

TO: General Lester L. Lyles (USAF, Ret.), Chairman  
Defense Advisory Committee on Diversity and Inclusion (DACODAI)

FM: R. Lawrence Purdy

RE: Written Submission for DACODAI Meeting (Dec. 14-15, 2023)

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-and-

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Dear Chairman Lyles:

***I respectfully urge your Committee to recommend the adoption of service-wide, color-blind meritocratic policies that eliminate considerations of race and ethnicity.***

#### ***I. INTRODUCTION***

By way of background, I am a 1968 graduate of the United States Naval Academy. After completing my military service commitment (which included a year-long tour in Vietnam), I graduated from William Mitchell College of Law (St. Paul, Minnesota) in 1977. While in private practice, I was privileged to serve as part of the *pro bono* trial and appellate team representing the plaintiffs in *Gratz, et al. v. Bollinger*, 539 U. S. 244 (2003) and *Grutter v. Bollinger*, 539 U. S. 306 (2003). These cases challenged the separate race-conscious admissions systems at the University of Michigan Undergraduate College of Literature, Sciences & the Arts (*Gratz*) and at the University of Michigan Law School (*Grutter*). As a result of that work, I have been a guest lecturer at colleges and universities across the country and have authored several law review articles and essays on the topic of race.

## II. DISCUSSION

As set forth in DACODAI's online description, your Committee was created to provide independent advice and recommendations on matters and policies *relating to* improving the racial/ethnic diversity, inclusion and *equal opportunity in the Armed Forces of the United States*.

What is unclear is whether your Committee's goal is to continue to promote decades-old Department of Defense guarantees of "equal opportunity and treatment" for all members of the armed forces of the United States *irrespective of race and/or ethnicity* (see, **A. Promises Made**, below); or whether it is to promote "equity" via the explicit use of race-based policies, many of which were birthed by the Military Leadership Diversity Commission (MLDC),<sup>1</sup> a Commission which you chaired between 2009-2011? (See, **B. Promises Broken**, below.)

While the use of racial classifications is rife throughout our society today, often as part of so-called *Diversity, Equity & Inclusion* (DEI) plans, I respectfully submit that DoD's pursuit of such policies is in direct conflict with what should be among DoD's paramount goals, i.e., insuring *Equal Opportunity and Treatment for all members of our Armed Forces irrespective of race, color, or national origin*.

### A. Promises Made

As recognized in the extensive MLDC Final Report, "[t]he U. S. Armed Forces became a deliberately inclusive organization in 1948. It was in that year 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.'"<sup>2</sup> 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:

- . . . essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of

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<sup>1</sup> *From Representation to Inclusion: Diversity Leadership for the 21<sup>st</sup> Century Military* (March 15, 2011) ("MLDC Final Report").

<sup>2</sup> *Id.*, at vii.

treatment and opportunity for all those who serve in our country's defense. \*\*\* [And he] declared [it] 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.*<sup>3</sup>

Despite President Truman's Executive Order, change was slow in coming. Thus, two decades later in 1969, during our nation's civil rights revolution, DoD issued its first Human Goals Charter ("DoD Charter") which explicitly mentioned "diversity."<sup>4</sup> From the outset, it was understood that the meaning of *diversity* was associated with the *principle of equal opportunity*. To quote from the MLDC's final 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 programs [were] another name for equal opportunity (EO) programs, . . .*<sup>5</sup>

Fast forward over four decades later and we see DoD reaffirming the importance of equal opportunity without regard to race or ethnicity. For example, in 2014, the DoD Charter was renewed and was signed by President Barack Obama's Secretary of Defense, the Secretaries of the Army, Navy, and the Air Force, and by every member of the Joint Chiefs of Staff. It repeated the essential steps necessary to maintain our peace and security:

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, . . .*<sup>6</sup>

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

<sup>4</sup> MLDC Final Report, *supra* note 1, at 27-29.

<sup>5</sup> *Id.*, at 11 (emphasis added).

<sup>6</sup> Steven Hoarn, *Revised Department of Defense Human Goals Charter Disseminated Far and Wide*, Defense Media Network (Jun. 8, 2014) (emphasis added).

