

In The
Supreme Court of the United States

—◆—
ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

—◆—
**BRIEF OF THE HONORABLE ALLEN B. WEST,
MEMBER OF CONGRESS AND LIEUTENANT
COLONEL, UNITED STATES ARMY (RET.), AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

—◆—
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**IDENTITY AND INTEREST
OF *AMICUS CURIAE***

Amicus curiae Allen B. West is a retired Lieutenant Colonel in the United States Army who currently serves as a Member of the United States House of Representatives.¹ Lt.Col. West earned a Bachelor's degree in political science from the University of Tennessee (1983); a Master's degree in political science from Kansas State University (1986); and a Master's degree in military arts and science from the U.S. Army Command and General Staff College (1997). Lt.Col. West was elected to Congress in November 2010 representing the State of Florida's Twenty-Second Congressional District. Among other assignments, he serves as a Member of the House Armed Services Committee. Before retiring from active duty, Lt.Col. West served as Commander 2nd Battalion 20th Field Artillery 4th Infantry Division (Task Force "Deep Strike"). In that position, he led a force of approximately six hundred fifty men involved in combat operations in Iraq. He held this position of leadership in 2002-2003 and retired in 2004 following twenty-two years of service. Lt.Col. West's awards and decorations include the Bronze Star, Meritorious Service

¹ In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and his counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

Medal (with two oak leaf clusters), Army Commendation Medal (with three oak leaf clusters and one valor device), numerous service ribbons and both the Air Assault Badge and Master Parachutist's Badge.



SUMMARY OF ARGUMENT

To borrow the precise language used by Thurgood Marshall as counsel for Petitioners in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), Respondents in this proceeding, the University of Texas, *et al.*, have “no power under the Fourteenth Amendment to use race as a factor in affording educational opportunities to its citizens.”² Notwithstanding this Court’s decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003),³

² Brief for Appellants at 5 in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), cited in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 31 (Kurland & Casper, eds., 1975).

³ R. Lawrence Purdy, counsel for *Amicus Curiae*, served as one of the trial and appellate counsel for Petitioners in *Grutter*, *supra*, and its companion case, *Gratz, et al. v. Bollinger, et al.*, 539 U.S. 244 (2003). He is the author of a law review article discussing the legal and procedural history of *Grutter*. See R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. REV. L. & POLITICS 313 (Spring 2003). Mr. Purdy is a 1968 graduate of the United States Naval Academy and a veteran of the Vietnam War. He previously published a response to the “retired officers’ brief” (*infra* note 13) filed in support of respondents in both *Grutter* and *Gratz*. See R. Lawrence Purdy, *Operation Racial Preferences: What the U.S. military doesn’t need*, NATIONAL REVIEW ONLINE (May 28, 2003), <http://www.nationalreview.com/articles/207050/operation-racial-preferences/r-lawrence-purdy>.

this principle applies with full force to any effort to use race or ethnicity as factors in the selection and advancement of our Nation's military personnel.⁴

Race-conscious policies do not advance – in fact, they harm – the most compelling of all governmental interests: protecting and defending our Nation's security. This is true whether practiced by colleges and universities (which, together with the Nation's military academies, produce the majority of the commissioned officers in our country's military), or by the military itself in the selection and advancement of its officer and enlisted personnel.

To further this compelling interest, the U.S. government has been committed, since 1948, to insuring that members of its armed forces receive equal treatment and opportunity without regard to race or ethnicity.⁵

Today, however, placing heavy reliance on the “diversity” rationale adopted in *Grutter*, a recent congressional commission⁶ has suggested that the equal

⁴ As Yale law professor Steven L. Carter observed, “most philosophers still hold the view that *a principle, in order to be a principle, must be applied universally and impartially* – that is, must actually be applied to all the cases that it fits, with no exceptions for partisan considerations.” STEVEN L. CARTER, INTEGRITY 48 (1996) (emphasis added).

⁵ Exec. Order No. 9981, 3 CFR 722 (1948) signed by Harry S. Truman on July 26, 1948.

