parallel case that addresses whether **public colleges and universities** can use race as a factor in admissions and “whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.”¹⁹

During the UNC case, Solicitor General Elizabeth Prelogar, the highest ranking government official tasked with representing the government in the United States Supreme Court, argued for the benefit of affirmative action policies. Within the first 30 seconds of her argument, she brought up the importance of diversity in the military.²⁰ General Prelogar argued:

Our armed forces know from hard experience that when we do not have a diverse officer corps that is broadly reflective of a diverse fighting force, our strength and cohesion and military readiness suffer. So it is a critical national security imperative to attain diversity within the officer corps. And, at present, it's not possible to achieve that

¹⁵ CENTER FOR NAVAL ANALYSIS, POPULATION REPRESENTATION IN THE MILITARY SERVICES FY 2019, APPENDIX B, TABLE B-25 (2019).

¹⁶ DEPARTMENT OF DEFENSE, 2020 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY, TABLE 2.24 (2020).

¹⁷ SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/> (last visited Nov. 21, 2022).

¹⁸ Transcript of Oral Argument, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 21-1199 (October 31, 2022).

¹⁹ SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-university-of-north-carolina/> (last visited Nov. 21, 2022).

²⁰ Transcript of Oral Argument at 143, *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (October 31, 2022).

diversity without race-conscious admissions, including at the nation's service academies.²¹

When questioned about the role of diversity for the purposes of education, Prelogar added that in service academies in particular, the benefits of diversity include increasing cross-racial understanding, challenging stereotypes and assumptions, reducing the sense of racial isolation, and greater participation by minority students.²² She also added that in order for the military leadership to be seen as legitimate in the eyes of the public, it must reflect the diversity of the country and of the enlisted personnel.²³ Prelogar also notes that more officers come from ROTC programs than service academies and that diversity in those programs is important for similar reasons.²⁴ When further questioned by Justice Kagan about the availability of race-neutral alternatives for achieving a diverse student body, Prelogar noted that service academies have engaged in race-neutral alternatives, like bolstering outreach efforts to underserved communities and soliciting additional nominations from congressional districts that don't normally send as many students to academies.²⁵ Prelogar argued that other alternatives, like socioeconomic preferences or a top 10 percent plan, would actually increase the number of white men at service academies based on prior studies undergone by the service academies.²⁶

Briefs were also filed by former flag officers and the top Pentagon lawyer voicing their concerns about the impact of reduced racial diversity on military effectiveness should affirmative action no longer be allowed.²⁷ Thirty-five top former military leaders, including 22 four-star Generals and Admirals, eight former superintendents of service academies, and four former chairs of the Joint Chiefs of Staff signed onto a brief stressing that the diversity gap between enlisted personnel and officers may widen without affirmative action.²⁸ These leaders also voiced their concerns about undermining institutional legitimacy and operational effectiveness, specifically in working with international partners and maintaining internal morale.²⁹

On the other side, Patrick Strawbridge, argued on behalf of the Students for Fair Admissions against affirmative action policies. He rebutted General Prelogar's argument by noting that:

We don't know precisely what race-neutral alternatives they have looked at. We don't know what has been tried. We don't know what else could be available to them,

²¹ *Id.* at 143-44.

²² *Id.* at 145.

²³ *Id.*

²⁴ *Id.* at 149.

²⁵ *Id.* at 146.

²⁶ *Id.* at 147.

²⁷ Irene Loewenson, *If Supreme Court ends affirmative action, how will the military adapt?*, MILITARYTIMES (Oct. 26, 2022), <https://www.militarytimes.com/news/your-military/2022/10/26/if-supreme-court-ends-affirmative-action-how-will-the-military-adapt/>

²⁸ *Id.*

²⁹ *Id.*

especially with the fact that they can draw on appointed -- appointments from the enlisted ranks, as well as from prep schools.³⁰

Strawbridge argued that the Coast Guard academy is the “only actual information we have about how race-neutral alternatives might work in the military setting” since there was a period of time that the Coast Guard Academy did not use race as a factor in admissions.³¹ In the final year that the Coast Guard was not using race in admission, Strawbridge noted “it expanded race-neutral recruiting and other pipeline initiatives, and it obtained underrepresented minority enrollment within two points of the Air Force Academy and West Point, which were using race as a -- as an admissions factor.”³² Speaking specifically to ROTC programs, Strawbridge argued that there was no evidence to suggest that ROTC students who came from programs that did not have affirmative action programs received fewer benefits of educational diversity than those from UNC.³³

A brief was filed by hundreds of veterans through the group Veterans for Fairness and Merit supporting Strawbridge’s argument. The veterans include 12 four-star Generals and Admirals, one service academy superintendent, 21 Medal of Honor recipients, and two Service Chiefs of Staff. This group argued that “this fixation on race can only foster a culture of arbitrary advancement, disunity, and frustration.”³⁴ They also argue that racial preferences are not necessary to achieve or maintain officer racial diversity and that officer racial diversity is not “critical” or “indispensable to” national security.³⁵ They also proffer that the use of racial preferences is harmful to national security and the “colorblind culture necessary for our military to prevail on the battlefield.”³⁶ Lastly, they argue that affirmative action policies at the service academies have been costly, inefficient, and lead to the intended minority-beneficiaries failing in disproportionate numbers with no evidence of increased combat effectiveness.³⁷

What Happens Next?

If the Court rules for UNC and Harvard, affirmative action policies will be allowed to remain as-is in public and private universities alike. If the Court rules against UNC and/or Harvard, we would not necessarily see an impact, if any, on the diversity of new ROTC officers for another 4-5 years from now when the next wave of four-year ROTC students commission out of those programs. We will have to wait and see whether the Court addresses service academies specifically in their decision. When Chief Justice John Roberts asked Prelogar whether she

³⁰ *University of North Carolina*, No. 21-707 at 177-78.

³¹ *Id.* at 178.

³² *Id.*

³³ *Id.*

³⁴ Brief for Veterans for Fairness and Merit at 22, Students for Fair Admissions, Inc. v. University of North Carolina, No. 21-707, Transcript of Oral Argument, Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, No. 21-1199.

³⁵ *Id.* at 5.

³⁶ *Id.*

³⁷ *Id.*

wanted the Court to view the military argument separately from civilian universities, or whether the military argument should “rise or fall” with Harvard and UNC, she did not give a direct answer.³⁸ Prelogar stressed the “distinctive interests” the military has in diversity, but also stressed the importance of the pipeline from colleges and universities with ROTC programs to the officer corps.³⁹ This leaves the Court open to determining that service academies are to be tied to the decision of one or both of these cases, or perhaps that their use of race in admissions will be addressed separately by a new case in the future.

Given that the Court heard these cases in late October, it is not likely that they will issue their decision until mid-2023. We will not know the true implications until the Court issues its decision. We will be sure to update this article when that time comes to keep you informed.

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ROA is more than a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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³⁸ *University of North Carolina*, No. 21-707 at 148.

³⁹ *Id.* at 149.

⁴⁰ Congress recently established the United States Space Force as the 8th uniformed service.

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⁴¹ You can also contribute on-line at www.roa.org.