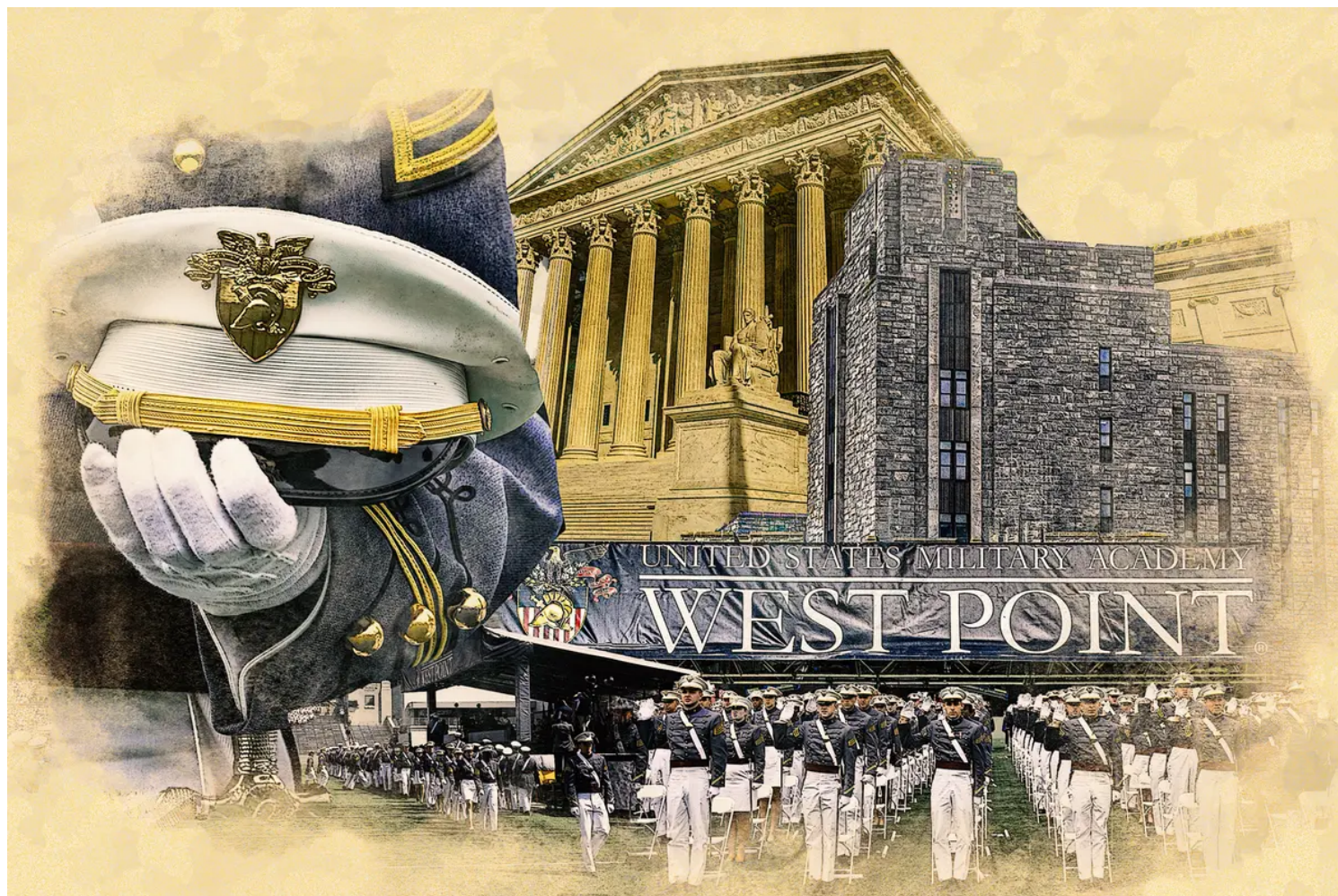


After Affirmative Action Win Over Harvard, Group Takes on West Point

Students for Fair Admissions has a steeper hill to climb at the Supreme Court as it tries to overturn the military's diversity, equity, and inclusion policies.



(Illustration by The Epoch Times, Getty Images, Shutterstock)

By Michael Washburn | Dec 13, 2023 Updated: Dec 13, 2023

The group that triumphed in a landmark Supreme Court case that struck down affirmative action policies at Harvard University earlier this year hopes to build on the victory with a lawsuit targeting similar policies at the U.S. Military Academy at West Point.

Students for Fair Admissions (SFFA) filed the lawsuit on Sept. 19 with high hopes, but the organization has strayed into a legal and political minefield as the academy and the Biden administration try to block the lawsuit on the grounds that an institution training military officers isn't subject to the same rules as private universities and that diversity, equity, and inclusion (DEI) policies help, rather than hinder, effectiveness in combat.