⁶ The Military Leadership Diversity Commission (“MLDC”) was established as part of the National Defense Authorization

(Continued on following page)

opportunity-inspired mandate of the past no longer requires military leaders to treat all service members the same.⁷ The commission encourages military leadership to become color-conscious rather than color-blind; and it criticizes long-standing efforts to assimilate service members into cohesive units without regard to race or ethnicity, suggesting instead that racial differences should be “leveraged” as opposed to suppressed.⁸ Such statements would have been unthinkable prior to the decision in *Grutter*.

In order to further the federal government’s compelling interest to protect and defend our Nation’s security, the United States of America must assure the members of its armed forces that our Nation is now, and shall forever remain, committed to the principle that no service member will be subjected to racial discrimination; and, further, that a service member’s race will play no role, positively or negatively, in his or her selection and advancement.



Act for Fiscal Year 2009. Its final report, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, was delivered to President Barack Obama on March 15, 2011 (“MLDC Final Report”). A copy of the MLDC Final Report is available at <http://mldc.whs.mil/>.

⁷ *Id.* at 18.

⁸ *Id.*

ARGUMENT

SINCE 1948 IT HAS BEEN AN ESSENTIAL PRINCIPLE THAT THERE SHALL BE EQUALITY OF TREATMENT AND OPPORTUNITY FOR ALL PERSONS IN THE UNITED STATES ARMED SERVICES WITHOUT REGARD TO RACE, COLOR OR NATIONAL ORIGIN

1. The Use of Race-Conscious Policies In Pursuit of A Non-Remedial Interest, Like The Interest In “Diversity” Approved in *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003), Violates the Principle of Equal Opportunity for Military Personnel First Inspired by President Truman’s Historic Executive Order 9981.

“The U.S. Armed Forces became a deliberately inclusive organization in 1948, when President Harry S. Truman issued his historic Executive Order 9981 that called for ‘equality of treatment and opportunity for all persons in the armed services.’”⁹ In his Executive Order, President Truman captured the essence of the principle necessary to further our Nation’s *compelling interest* to protect and defend our country’s security. He described it as follows:

[I]t is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country’s defense.¹⁰

⁹ *Id.* at vii.

¹⁰ Exec. Order No. 9981, *supra* note 5.

It was the Commander-in-Chief's effort, long overdue, to guarantee equal treatment and opportunity to the thousands of minority men and women who, notwithstanding being denied basic civil rights in many parts of our country, had served bravely and honorably in its defense during World War II. President Truman's words ring as true today as when he first issued his Order in 1948. Importantly, he went on to emphasize that this equality of treatment and opportunity was premised on the military's elimination of any consideration of race:

It is hereby declared to be the policy of the President that there shall be *equality of treatment and opportunity* for all persons in the armed services *without regard to race, color, . . . or national origin*.¹¹

Yet, as the parties approach this Court in 2012, and based in part on this Court's 2003 holding in *Grutter*,¹² race has been all-but-fully reinserted as a factor in the treatment of, and the opportunities being offered to, members of today's armed services. Placing reliance on *Grutter*, the U.S. military is being

¹¹ *Id.* (emphasis added).

¹² The MLDC's recommendations seeking to achieve racial balance within the military and, in particular, within its officer corps, relies in part on this Court's decision in *Grutter*, while, at the same time, "differentiating diversity from equal opportunity." See MLDC Issue Paper #20, Definition of Diversity: *Services' Processes for Developing Definitions of Diversity and Diversity Policy Statements* (Mar. 2010) at 2, 4, 6; copy available at <http://mldc.whs.mil/index.php/issuepapers>.

pushed by partisans in the race-preference battles¹³ to adopt race-based policies that extend far beyond what even *Grutter* condoned. Today's military leadership is being encouraged, if not directed, to institute race-conscious policies designed to achieve pure racial balancing within the Nation's armed forces.¹⁴ No decision

¹³ The Vice Chairman of the MLDC previously served as the lead *amicus* in a brief filed in support of the openly race-conscious admissions policies at issue in both *Grutter* and *Gratz*. See Brief for Lt.Gen. Julius W. Becton, Jr., et al. as *Amici Curiae*, cited in *Grutter*, *supra*, 539 U.S. at 331 ("retired officers' brief"). Serving on the MLDC were others who strongly supported the University of Michigan's race-conscious policies.