The 2014 version of the DoD Charter goes on to assert that the attainment of its goals requires that the military strive:

TO make military service . . . *a model of equal opportunity for all regardless of race, color . . . or national origin.*<sup>7</sup>

These are just a few of the many promises made over several decades to our military personnel. Each suggests in unambiguous language that DoD will neither permit nor condone racial discrimination against any individual wearing a uniform, with the latest example being found in Department of Defense Instruction (DoDI) 1350.02 (dated Dec. 20, 2022):

The DOD, through the [Military Equal Opportunity] Program will: (1) Ensure that Service members are treated with dignity and respect and are afforded *equal opportunity in an environment free from prohibited discrimination on the basis of race, color, [or] national origin . . .*<sup>8</sup>

### ***B. Promises Broken***

Notwithstanding the many promises outlined, above, beginning in 2003, a group of senior retired military officers (two of whom were my respected Naval Academy classmates) publicly admitted that the service academies, like the University of Michigan, had been using race as a factor in admissions. In an *amicus* brief which both of my classmates joined, filed in support of the University of Michigan's use of race-conscious admissions policies, these retired officers claimed that a racially diverse officer corps could not be achieved "unless the service academies [and ROTC units at civilian universities like the University of Michigan] used limited race-conscious recruiting and admissions policies."<sup>9</sup>

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<sup>7</sup> *Id.* (emphasis added). Identical language was present in the 1998 version of the DoD Charter. See MLDC Final Report, *supra* note 1, at 28.

<sup>8</sup> See *DoD Military Equal Opportunity Program*, DoDI 1350.02 §1.2 (a) (1) (emphasis added). It is disappointing that the military *Amici Curiae* brief in *SFFA* failed to acknowledge, much less cite to, this language found in both the 2020 and 2022 versions of this DoD Instruction.

<sup>9</sup> Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al., as *Amici Curiae* in *Gratz and Grutter*, at 5. (Lt. Gen. Becton served as your Vice-Chair of the MLDC).

In reliance upon the eventual decision in *Grutter*, wherein a deeply divided Supreme Court held that the University Law School's race-based policy could continue, race became openly embedded as a factor in the treatment of, and the opportunities being offered to, members of our armed services. This return to the old segregationists' claim that "race matters" was ironically captured in the MLDC's Final Report 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 difficult 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.<sup>10</sup>

Today, with DoD's heavy emphasis on race and ethnicity, military leaders are encouraged to abjure "assimilation" and, instead, are encouraged to leverage rather than suppress our irrelevant and immutable racial differences.

In my opinion, the MLDC's race-focused recommendations are a tragic detour from the individual protections against racial discrimination contained in the Fifth and Fourteenth Amendments to our Constitution. Moreover, they are inconsistent with the unanimous holding in *Brown v. Board of Education*, 347 U. S. 483 (1954).<sup>11</sup> They run counter to the inspirational words contained in Dr. Martin Luther King, Jr.'s "I Have a Dream" speech (1963)<sup>12</sup> and entirely deviate from the

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<sup>10</sup> MLDC Final Report, *supra* note 1, at 18 (emphasis added).

<sup>11</sup> "[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).

<sup>12</sup> "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." Coretta Scott King (ed.), *The Words of Martin Luther King, Jr.*, at 95 (1983).

unambiguous language of Title VI of the Civil Rights Act of 1964.<sup>13</sup> Needless to say, DoD's race-focused policies are far removed from the principle originally set forth in President Truman's 1948 Executive Order and clearly violate DoD's numerous color-blind promises, outlined above.

Which brings us to *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (No. 20-1199) and *University of North Carolina, et al.* (No. 21-707), 600 U. S. 181 (2023 ("*SFFA*"). In the wake of the Supreme Court's recent decision in this landmark case, which effectively overruled *Grutter* and struck down the race-conscious admissions policies at Harvard College and the University of North Carolina (policies which, disappointingly, two members of DACODAI fully supported as *amici curiae*),<sup>14</sup> newly aggrieved parties approach the courts regarding the race-based admissions policies at our service academies.<sup>15</sup>

Like Harvard's and UNC's unconstitutional policies, I respectfully submit that our service academies' race-based policies must, in the end, be rejected on similar constitutional grounds. Consider, for example:

[T]he Harvard and UNC admissions programs cannot be reconciled with the guarantees of the [Fourteenth Amendment's] Equal Protection Clause.<sup>16</sup>

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<sup>13</sup> 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, by denied the benefits or, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

<sup>14</sup> Brief of Adm Charles S. Abbot, et al. as *Amici Curiae* in *SFFA* (supporting Harvard's and UNC's use of race in admissions). Joining as *amici* were two members of DACODAI and three of my Naval Academy classmates.