Largely as a result of the perceived disparity between those standards that apply to private colleges and universities and those applicable to entities under federal oversight, the SFFA faces one of the most formidable legal challenges, the outcome of which will have implications for every school and academy in the nation.

Since President Joe Biden took office, a marked cultural shift has been underway in virtually all branches of the military.

The Biden administration has forced through policies that promote DEI at the expense of the traditional criteria of combat readiness and the minimization of U.S. casualties, experts [have told](#) The Epoch Times.

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West Point Military Academy Sued Over Race-Based Admissions



Lawsuit Challenges West Point Military Academy's Race-Based Admissions Policies

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President Biden has revised rules put in place by the Obama administration to remake the military even more boldly in accordance with DEI principles and has relied on executive orders, often without public discussion, to force through this agenda.

In December 2022, revisions to the Obama-era Department of Defense (DOD) Instruction 1300.28 altered official DOD vocabulary regarding transgender recruits, made officers more directly liable for perceived offenses against such persons, and gave official approval to cross-dressing on military bases, among other changes.

President Biden's general DEI stance makes the SFFA litigation one of the most impactful lawsuits so far undertaken against a military institution in modern history.

DOD officials and representatives for West Point didn't respond to a request for comment.



President Joe Biden (C) flanked by Defense Secretary Lloyd Austin and Chairman of the Joint Chiefs of Staff General Mark Milley, meets with defense leaders to discuss national security priorities, in the White House in Washington on Oct. 26, 2022. (Saul Loeb/AFP via Getty Images)

From Triumph to Trial

The Supreme Court handed down its ruling on June 29 in the closely watched legal case of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, finding that affirmative action policies at Harvard violated Title VI of the Civil Rights Act of 1964.

The court issued a similar ruling in the matter of *Students for Fair Admissions, Inc. v. University of North Carolina (UNC)* on the same day.

In a footnote to its opinion in the Harvard case, the majority explained that its ruling didn't apply to military institutions such as West Point, stating that no military academies were a party in the case.

The court acknowledged a U.S. government brief that contended that "race-based admissions programs further compelling interests at our Nation's military academies."

SFFA's founder, Edward Mr. Blum, now sees an opportunity to redress what he sees as a glaring omission in the Supreme Court's June rulings.



Edward Blum, a long-time opponent of affirmative action in higher education and founder of Students for Fair Admissions, leaves the U.S. Supreme Court after oral arguments in cases against Harvard and the University of North Carolina, in Washington on Oct. 31, 2022. (Chip Somodevilla/Getty Images)

“The SFFA cases have energized the legal community to challenge longstanding policies that have always been illegal. That is happening especially in the employment arena,” he told The Epoch Times.

In the case of West Point, the legal issues are fundamentally the same, Mr. Blum believes—as is the opposing argument from those who want to preserve affirmative action.

“It is the same failed argument that the government made about ‘leadership’ and ‘diversity’ in the Harvard and UNC cases,” he told The Epoch Times.

But West Point and the Biden administration don't see matters that way.

In a Nov. 22 memorandum filed in the U.S. District Court for the Southern District of New York, U.S. Attorney Damian Williams and colleagues set forth a number of defenses of West Point's admissions policies.

They charge that the plaintiff, in extending the reasoning from the Harvard and UNC cases to this one, “ignores critical differences between civilian and military universities” and has failed to establish legal standing to weigh in on a matter that falls under federal jurisdiction.

The government lawyers also argue that the Army's “operational interests” require the training of officers who can build a “cohesive rapport with subordinates,” and that, in “an increasingly diverse nation,” that goal isn't achievable without affirmative action.

But it isn't clear if arguments in court will even get far enough to consider that last issue.



West Point graduates stand and sing the Army Song during the 2022 West Point Commencement Ceremony at West Point Military Academy in West Point, N.Y., on May 21, 2022. (Michael M. Santiago/Getty Images)

Clearing the Standing Bar

During hearings set to take place early in 2024, defense lawyers for West Point will attempt to have the lawsuit dismissed on the grounds that the plaintiff lacks standing under Article III of the Constitution.

The article sets the bar high for proving actual or imminent injury as grounds for a party to pursue legal action touching on matters that would normally fall under federal jurisdiction, as military matters generally do.

The highest court has been moving toward an ever-stricter [interpretation](#) of what such standing requires.

Pursuant to its ruling in the 2021 case of *TransUnion LLC v. Ramirez*, the Supreme Court now requires evidence of “concrete harm” to qualify for Article III standing.