¹⁴ See, e.g., "**Recommendation 5** . . . develop a standard set of strategic metrics and benchmarks to track progress toward the goal of having a . . . 20-30 year pipeline that yields (1) an officer and enlisted corps that *reflects the eligible U.S. population* . . . * * * **Recommendation 18** . . . The Services . . . should conduct annual 'barrier analyses' to review *demographic diversity patterns* across the military life cycle, starting with accessions [and should include] . . . accession *demographics* [and] retention, command selection, and promotion rates by race/ethnicity . . . [and] identification of persistent, group-specific deviations . . . * * * **Recommendation 20** . . . The Secretary of Defense must ensure that all qualified candidates (including racial/ethnic minorities and women) have been considered for the nomination of every 3- and 4-star position. If there are no qualified racial/ethnic minority and/or female candidates, then a statement of explanation should be made in the package submitted to the Senate for the confirmation hearings." MLDC Final Report, *supra* note 6, at 125-26, 129-30 (emphases added). Moreover, the threat is implicit but very real to any commander who fails to offer a list of "qualified" candidates that includes sufficient numbers of the sought after racial/ethnic groups in order to satisfy demographically-based goals. See, e.g., *id.* at xviii.

of this Court has ever suggested that the Constitution permits the use of suspect racial classifications for this purpose. All, including *Grutter*, prohibit it.¹⁵

This development can be seen in the MLDC's report, expressed in language that would have been all-but-unimaginable prior to *Grutter*:

. . . [A]lthough good diversity management rests on a foundation of fair treatment, *it is not about treating everyone the same*. This can be a difficult concept to grasp, especially for leaders who grew up with the [Equal Opportunity]-inspired mandate to be . . . color blind. . . . Blindness to differences, however, can lead to a culture of assimilation in which differences are suppressed rather than leveraged.¹⁶

Encouraged by the adoption of the non-remedial “diversity” rationale in *Grutter*, heavy emphasis is being placed on the race and ethnicity of the Nation's military personnel¹⁷ with military leaders seemingly

¹⁵ *Grutter, supra*, 539 U.S. at 329-30 (“[An] interest . . . ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin’ . . . would amount to *outright racial* balancing, *which is patently unconstitutional*.” (emphasis added) (citations omitted)).

¹⁶ MLDC Final Report, *supra* note 6, at 18.

¹⁷ See, e.g., Military Leadership Diversity Commission Issue Paper #1: Definition of Diversity, *How We Define Race and Ethnicity Categories for MLDC Research* (Nov. 2009); copy available at <http://mldc.whs.mil/index.php/issuepapers>.

being encouraged to leverage rather than suppress these irrelevant differences. In short, the MLDC's recommendations – in the context of race and ethnicity – are a detour from the milestones marked in *Brown* (1954), in Dr. King's "I Have A Dream" speech (1963),¹⁸ in the language of Title VI of The Civil Rights Act of 1964 ("Civil Rights Act"),¹⁹ and far removed from the principle originally set forth in President Truman's 1948 Executive Order.²⁰

These steps backward are fundamentally at odds with the hard-fought victories achieved after decades of military devotion to the color-blind principle inherent in the equal opportunity-inspired mandate. In fact, adherence to the principle encapsulated in the language of the Civil Rights Act has made possible the extraordinary advances within the military achieved

¹⁸ Coretta Scott King (ed.), *THE WORDS OF MARTIN LUTHER KING, JR.* 95 (1983) ("I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.").

¹⁹ 42 U.S.C. §2000d (2006) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

²⁰ Not only are MLDC's suggestions inexplicable, they directly conflict with the earlier observation that, "Individuals expect to be promoted *not* on the basis of their background or heritage but on the basis of the Services' standards of excellence and performance." MLDC Final Report, *supra* note 6, at 12-13 (emphasis added).

by dedicated and talented Americans of every race and ethnicity.