<sup>15</sup> See, *Students for Fair Admissions v. The United States Military Academy at West Point, et al.* (Case 7-23-cv-08262) (USDC, S.D.N.Y. (White Plains Div.)) (09-19-2023) ("*West Point*"); and *Students for Fair Admissions v. The United States Naval Academy, et al.* (Case 1:23-cv-02699-ABA) (USDC, D. Maryland (Northern Div.)) (10-05-23) ("*Annapolis*").

<sup>16</sup> "The Fifth Amendment, which is applicable [to the federal government], does not contain an equal protection clause, as does the Fourteenth Amendment, which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. \* \* \* [T]he Constitution forbids . . . discrimination by the General Government . . . against any citizen because of his race." *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954) (emphasis added).

Both programs [a] lack sufficiently focused and measurable objectives warranting the use of race, [b] unavoidably employ race in a negative manner, [c] involve racial stereotyping, and [d] lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today. (*SFFA*, 600 U. S., at 230.)

There can be little dispute that the Court’s criticisms of the Harvard and UNC admissions policies – [a] through [d] in the previous paragraph – are fully applicable to the race-based policies presently being used at West Point, Annapolis, and at the Air Force Academy. In addition, these race-based policies directly violate long-standing DoD regulations and instructions guaranteeing equal treatment and opportunity for all military personnel without regard to race (examples previously discussed in ***A. Promises Made***, above). Thus, when it comes to the Department of Defense, one reasonably would expect DoD to promptly revoke all uses of race in service academy admissions in order to bring these government institutions into full compliance with the principle announced in *SFFA* (see language in bold and italicized on page 8, below). It goes without saying that your Committee can play an important role in bringing about such an outcome were it to recommend, as I humbly submit it should, the elimination of all future uses of race when it comes to decision-making in our military.

With specific regard to our service academies’ admissions policies, I respectfully direct your Committee’s attention to a recently published and extremely thorough legal analysis that frames the question of “whether, in light of [*SFFA*], the service academies may continue to use . . . race-based admissions polic[ies].” See, Larkin, Paul J., Stimson, Charles D., and Spoehr, Thomas W., *Should We Play Politics with the Nation’s Defense? The Supreme Court’s Ruling in Students for Fair Admissions v. Harvard College and the U.S. Service Academies*.<sup>17</sup> The authors conclude “that the service academies may not do so.”<sup>18</sup> I urge your Committee to carefully consider their well-reasoned legal analysis.

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<sup>17</sup> See, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4577628](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4577628), posted 17 Oct 2023.

<sup>18</sup> *Id.*, at 5.

As mentioned in note 14, above, two esteemed members of DACODAI (you and retired Army General Vincent K. Brooks) as well as three of my Naval Academy classmates joined the *amicus* brief in *SFFA* promoting the defendants' retention of race-based admissions, and arguing that similar policies should be allowed to continue at our service academies. With all due respect, such a position directly contravenes the principle announced by the Supreme Court in *SFFA*:

***Eliminating racial discrimination means eliminating all of it... [T]he Equal Protection Clause ... applies without regard to any differences of race, of color, or of nationality—it is universal in [its] application... [T]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.***

*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U. S. 181, 206 (2023) (citations and punctuation omitted).

While there are many disturbing aspects surrounding Harvard's and UNC's military *amici's* support for race-preference admissions, perhaps the most unsettling from a military standpoint is the inescapable suggestion that an officer's skin color matters; and that, for example, only black officers can effectively lead black enlisted personnel. Of course, the incendiary corollary is that only white officers can effectively lead white enlisted personnel. Both are utterly false and divisive claims and entirely at odds with the true meaning of military leadership. The exceptional careers of all the *amici* in *SFFA* beginning with your own exemplary achievements present all the proof needed that such arguments are without merit.

