DOI: 10.51845.38.1.8

Racial Preferences: What the Judge in *SFFA v. USNA* Got Wrong

by William A. Woodruff

Racially Discriminatory Admissions Prohibited

When the Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U. S. 181 (2023) ("*Harvard*"), declared the use of racial preferences in the admissions programs of Harvard and the University of North Carolina unconstitutional, colleges and universities that were not parties to the case reviewed their own programs and, presumably, adjusted them to conform to the Court's guidance. West Point, the Naval Academy, and the Air Force Academy, however, continued to use racial preferences despite the Court's ruling.

The Biden administration's Solicitor General, Elizabeth Prelogar, filed an *amicus* brief supporting Harvard and UNC arguing that racial preferences were necessary at colleges and universities hosting ROTC programs so future officers would have the experience of living and working in a diverse population. That experience, she argued, better equipped military officers to lead the troops under their command. In finding racial preferences unconstitutional, the Court rejected the claim that a "diverse student body" was a compelling interest sufficient to justify racial discrimination.

The Case Against the Naval Academy

In footnote 4 of the *Harvard* opinion, the Court noted that because the service academies were not parties to the case and their admissions programs had not been scrutinized by the lower courts, the Court was not passing judgment on the constitutionality of those programs. That task would have to be left to subsequent litigation where the legal and factual issue and potentially distinct interests of the service academies could be appropriately analyzed.

Students for Fair Admissions promptly sued West Point, the Naval

Academy, and most recently the Air Force Academy raising the same arguments that prevailed in the *Harvard* case: granting racial preferences in admissions violates equal protection guarantees.

The West Point case and the Air Force Academy case are still pending in trial court. The case against the Naval Academy went to trial before Judge Richard Bennett in the U.S. District Court for the District of Maryland. After nine days of trial, the judge ruled for the Naval Academy, holding that as a federal judge he was obligated to defer to the professional military judgment that a diverse officer corps was a national security imperative. Specifically, the judge accepted the opinions, unsupported by objective evidence or reliable data, of senior Department of Defense and Navy leaders that a diverse officer corps furthers national security interests by making the Navy more lethal in war, enhancing recruiting and retention, and adding domestic and foreign "legitimacy" to the American military.

A Compelling State Interest

Because the case dealt with unequal treatment based on race in making admissions decisions, the admissions program was subject to strict judicial scrutiny, the most exacting standard of review in the law. To pass strict scrutiny, the granting of racial preferences must further a "compelling state interest" and be "narrowly tailored"—meaning necessary—to achieve the goal of furthering the compelling interest. Furthermore, once the challenger, in this case SFFA, establishes the unequal treatment based on race, the burden shifts to the government to establish both the compelling state interest and the narrowly tailored policy necessary to further that interest.

No one disputes that national security is a compelling state interest. What was at issue in the case was whether racial preferences in the Naval Academy admissions program furthers that interest by creating a racially diverse officer corps.

Cautioning Lower Courts Not to Repeat Mistakes of the Past

Judge Bennett ignored important guidance from the Supreme Court. Much attention has been paid to footnote 4 of the *Harvard* opinion that explained why the Court was not deciding whether the service academy admissions programs were constitutional. But in the context of applying strict scrutiny to the Naval Academy admissions program, footnote 3 of the *Harvard* opinion is key.

Footnote 3 of the *Harvard* opinion says:

> The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), in the infamous case *Korematsu v. United States,* 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry in prescribed West Coast ... areas" during

> World War II because "the military urgency of the situation demanded" it. *Id.,* at 217, 223, 65 S.Ct. 193.
>
> We have since overruled *Korematsu,* recognizing that it was "gravely wrong the day it was decided." *Trump* v. *Hawaii,* 585 U. S. ___, ___, 138 S.Ct. 2392, 2448, 201 L.Ed.2d 775 (2018). The Court's decision in *Korematsu* nevertheless «demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification» and that «[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future."