This principle – *equal opportunity* (without regard to race or ethnicity) – is captured by the words of two distinguished Americans separated by nearly a century. The first quote comes from Mary Church Terrell, an early black graduate of Oberlin College. In a speech given to the National American Women's Suffrage Association, Ms. Terrell concluded with this thought:

With courage born of success achieved in the past, with a keen sense of the responsibility which we shall continue to assume, we look forward to a future large with promise and hope. *Seeking no favors because of our color, nor patronage because of our needs, we knock at the bar of justice asking an equal chance.*²¹

The year was 1898.

Almost one hundred years later, United States Senator Joseph Lieberman (the Democrat candidate for Vice-President in 2000) had this to say about

²¹ Mary Church Terrell (1863-1954) was the daughter of former slaves. She earned bachelors and masters degrees in the 1880s from Oberlin College. She later worked in the suffrage movement and helped found the Colored Women's League and the NAACP. See Mary Church Terrell, *Samples of great rhetoric from the past*, MINNEAPOLIS STAR-TRIBUNE, Aug. 12, 2002, at A15 (emphasis added).

policies that provide favorable treatment to persons based on their color:

You can't defend policies that are based on group preferences as opposed to individual opportunities . . . [t]hey're patently unfair . . . *Not only should we not discriminate against somebody, we shouldn't discriminate in favor of somebody* based on the group they represent.²²

To the above, we can add similar words written by two recent and highly distinguished members of our Nation's defense team. Penned when each generally was free from the politics that, unfortunately, too often surround issues of race, and at a time when neither was being nudged by partisans on either side of the debate over race-conscious policies, each man offered separate, unambiguous statements expressing opposition to the sorts of race preference policies at issue in both *Grutter* and *Fisher v. Univ. of Texas at Austin, et al.*, 631 F.3d 213 (5th Cir. 2011).

The first in point of time comes from General Colin Powell (USA, Ret.) who served as Chairman of

²² Stuart Taylor, "Gore-Lieberman: Racial Preferences Forever?" *THE NATIONAL JOURNAL* (Sept. 4, 2000) (emphasis added). Senator Lieberman also said, "The current system of group preferences has to end. *They were only* intended to be temporary, *aimed at combating racism*. But it's actually fueling division between the races." *Id.* (emphasis added); copy available at <http://www3.nationaljournal.com/members/buzz/2000/openingargument/09042000.htm>.

the Joint Chiefs of Staff under Presidents George H. W. Bush and William J. Clinton; and later as Secretary of State under President George W. Bush. In his autobiography published after his retirement from the Army, General Powell stressed the importance of properly defining “affirmative action.” His definition is fully consistent with the concept of “affirmative action” originally described by President John F. Kennedy in a 1961 Executive Order. President Kennedy’s use of the phrase “affirmative action” was explicitly intended to remove – rather than add – race as a factor in government employment and contracting.²³ When writing his autobiography, General Powell unquestionably shared President Kennedy’s view about the inappropriateness of allowing “affirmative action” to metastasize into preferential treatment. Powell’s words could not be more clear:

The debate over affirmative action has a lot to do with definitions. If affirmative action means programs that provide equal opportunity, then I am all for it. *If it leads to preferential treatment, . . . I am opposed.* I benefited from equal opportunity and affirmative action in the Army, but I was not shown

²³ “WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; . . . The contractor will take *affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.*” See Exec. Order No. 10925, 3 CFR 448 (1961), signed by John F. Kennedy on March 6, 1961 (emphasis added).

preference. . . . Affirmative action in the best sense promotes equal consideration, not . . . discrimination. Discrimination “for” one group means, inevitably, discrimination “against” another; and *all discrimination is offensive*.²⁴

General Powell, of course, is right. All discrimination is offensive; and poisonous to our military. It is a view widely shared within our Nation’s armed forces. For example, based on a 2004 survey of U.S. Army personnel, 56% of the Army officers surveyed opposed race-preference type programs with only 18% supporting them.²⁵ Indeed, contrary to the *pro* “race preferences” position expressed in the “retired officers’ brief” filed in the Michigan cases (*see, supra* note 13), the same 2004 data – obtained the year

²⁴ COLIN POWELL, MY AMERICAN JOURNEY 591-92 (1995) (emphasis added). Northwestern University Professor Charles Moskos, observed that, “An emphasis on standards [for college admissions, employment, or military promotion] can work only if it goes hand in hand with *a true commitment to equal opportunity* and vice versa. . . . *In preferential treatment, those standards are suspended; that is, quotas are adopted to favor individuals on the basis of their membership in groups rather than on the basis of merit.* . . . [M]ajorities of both blacks and whites consistently oppose the latter.” Charles Moskos, *Affirmative Action in the Army: Why it Works*, in THE AFFIRMATIVE ACTION DEBATE 231 (George E. Curry, ed., 1996) (emphasis added).