“That’s an important issue. You’ve got to clear the standing hurdle before you get in the courthouse,” lawyer William Woodruff, former chief of the U.S. Army’s litigation division and former Department of Justice trial attorney, told *The Epoch Times*.

“
The government’s main defense is that this is military policy, national security, and the Constitution invests that authority in the government and not in the courts.

William Woodruff, lawyer

The new legal standard has evolved to the point in which establishing Article III standing will be hard for any plaintiff, he said.

“You’ve got to have direct injury. So the question is: What is your injury, and is that direct enough?” Mr. Woodruff said.

“The government’s main defense is that this is military policy, national security, and the Constitution invests that authority in the government and not in the courts. The courts should stay out of it, we’re the ones responsible for the defense of the nation.”

He said that, as an Army lawyer defending the service from lawsuits, he made that very argument regularly in courts around the country, with the goal of keeping the courts from meddling in Army policy.

“And it’s a valid argument, except that now, we’ve got the SFFA and Harvard/UNC cases, which sort of cracked open the door on that and shed some new light,” Mr. Woodruff said.

“In the unique situation of the military, how does this apply and how much deference should we extend?”



Critical Differences

Having made the case for Article III exemptions routinely during his days as an Army lawyer, Mr. Woodruff understands well its applications.

He described judicial deference to the military's authority and mandate as a long-established principle backed by a large body of legal precedent. Yet there are clear limits to how far it extends.

"This principle of judicial deference to professional military judgment does not mean that the courts must rubber-stamp those decisions. It doesn't mean that the Constitution doesn't apply to the military. And it does not mean that the military is free to ignore constitutional rights, privileges, and protections," Mr. Woodruff said.

Just because the military may be broadly free to set its own policies without giving other branches a say in its decisions, that does not mean that the military is free to violate citizens' most basic rights.

A proper understanding of Article III and the exemptions that flow from it requires any court to give careful consideration to how the Constitution divides authority among the branches of government, he said.

Just because the military may be broadly free to set its own policies without giving other branches a say in its decisions, that doesn't mean that the military is free to violate citizens' most basic rights.

"When a fundamental right, like the right to be free from racial discrimination, is involved, the scope of judicial review must consider the unique role and mission of the military in determining how that right applies. It does not mean that the court must accept the military's justification without proof or scrutiny," Mr. Woodruff said.

Even when considering the "potentially distinct interests" of service academies, as opposed to private universities, the military academies can't get away with blatant racial discrimination, he contended.

The Harvard and UNC cases weren't identical. As a private university, Harvard had to comply with Title VI's barring of racial discrimination, while UNC, a public school, was subject to Title VI as well as the 14th Amendment's equal protection clause, according to Mr. Woodruff.



(L–R) Claudine Gay, president of Harvard University, Elizabeth Magill, president of University of Pennsylvania, Pamela Nadell, professor of history and Jewish studies at American University, and Sally Kornbluth, president of Massachusetts Institute of Technology, testify before a House committee in Washington on Dec. 5, 2023. (Kevin Dietsch/Getty Images)

Title VI and the equal protection clause don't apply to a federal entity such as a U.S. Military Academy (USMA), he said.

But the Supreme Court has found that the Fifth Amendment's due process clause is co-extensive with the 14th Amendment's equal protection provision. And the Fifth Amendment very much applies to federal agencies and organizations.

"Thus, the technical source of the law applicable to USMA, Harvard, and UNC differs, but the substance is the same. USMA is subject to constitutional equal protection principles," Mr. Woodruff said.

The Infamy of Korematsu

The Supreme Court has explicitly acknowledged the folly of allowing the military to conduct itself however it wants on the grounds that it falls under separate rules and oversight from entities run by civilians.

The highest court has gone so far as to repudiate the legal rationale put forward in the 1944 case of *Korematsu v. United States*.

That decision provided the highly questionable justification for a policy that most people now view with distaste and disapproval—the decision to place Japanese Americans in internment camps during the Second World War on the grounds that they might be more loyal to America's enemy.

Recently, the Supreme Court made a formal admission of the grave mistake—and violation of the most fundamental rights of U.S. citizens on the basis of race and ancestry—*Korematsu* entailed.

The fact that the rationale for the internment involved national security and military necessity didn't minimize the outrage or get its architects off the hook.



Guests look at a photograph of Fred Korematsu during a presentation of his portrait to the National Portrait Gallery in Washington on Feb. 2, 2012. (Mandel Ngan/AFP via Getty Images)

Publicly acknowledging the error of Korematsu, the court overturned the decision with a new ruling, *Trump v. Hawaii*, in 2018.