To paraphrase Justice Roberts: "The last time we [SCOTUS] deferred to professional military judgment in a case involving unequal treatment based on racial or ethnic categories we approved a policy that put 120,000 Americans of Japanese ancestry in detention camps. We're not going to make that mistake again."

Judge Bennett seemingly missed Chief Justice Roberts' clear admonition. This is how Judge Bennett explained *Korematsu*'s application to the USNA case:

> In *Harvard*, the Supreme Court explained in a footnote that *Korematsu* demonstrates that "even the most rigid scrutiny" at times fails to detect an illegitimate racial classification and "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error." *Harvard*, 600 U.S. 181, 207 n.3 (2023) (citations omitted) (alterations in original). This language does not suggest that the Court rejects deference to military judgments, which has long existed within the rigid strict scrutiny analysis. Rather, the Court's language characterizes *Korematsu* as an application of "the most rigid scrutiny." *SFFA v. USNA,* No. 23-cv-02699-RDB, (*decided* Dec. 6, 2024) *slip op.* at 124, n. 72.

Judge Bennett viewed the Court's reference to *Korematsu* in *Harvard* as simply an example of appropriate application of strict scrutiny to military judgment rather than as a cautionary signal to be particularly careful when reviewing military practices that treat people differently based on suspect racial categories. He, apparently, missed the part where the Court said *Korematsu* was "gravely wrong the day it was decided." As a result, he did what the Court in *Korematsu* did—accepted the opinions offered by the Navy officials without considering whether they were credible, reasonable, rational, logical, or supported by observable facts or data.

The Court couldn't have been clearer in *Harvard*. While the military is due a degree of deference, courts must not abdicate their responsibility to review those military policies, programs, and operations under the established strict scrutiny standard. Especially when the practice at issue is based on suspect racial classifications. If *Korematsu* was "gravely wrong the day it was decided," so, too, was Judge Bennett in *SFFA v. USNA*.

Deference to Military Does Not Replace Strict Scrutiny

In the context of the USNA case, strict scrutiny of the Naval Academy's admissions policy required the trial court to defer to the professional military judgment that national security is a compelling state interest. This, of course, is a judgment that is self-evi-

dent. But there is an important second step in this analysis which Judge Bennett failed to perform: to strictly scrutinize the chain of logic that connects racial preferences in admission to furthering that "national security" interest. Instead of scrutinizing how such policies further national security, Judge Bennett uncritically accepted the military's ideological, but factually unsupported argument.

Judge Bennett reviewed the long and daunting line of SCOTUS cases dealing with deference to the Executive and Legislative branches in lawsuits challenging various military policies or practices. What he failed to grasp, however, was that in each of the cases where the Court deferred to professional military judgment, they also examined the underlying basis for the military judgment.

For example, in *Rostker v. Goldberg*, the case upholding the male only draft, the Court examined the extensive congressional record that supported limiting the draft to men. The Court did not find the male only draft constitutional simply because the generals said it was necessary. By the same token, the Court did not second guess the legislative conclusion that the male only draft was a necessary component of national security policy. Separation of powers concerns dictated the Court defer to those in whom the Constitution placed the authority. Importantly, however, the Court did not defer to conclusions based on opinions not supported by underlying facts and data.

Even in *Goldman v. Weinberger* where the Court upheld Air Force regulations prohibiting an orthodox Jewish Air Force officer from wearing a yarmulke while in uniform, the Court did not blindly defer to the generals. Rather, the Court examined the logical link between uniform regulations, discipline, and obedience to orders. The Court did not weigh competing opinions as to the benefits of uniformity, but it did make sure the justification connecting uniform regulations to overall discipline was reasonable, rationale, and logical.

Nor did Judge Bennet consider how the Court's deference jurisprudence has been influenced by the more recent War on Terror cases. In *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), the Court rejected the government's argument that the judiciary should defer to the Executive branch's decision to detain an American citizen captured in Afghanistan while fighting with the Taliban and deny the right to file a petition for *habeas corpus* to challenge the basis for his detention. The Court noted the separation of powers issue regarding intrusion by the courts on the Executive's war powers but also that,

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. *Id.* at 535.