²⁵ The survey defined these programs as “programs which make special efforts to help minorities get ahead.” JASON K. DEMPSEY, OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS 64 (2010). Of the officers surveyed, 39% were “White,” 32% “Hispanic,” 24% “Black,” with 5% “Other.” *Id.* at 209.

after *Grutter* was decided – showed that “Senior officers [were] most opposed, with 60% against and 15% in support of such programs.”²⁶

Another eminent member of our Nation’s defense team who demonstrated a commitment to equal opportunity is former Secretary of Defense Robert M. Gates. Dr. Gates enjoyed a long career in government, ending with his recent service as the Secretary of Defense under Presidents George W. Bush and Barack Obama. Prior to being appointed in 2006 as the twenty-second Secretary of Defense, Dr. Gates (beginning in 1999) served as dean of the George Bush School of Government and Public Service at Texas A&M University, an institution with a strong

²⁶ *Id.* at 64. The opposition to race preference policies is not limited to our military. Americans in every walk of life overwhelmingly reject – and find inconsistent with fundamental American principles – the use of race when it comes to guaranteeing equal opportunity to our fellow citizens. *See, e.g.*, PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 25-27, 102 (1997). *See also* Washington Post/Kaiser/Harvard Poll (March 8 – April 22, 2001) (92% of all respondents including 86% of African-American respondents stated that “hiring, promotion, and college admissions should be based strictly on merit and qualifications other than race or ethnicity”); Zogby International *Report on Academic Life Survey* (April 7, 2000) (77% of college students opposed the use of race preferences in admissions and “at least two-thirds of African-Americans agreed with the majority that fairness and standards should prevail over ethnic diversity in admissions”); and New York Times/CBS Poll (Dec. 6-9, 1997) (“[A] majority of Americans . . . oppose the idea of making hiring and admissions decisions based on race.”). Website addresses for each poll cited, above, are included in the Table of Authorities.

tradition of producing men and women who serve our Nation in uniform. Three years later Dr. Gates was named president of the University. Under President Gates' leadership, Texas A&M was perhaps the most principled flagship university in the Nation when it came to evaluating each applicant on the basis of his or her individual merit while at the same time eschewing race as a criterion. Coming on the heels of the decision in *Grutter*, when many schools accepted *Grutter's* license to adopt race-conscious admissions policies, President Gates issued a statement that "students at Texas A&M should be admitted on personal merit – and *on no other basis*."²⁷ He also added an important commitment, emphasizing outreach and recruitment, that captured the essence of affirmative action in its best sense:

Texas A&M will make new and significant efforts to encourage minority students to apply for admission to the University. . . . However, apart from quantitative admissions decisions (e.g., the top 10% law), the decision on whether to admit a student will be made on an individual basis, taking into account personal achievement, merit and leadership potential. Every student who is at Texas A&M must know, now and in the future, that he or

²⁷ *Statement of Texas A&M President Robert M. Gates 12/03/03*; copy available at <http://tamunews.tamu.edu/archives/article.php?articleid=16035&month=12&year=2003>.

she and all students here have been admitted on personal merit.²⁸

The *equal opportunity mandate* described in the words and actions of General Powell and Dr. Gates has a long history in the military. For example, in 1969 the Department of Defense issued its first Human Goals Charter (“DOD Charter”) which explicitly recognized respect for *diversity*.²⁹ The DOD Charter was, and remains, fully consistent with equal opportunity principles. From the outset it was understood that the very meaning of the word *diversity* was associated with the principle of equal opportunity – *not* racial preferences. To quote from the MLDC’s 2011 report:

For some – especially those who grew up before and during the civil rights movement – the word [*diversity*] conjures up the fight against racial segregation and inequality. For those Americans, *diversity policies and*

²⁸ *Id.* See also Peter Schmidt, *A New Route to Racial Diversity: Texas A&M raises minority enrollments without race-conscious admissions*, THE CHRONICLE OF HIGHER EDUCATION (Jan. 28, 2005) at 22 (“While many other colleges, including some staunch advocates of race-conscious admissions, were suffering declines in their minority enrollment, Texas A&M’s numbers were way up.”).