This Committee also should be aware that the first iteration of the retired officers' *amicus* brief in *Gratz* and *Grutter* contained a bizarre claim that students educated "in racially homogenous classrooms are ill-prepared for productive lives in our diverse society."<sup>19</sup> As is always the case, "homogenous" and "diverse" are never defined but we need look no further than to the racial demographics of the undergraduate institutions attended by many of the distinguished officers of all races who have joined one or more of the retired officers' *amicus* briefs (from

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<sup>19</sup> Consol. Br. of Lt. Gen. Julius W. Becton, Jr., et al. as *Amici Curiae*, *supra* note 9, at 8.



*Gratz/Grutter* to *SFFA*) to realize this claim, too, is patently untrue. Again, the educational backgrounds and accomplishments of the military *amici* in *SFFA* are a direct refutation of any such claim.

Of course, no one is suggesting that *racially homogeneous* classrooms (however they may be defined) are, in and of themselves, more or less desirable than *racially heterogeneous* classrooms. But the implicit criticism of individuals who may have been educated in less racially diverse settings surely cannot ring true to many of the most accomplished men and women in our military, both past and present. In fact, two of the distinguished black generals whose names appeared on the first iteration of the retired officers' brief in *Gratz* and *Grutter* – Army Lieutenant General Julius W. Becton, Jr., and Air Force General Lloyd W. Newton – graduated from racially homogeneous historically black universities, Prairie View A&M and Tennessee State, respectively.<sup>20</sup>

Similarly, several (if not most) of the retired admirals and generals, both black and white, who joined the first military brief in *Gratz* and *Grutter*, as well as those who joined one or more of the military briefs that have followed (including the most recent one in *SFFA*) were also educated in what many might fairly describe as racially homogeneous settings. Yet to a man (and, today, to a woman), each proved *not* to be, as the *Gratz/Grutter* retired officers' *amicus* brief contemptuously suggested, "ill prepared for productive lives in our diverse society." Quite the opposite. Each name on the retired officers' *amicus* briefs from *Gratz* to *SFFA* rose to a position of unparalleled leadership in the United States military.

The obvious lesson, as Dr. King taught us, is that *the skin colors of those who surround us do not matter. Only their (and ultimately our) character matters.*

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<sup>20</sup> Six years after retiring from the Army, General Becton returned to his alma mater, Prairie View A&M, to serve as its president. This was not a sign that General Becton viewed his undergraduate alma mater as an institution that "ill prepared" its graduates for productive lives in our diverse society. The same can be said for your colleague in *SFFA*, General Darrell K. Williams, who is now serving as President of his undergraduate alma mater, Hampton University. Whether West Point, Annapolis, or Air Force, or Harvard, Howard, or Hampton, it's the *character and accomplishments* of their leaders and their graduates who make the school. Race does not matter.

### **III. CONCLUSION**

Permit me to conclude with this heart-felt observation. While you and I and many of your fellow *amici* in *SFFA* may not share the same skin color, I remain confident that we share something far more important when it comes to the military's mission. And that is a shared dedication to our country and a willingness to put our lives on the line to protect the freedoms of every American – and the safety and well-being of every sailor, soldier, airman and Marine – without giving a passing thought to what anyone's race or ethnicity may be. That, I submit, should be the only test for every officer entrusted with the duty of protecting our national security.

As I observed over twenty years ago in response to my classmates who, in 2003, were (and still are) promoting the use of race in admissions to our alma mater, if we have learned nothing else from our history surrounding race, we should have learned this: Dividing any collection of individuals by race — whether it be a platoon, a battalion, an airwing, or an entire nation — and assigning benefits or assessing penalties to the resulting groups, is fundamentally destructive. Perpetuating racial favoritism, and its opposite, racial discrimination, doesn't heal a society; it poisons it. Policies that focus on race don't lead to a cohesive and effective military; they undermine it. In order to live up to the promises made, and owed, to our military personnel which guarantee equal opportunity and treatment to every man and woman in uniform irrespective of their skin color, all race-based decision-making in our military should come to an end. Our nation's future peace and security depend on it.

Respectfully submitted this 24<sup>th</sup> day of November 2023.

/s/

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