In deciding whether non-citizen enemy combatants detained at the U. S. Naval base in Guantanamo Bay, Cuba, had access to U.S. courts for purposes of *habeas corpus,* the Court in *Boumediene v. Bush,* 128 S. Ct. 2229 (2008), rejected the government's argument that judicial resolution of *habeas* petitions improperly injected the judiciary into the military's operations:

> The Government presents no credible arguments that the military mission at Guantanamo would be compromised if *habeas corpus* courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us. *Id* at 2261.

In reaching its decision in *Boumediene,* the Court did not blindly accept the government's argument that extending *habeas* protection to detainees at Guantanamo would interfere with the military's ability to perform its mission. On the contrary, the Court analyzed those arguments and found them not credible.

In perhaps the clearest example of the Court rejecting an uncritical deference to military judgment, *Hamden v. Rumsfeld,* 548 U.S. 557 (2006), held that trial by military commissions of enemy combatants violated fundamental rights under both domestic and international law. The Court analyzed and rejected the claim that commissions were authorized by "military necessity." It also found that the procedural protections under the order establishing the commissions were less than those offered by a court-martial under the Uniform Code of Military Justice and the government could offer no credible evidence that it was impracticable to provide at least those rights enjoyed by an accused at court-martial.

The upshot of the War on Terror cases is that the *ipse dixit* of the military brass is not sufficient to avoid judicial scrutiny when fundamental due process rights are at stake. Strict scrutiny demands that the professional military judgment be credible. Instead of applying the legal standard of "strict scrutiny" to those opinions to assess whether they were credible, Judge Bennet accepted the Navy's "Trust me, I'm an admiral" testimony.

Civilians Are Not Sailors

Judge Bennett also overlooked another important aspect of the Court's deference jurisprudence: it matters whether the policy affects civilians or service members. The Court has been careful not to inject itself into the chain of command and inappropriately interfering with the day-to-day operations and discipline of military units. In *Orloff v. Willoughby,* 345 U.S. 83 (1953), the Court deferred to military commanders in assigning duties to their subordinates. In *Gilligan v. Morgan,* 413 U.S. 1 (1973), the Court declined to insert itself into the training and deployment of the National Guard. In *Parker v. Levy*, 417 U.S. 733 (1974), the Court upheld Art. 134, UCMJ, against vagueness and overbreadth challenges that would have been fatal to a criminal statute in a civilian setting. *Chappel v. Wallace,* 462

U.S. 296 (1983), and *Goldman v. Weinberger,* 475 U.S.503 (1986) deferred to internal military policies, procedures, and remedies when service members claimed their fundamental rights were being violated.

Even in cases where civilians were affected by military policies or procedures the challenged policies were in place to protect the security and integrity of the military and military installations. In *United States v. Albertini,* 472 U.S. 675 (1985) the Court upheld Albertini's conviction for unlawfully entering a military base during an "open house" after he had been properly barred from entry by the commander. Similarly, in *Greer v. Spock,* 424 U.S. 828 (1976) the Court upheld a ban on political speeches by civilians on military installations to preserve the political independence of the military.

While the Naval Academy is a military institution and its Midshipmen are most certainly members of the military, most applicants to the Academy are civilian high school students. At the time the discriminatory practice is applied, the applicants are civilians and the use of racial preferences in admissions has nothing to do with protecting the security of the installation or preserving the political independence of the Navy.

Discriminatory Past Does Not Justify Discriminatory Present

In reaching his conclusion that a diverse officer corps is a compelling national security interest, Judge Bennett recounted the history of racial discrimination that existed prior to and during WWII and throughout the Vietnam War. Specifically, the Navy relied on the Vietnam Era racial unrest to justify discriminatory admissions practices today.