²⁹ See Dept. of Defense Human Goals Charter (Jul. 24, 1998) (“DOD Charter”); copy available at <http://www.defense.gov/news/newsarticle.aspx?id=43191>. See also MLDC Final Report, *supra* note 6, at 27-29.

*programs are another name for equal opportunity (EO) programs, . . .*³⁰

Building on the importance of equal opportunity without regard to race or ethnicity, the most recent version of the DOD Charter sets forth the essential steps believed necessary to accomplish the country's compelling interest to protect and defend the Nation's security. In relevant part, it provides that:

OUR Nation was founded on the principle that the individual has infinite dignity and worth. The Department of Defense, which exists to keep the Nation secure and at peace, must always be guided by this principle.³¹ . . .

THE defense of the Nation requires a well-trained volunteer force, military and civilian, regular and reserve. To provide such a force, we must increase the attractiveness of a career in the Department of Defense so that service members and civilian employees will feel the highest pride in themselves, their

³⁰ MLDC Final Report, *supra* note 6, at 11 (emphasis added).

³¹ Consistent with this foundational principle of the DOD Charter is the following: "The fundamental premise of our society is that *each person is equally 'diverse' exactly because of her equality before God and the law. . . .* Thus, the starting basis is one of equality, not of separately assigned categories that are used to measure diversity. From that starting point, every person's experiences are 'diverse' from those of every other." *Grutter v. Bollinger, et al.* ("*Grutter II*"), 288 F.3d 732, 792 (6th Cir. 2002) (Boggs, Circuit Judge, dissenting) (emphasis added).

work, their organization, and their profession.

THE ATTAINMENT OF THESE GOALS
REQUIRES THAT WE STRIVE

* * *

TO make military service . . . *a model of equal opportunity for all regardless of race, color, sex, religion, or national origin*; . . .³²

No plainer set of statements can be imagined to describe the importance of adhering to a policy of equal opportunity that neither permits nor condones racial discrimination of any kind. Indeed, the men and women who today volunteer to serve our country and have “grown up under the protection of [equal opportunity] laws and regulations,”³³ have a right to assume their treatment will at all times lawfully be based upon traditional equal opportunity principles. Thus, they have a right to expect equal treatment consistent with the equal protection clause of the Fourteenth Amendment, the express language of the Civil Rights Act, and the promises contained within the DOD Charter. The “diversity” rationale adopted in *Grutter*, if applied to our military personnel, would fundamentally violate this guarantee of equal opportunity.

³² DOD Charter, *supra* note 29 (emphasis added).

³³ MLDC Final Report, *supra* note 6, at 11.

2. The Guarantee of Equal Opportunity Is Indispensable to A Military Unit's Cohesion and Critical to Military Effectiveness and Our National Security.

The corrosive impact on our Nation's security of instituting any policy *contrary* to the *guarantee of equal treatment and opportunity without regard to race* cannot seriously be questioned.

This uncontroverted observation was, in fact, fully acknowledged in the "retired officers' brief" cited in *Grutter*.³⁴ That brief, which included a heavy focus on the tumultuous racial divisions that simultaneously were convulsing not only our military but our entire nation during the Vietnam War era,³⁵ acknowledged that "policies combating discrimination are essential to good order, combat readiness, and military effectiveness."³⁶ In fact, the "retired officers' brief" made this point not once, but twice:

Racial conflict within the military during the Vietnam era was a blaring wakeup call to the fact that *equal opportunity is absolutely indispensable to unit cohesion, and therefore*

³⁴ See retired officers' brief, *supra* note 13, at 14 ("[M]ilitary effectiveness depends heavily upon unit cohesion.").

³⁵ See generally *id.* at 13-17, 28-29.