The majority of the Supreme Court that ruled in favor of SFFA in the Harvard lawsuit acknowledged this precedent, noting in its opinion that Korematsu was “gravely wrong the day it was decided” and that the case “demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification,” Mr. Woodruff quoted.

“By specifically addressing, in *SFFA v. Harvard*, the ill-considered and faulty analysis the court applied in *Korematsu*, where professional military judgment concluded that racial stereotyping was required to further national security interests, the court unmistakably sent the message that, especially when the ‘compelling interest’ in the equal protection clause is national security, the judiciary must not retreat from the most searching inquiry,” he said.

“Failure to apply ‘the most rigid scrutiny’ risks another mistake like *Korematsu*.”

The way recent rulings have gone, Mr. Woodruff sees the Biden administration’s position as a tough one. Trying to justify racial discrimination in any context will be a hard sell.

More Direct Injury

Apart from the difficulty of defending affirmative action at West Point, plaintiffs are bound to ask whether using quotas to achieve a more diverse officer corps is legally sound policy on its own terms.

Here’s where an element of grievous harm—just as serious, if not more so than the damage that discrimination inflicts on white and Asian applicants—comes into the equation, providing further grounds to challenge West Point on grounds of direct injury.

While West Point and the government have failed to provide compelling evidence that heightened diversity strengthens combat effectiveness, Mr. Woodruff has seen plenty of evidence to the contrary, he said.



Chairman of the Joint Chiefs of Staff General Mark Milley arrives for commencement ceremonies at the U.S. Military Academy West Point, in New York on May 21, 2022. (Timothy A. Clary/AFP via Getty Images)

"I think that DEI is injecting divisive elements into what should be a cohesive unit," he said.

"I have a mantra: we don't call them the uniformed services simply because they wear the same color clothes. It's unity and cohesion that make men charge up a hill into gunfire and risk their lives."

A relentless emphasis on the difference between officers and on interests that pertain to race, rather than the fighting force as a whole, directly undermines this ethos, according to Mr. Woodruff.

"The emphasis on DEI and critical race theory is actually accentuating the differences rather than minimizing them," he said.

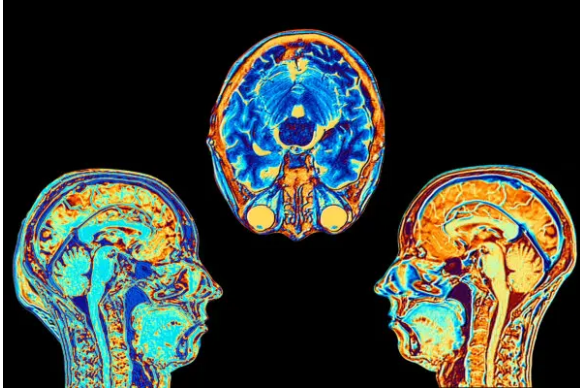
Mr. Blum, who expects highly contentious hearings as SFFA's latest case winds its way through the courts in coming months, agrees.

"We strongly disagree with using race as a factor at those institutions," he said.

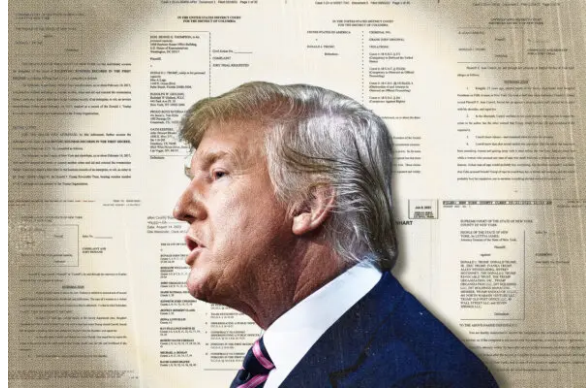
"If race is forbidden at all college ROTC programs throughout the nation, then it must follow that the service academies are forbidden from using race as well."

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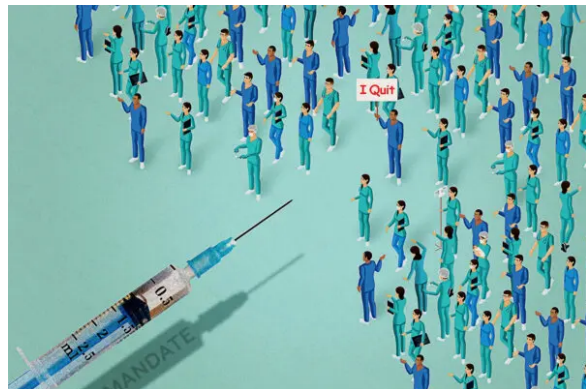
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