The racial conflicts that arose during America's involvement in Vietnam were symptomatic of broader racial tensions that existed in the country and were not unique to the military. This fact was lost on the Navy's witnesses and the judge. The unpopular nature of the Vietnam War, rampant drug use among the troops, the protests and civil unrest by opponents of the war, and the resistance to the draft in the 1960s and early 1970s all produced serious disturbances and problems in both the military and civilian populations of the country. Those factors, unique to that period, spawned the racial tensions experienced in both the military and on college campuses throughout the country.

The end of the Vietnam War and the advent of the all-volunteer force, however, produced an easing of racial tensions. But Judge Bennett deferred to the Navy's historians who testified that racial preferences today are necessary to overcome problems that existed over fifty years ago when the facts on the ground were considerably different. Neither the Navy's witnesses nor the judge explained how factors that produced racial tensions that were largely eliminated over a half-century ago justify racial preferences today, or even if they had the desired effect at the time of implementation.

In today's military every member is a volunteer. There's not a Sailor, Soldier, Airman, or Marine currently serving who is there because the government conscripted him and ordered him off to war. The current political ideology that elevates diversity, equity, and inclusion (DEI) over color-blindness and merit-based principles, not historical events that occurred during an unpopular war where conscription was the means chosen to fill the ranks, better explains the current use of racial preferences at the Naval Academy.

Artificial Racial Categories Do Not Enhance National Security

The racial and ethnic categories used by the Naval Academy, as well as the rest of higher education, were first created in 1978 by bureaucrats as a way of assembling statistics for informational purposes. They have been amended over the years as political pressure has been applied to identify additional racial categories. But one thing has remained the same: the bureaucrats who developed these categories specifically warned that the categories should not be used to determine benefits or access to federal programs. But that is exactly what the Naval Academy is doing when they grant racial preferences based on the category designation checked by each applicant on his admissions application.

In the *Harvard* case, the Court examined the nature of these racial categories and found that they were "imprecise ... overbroad ... arbitrary ... undefined ... under inclusive ... incoherent" based on "irrational stereotypes," and were never intended to be used in awarding government benefits or access to government programs. *SFFA v. Harvard,* 600 U.S. 181, 216-217 (2023). In the final analysis the so-called professional military judgment of the Navy brass is that an officer corps that has a certain percentage of people who fit into imprecise, arbitrary, incoherent, and irrational stereotypical categories makes the Navy a more powerful fighting force. Of course, the Navy has no empirical data to support this claim.

Furthermore, the category into which a given applicant falls is determined not by some objective criteria but by the subjective and personal beliefs of each individual applicant. There are no consistent and objective criteria by which "diversity" based on these categories can be decided or measured. It is literally made up as it goes along.

Accordingly, the professional military judgment that Judge Bennett uncritically accepted is that creating a diverse officer corps based on imprecise, incoherent, arbitrary, overbroad, under inclusive, and irrational stereotypes, subjectively determined by each of the 1,200 or so new Midshipman enrolled each year makes the Navy a more lethal fighting force. Those same characteristics somehow allegedly enhance recruiting and give legitimacy to the Navy. It is not difficult to see why some observers might think this chain of logic lacks credibility.

The Navy Does Not Really Believe Racial Diversity Improves Combat Lethality

The Navy has never managed the racial balance of ships' crews, aviation squadrons, or any other Naval combat unit. Moreover, commanders do not report on the racial make-up of their units in their routine readiness reports. While the Navy periodically publishes demographics for the service, there is no effort to "balance" the racial make-up of the units that do the actual fighting and dying in a shooting war.

If a diverse officer corps really made the Navy more lethal you would think that the racial demographics of combat units would be a high priority in the readiness equation and would be monitored closely by the senior leadership. When the racial make-up of a unit falls beneath the purported optimum required to achieve maximum combat lethality, immediate steps would be taken to correct the imbalance. After all, combat is a life and death exercise, and maximum lethality based on some arbitrary optimum racial balance saves lives and makes victory more likely, doesn't it?