³⁶ *Id.* at 12.

*critical to military effectiveness and our national security.*³⁷

Yet, today, this fact is being ignored with the military being encouraged to adopt race-based policies that inevitably lead to different treatment based on a service member's race.³⁸

Increasingly lost in the fog of *Grutter's* "diversity" rationale is the "essential" principle set forth in President Truman's Executive Order 9981, to wit: the need to insure that every person who desires to serve is guaranteed an *equal opportunity* to do so irrespective of his or her race or ethnicity.

³⁷ *Id.* at 17 (emphasis added) (internal quotes and citations omitted).

³⁸ The poisonous effects of using national origin as criteria for military advancement can be seen in the writings of the young George Washington. In 1757, after he had concluded that British authorities, aghast at the thought of an American-born provincial advancing too far in the King's Army, had blocked a commission he had earned through his performance during the French and Indian War, Washington contemplated leaving military service altogether. He lamented, "it is not to be wondered at, if, under such peculiar circumstances, I should be sick of a service, which promises so little of a soldier's reward." See LETTER FROM GEORGE WASHINGTON TO THE EARL OF LOUDOUN, *reprinted in* THE WRITINGS OF GEORGE WASHINGTON, VOL. II 228-29 (Jared Sparks, ed., 1834). Over 250 years later, Washington's lament is addressed in the MLDC Final Report, *supra* note 6, at xvi ("The performance of the Nation's military is tied to the individual's belief that he or she will be treated fairly regardless of his or her background.").

3. The Bitter Fruit of *Grutter*.

Of all the statements describing the multitudinous dangers associated with the use of race-conscious policies – among them anger, resentment, stigma and the rejection of the fundamental American principle of equal opportunity without regard to race or ethnicity – perhaps none is more apt than this from Justice Clarence Thomas, writing in dissent in *Grutter*:

The Constitution abhors classifications based on race, not only because those classifications can harm favored races³⁹ or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. Purchased at the price of immeasurable human suffering, the equal

³⁹ For additional examples of the harm that can occur to “favored races,” see Robin Wilson, *The Unintended Consequences of Affirmative Action: A Controversial Study from Unlikely Sources Asks Why College Faculties Lack Diversity*, THE CHRONICLE OF HIGHER EDUCATION (Faculty Vol. 49:21) at A10 (Jan. 31, 2003). In Ms. Wilson’s article, Dr. Claude M. Steele, an expert designated by the University of Michigan in *Grutter* (later withdrawn as a witness by the University’s lawyers on the eve of testifying) expressed concern over the potential effect of observations set forth in a book by Stephen Cole and the late Elinor Barber, INCREASING FACULTY DIVERSITY (2003). Dr. Steele was quoted as saying, “I think Sandra Day O’Connor’s law clerks are going to read [the Cole/Barber study] and they’ll say, ‘Look at this. Here’s a real thorough study, and it is arguing that affirmative action is harming these kids.’”

protection principle reflects our nation's understanding that such classifications ultimately have a destructive impact on the individual and our society.⁴⁰

Justice Thomas' powerful words are directly applicable to the men and women serving in our Nation's armed forces. He added this coda:

For the immediate future . . . the majority [in *Grutter*] has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause.⁴¹

Justice Anthony Kennedy, who also criticized the race-conscious policy upheld in *Grutter*, offered words equally apt to the potential harm to our military personnel when race is inserted into the selection process:

Preferment by race, when resorted to by the State, *can be the most divisive of all policies*, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.⁴²

⁴⁰ *Grutter, supra*, 539 U.S. at 353-54 (Justice Thomas, concurring in part and dissenting in part) (citations, quotations, omitted).

⁴¹ *Id.* at 378.

⁴² *Id.* at 388 (Justice Kennedy, dissenting) (emphasis added).

While there no doubt are many words that describe the evil of using race as a factor in governmental decision-making, Justice Kennedy may have picked the perfect descriptive when it comes to our military: “corrosive.”⁴³ He concluded that the “unhappy consequence [of the failure to apply strict scrutiny to the use of race condoned in *Grutter*] will be to perpetuate the hostilities that proper consideration of race is designed to avoid,” a perpetuation he asserted “would be the worst of all outcomes.”⁴⁴

The “harmony and mutual respect among all citizens that our constitutional tradition has always sought”⁴⁵ is critical when it comes to furthering our government’s compelling interest to protect and defend our Nation’s security. Race-conscious programs like the one narrowly approved in *Grutter* are antithetical to that critical goal.

One final point. The MLDC has recommended for Service-wide adoption the following definition of *diversity*:

Diversity is all the different characteristics and attributes of individuals that are consistent with Department of Defense core values, integral to overall readiness and mission

⁴³ *Id.* at 394.

⁴⁴ *Id.*

⁴⁵ *Grutter, supra*, 539 U.S. at 395 (Justice Kennedy, dissenting).

accomplishment, and reflective of the Nation we serve.⁴⁶

Setting aside whether any sense can be made of this proposed definition, it is absolutely clear that race and ethnicity have nothing to do with Department of Defense “core values.” DOD’s core values are *duty, integrity, ethics, honor, courage, loyalty, leadership, professionalism, and technical know-how*.⁴⁷ Everyone wearing a uniform must live by them. It is a singular devotion to these core values irrespective of a service member’s race or ethnicity that is critical to DOD’s “overall readiness and mission accomplishment.”

Second, the concluding phrase, “reflective of the Nation we serve,” is nothing more than an invitation to use whatever means are necessary to effect racial balancing within the military. The text of the MLDC’s report and its policy recommendations make this goal clear.⁴⁸

⁴⁶ See MLDC Final Report, *supra* note 6, at xiv.

⁴⁷ Dept. of Defense 101, <http://www.defense.gov/about/dod101.aspx>; also cited in MLDC Final Report, *supra* note 6, at 132.

⁴⁸ “The Commission found that top military leaders are representative neither of the population they serve nor of the forces they lead. The extent to which racial/ethnic minorities . . . are underrepresented varies across the Services, . . .” MLDC Final Report, *supra* note 6, at xvi. “The Commission’s recommendations include that DoD and the Services . . . require accountability for recruiting from underrepresented demographic groups, . . . * * * and persistent accountability for achieving the goals of diversity and inclusion.” *Id.* at xvii. These recommendations

(Continued on following page)

In the end, it is impossible to square the MLDC's multiple concessions that the military must provide "equal opportunity for all"⁴⁹ without regard to one's race or ethnicity with the commission's race-focused recommendations and its incongruous statement that "it is *not* about treating everyone the same."⁵⁰ This is the sad and bitter fruit of *Grutter*.

CONCLUSION

Fifteen years after General Powell expressed his unambiguously negative view of preferential treatment, it was once again given a human face by retired Army Major General Alfredo Valenzuela. In testimony given before the MLDC on January 14, 2010, General Valenzuela offered this:

[My dad] told me one thing when he came back from World War II . . . we all wear green . . . we all bleed red, . . . there is no difference and don't let ethnicity play a role.⁵¹

seem directed at one goal only: the achievement of racial balancing within the military.

⁴⁹ *See, e.g.*, MLDC Final Report, *supra* note 6, at xix.

⁵⁰ *Id.* at 18 (emphasis added).

⁵¹ Transcript of testimony of Maj.Gen. Alfredo Valenzuela (USA, Ret.) given to the MLDC (Jan. 14, 2010) at 41. A copy is available at <http://mldc.whs.mil/download/documents/Transcripts/10.../0114mldc.pdf>.

Lt.Col. West concurs with the observations of both General Powell and Major General Valenzuela's father.

This fact remains unchanged, as it has since President Truman issued his Executive Order in 1948: Neither race nor ethnicity has a legitimate role to play in determining how opportunities, promotions, benefits and privileges are awarded within the U.S. military.

In the end, the principle prohibiting racial discrimination in the public sphere, as unanimously laid down in *Brown*⁵² and statutorily affirmed in the Civil Rights Act, should be fully re-embraced as the governing principle for every policy affecting our military personnel.

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⁵² “[R]acial discrimination in public education is unconstitutional. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.” *Brown v. Bd. of Educ.* (“*Brown II*”), 349 U.S. 294, 298 (1955) (emphasis added).