But the Navy doesn't do that. Nor do any of the other military branches. Racial demographics where the fighting takes place are not measured, monitored, or managed. Yet the brass claims that a racially diverse military is a more lethal and effective combat force. The disconnect between the professional military judgment emanating from the Pentagon and the actual military practice in the field (or, in the Navy's case, in the fleet) exposes the absurdity of the professional military judgment that diversity enhances combat lethality.

The absurdity of trying to measure, monitor, and manage the racial make-up of combat units, as well as the fleet as a whole, becomes even more stark when one considers the moving nature of the target. Racial demographics across American society are constantly evolving. As more immigrants enter the United States and marriages across racial lines increase, the more arbitrary and irrational racial categories become. As political pressure to include new and emerging racial categories into the mix increases, the more difficult it becomes to achieve any sort of balance or ratio between the demographics of the officer corps and the enlisted ranks. Adding more arbitrary categories to the list and giving applicants more choices for their subjective self-identity compounds the problem. With populations constantly growing and changing it is impossible to determine any sort of optimum demographic mix.

Racial Preferences: ROTC vs. Naval Academy

Despite the argument of the United States in *Harvard* that forbidding racial preferences would hinder national security by reducing the number of minority students at civilian colleges who might join ROTC, the Court declared the Harvard and UNC admissions programs unconstitutional. In so doing, the Court

rejected the same argument the Navy made in Judge Bennett's courtroom. If the Supreme Court thought that a diverse officer corps is a national security imperative, as the United States argued in *Harvard*, one would expect the Court to at least address how ROTC could still contribute to that diversity even though racial preferences in admissions at colleges hosting ROTC units was unconstitutional. Instead, the Court said that racial discrimination was wrong and "eliminating racial discrimination means eliminating all of it." *SFFA v. Harvard,* 600 U.S. 181, 184 (2023).

It strains credulity for the Navy to argue that the Naval academy, which produces less than 20 percent of the commissioned officers each year, should be permitted to use racial preferences while those same racial preferences are prohibited at civilian colleges that produce the vast majority of officers through their ROTC programs. The numerical disparity between the Naval academy, on the one hand, and ROTC and Officer Candidate School commissioning sources on the other, means that even if the vast majority of the Naval Academy's graduating class was composed of minorities the numbers would never reach the Navy's goal of an officer corps that roughly matched the enlisted ranks in racial demographics. A program that produces only 20 percent of the fleet's officers each year will never be enough to achieve the racial balance the Navy seeks.

Failing the 'Strict Scrutiny' Standard

Instead of heeding the direction of the Supreme Court in footnote 3 of the *Harvard* case, considering how recent War on Terror cases have refined deference to military judgments, and considering the population upon which military judgments act, Judge Bennett reasoned that if the military brass says it, he must accept it. But with all due deference to Judge Bennett, strict scrutiny requires more. Instead of uncritically accepting the opinion of the military brass that a diverse officer corps makes the Navy more lethal, enhances recruiting and retention, improves the Navy's legitimacy both domestically and overseas and, as a result, furthers national security, Judge Bennett should have demanded the Navy produce credible facts and data to support their professional military judgment.

Had he done so he would have found that credible evidence does not exist, and the Navy's policy doesn't even pass a rational basis standard of review, which is far less exacting than the more rigorous strict scrutiny standard.

Judge Bennett Bought a Fairy Tale

Harvard's rejection of the national security justification for diversity in ROTC units at civilian colleges, the warning in footnote 3 of the *Korematsu* error in deferring to military judgment in situations where disparate treatment is based on suspect racial categories,

and the illogical and irrational chain of inferences that support the national security canard clearly indicate that Judge Bennett erred in finding the Navy justified its racially discriminatory admissions practices.

While judicial deference to professional military judgment is appropriate when the judgment is based on facts and rational inferences that can withstand strict scrutiny review, nothing requires courts to shut their eyes, much less defer to unsupported, irrational, and illogical claims that further a political ideology as opposed to legitimate military operations and goals. The military's claim that "diversity is a strategic" imperative is supported by the same quality of evidence as the emperor's new clothes.

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