An Overview of Civil Cases Challenging Equal Opportunity Guidance to Certain Military Promotion and Retirement Boards

Abstract

This paper reviews a set of civil lawsuits in which military members challenged the results of promotion and retirement boards, claiming that the boards' selection processes violated the equal protection of the laws guaranteed under the United States Constitution. Each of the cases was filed in a federal court and alleged that Secretary-level guidance directing the boards to consider the potential effects of individual and institutional discrimination for minority and women officers resulted in discrimination against white male officers. In each case, a primary question pertained to whether the guidance given to a particular board actually involved the use of a racial or gender (protected) classification, either on the face of the guidance or in the manner it in which it was applied by the board. For any case in which a court determined that the board process employed a racial or gender classification, heightened scrutiny was directed for assessing the propriety of the government's decision. *Heightened scrutiny*, as used here, refers to the strict scrutiny applied to the use of racial classifications and the intermediate scrutiny applied to the use of gender classifications. In a small subset of these cases, the courts also evaluated whether the government's justifications for considering race and gender actually met the requirements of heightened judicial scrutiny.

While the government received favorable initial rulings in lower courts for a number of the cases, at the appellate level, each of the courts ruled against the military. Of note, however, is that none of these cases has reached the United States Supreme Court, and very few of the courts decided the important question of whether the government's justifications for considering race and gender actually survived heightened scrutiny. In cases in which this question was reached, the government's justifications were largely premised upon remedying past discrimination or the perception of such, lacking strong empirical proof or individual examples of the operation of current discrimination within the forces. Finally, none of these cases substantially considered whether the use of racial and gender classifications could be justified based on the operational or strategic value of diversity.

Over the past 15 years, former U.S. Air Force and U.S. Army officers have filed several civil suits in federal courts challenging Secretary-level policies designed to foster gender and racial equality in military promotion and retention decisions. Each of these cases was initially filed in a federal district court or in the Court of Federal Claims and sought reinstatement and promotion or monetary damages for the plaintiffs. All of the plaintiffs claimed they were entitled to a remedy because the processes that failed to promote or retain them involved violations of their constitutional rights. Specifically, the cases alleged unconstitutional discrimination resulting from practices authorized in the precept language issued to promotion boards,[1] the memoranda of instruction (MoIs) provided to a reduction-in-force (RIF) board,[2] or the charges/instructions directing the course of selective early retirement boards (SERBs).[3] The facts and holdings of the cases, however, were somewhat distinctive and are briefly presented here.

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The cases are presented by case type (i.e., retention or promotion) and, within case type, chronologically from earliest to most recent. They should not, however, be considered to be of equal importance. First, cases with appellate court decisions, such as *Baker v. United States* and *Berkley v. United States*, have the greatest precedential value, or ability to influence the decisions of other courts. Additionally, such cases as *Saunders v. White* and *Christian v. United States*, which both discern the applicability of heightened scrutiny and apply these standards for race and gender, are most helpful for understanding limitations on the use of these classifications.[4] Ultimately, the results in these cases can be seen as tied to both the specific equal opportunity language and practices governing the boards at issue and pushback in federal courts against remedying societal discrimination by providing preferences to women and minorities. The cases, however, are quite helpful for identifying what types of justifications have failed to meet heightened scrutiny and what types of evidence will be needed to support the consideration of race and gender in governmental decisionmaking in the future.

Reduction-in-Force and Selective Early Retirement Board Cases

The Services use RIF boards and SERBs as tools to comply with congressional requirements for manpower management. Officers selected by these boards are involuntarily retired. The Secretaries provide guidance to the boards on selection rates and criteria. The boards are tasked with retaining the best-qualified candidates and operate by conducting comprehensive reviews of each record and assigning numerical scores that represent the overall quality of the officer. Beginning at the bottom of the ranking list, selections are made until the boards meet the Secretaries' prescribed quotas. Each of these cases involved guidance to boards that included special instructions for considering the records of minority and women candidates.

Baker v. United States (1995)

Baker v. United States was the first in a series of cases challenging the equal opportunity language used by various Services in their promotion, RIF, and SERB guidance. Although there was some question as to whether the language in the Secretary's charge instructing the board on how to consider the records of women and minorities was discriminatory on its face,[5] the disposition of the case largely turned on the board's description of how it applied the Secretary's guidance.

Col James Baker and a group of 82 similarly situated Air Force colonels sued to challenge the results of the 1992 SERB. The plaintiffs claimed that the Secretary of the Air Force's charge to voting members of the board created a preference for women and minority colonels over nonminority colonels. The charge at issue directed the board to retain the most-qualified colonels while eliminating 30 percent of the colonel force and to achieve this goal by considering "professional competence, job performance, leadership, breadth and depth of experience, job responsibility, academic and professional education, and specific achievements."[6] The charge further directed that the following criteria be applied to the consideration of women and minority colonels:

> Your evaluation of minority and women officers must clearly afford them fair and equitable consideration. Equal opportunity for all officers is an essential element of our selection system. In your evaluation of the records of minority officers and women officers, you should be particularly sensitive to the possibility that past individual and societal attitudes, and in some instances utilization of policies or practices, may have placed these officers at a disadvantage from a total career perspective. The board shall prepare for review by the Secretary and the Chief of Staff, a report of minority and female officer selections as compared to the selection rates for all officers considered by the board.[7]

The board's overall selection was 29.2 percent. The percentage of minority officers selected was 30.1, and no female officers were selected.[8] In its report to the Secretary of the Air Force and Chief of Staff, the board noted that the selection rates for blacks and women were better than the overall rates, while Hispanic numbers were worse. They also wrote,

> To ensure each minority and woman officer received fair and equitable consideration, the board president carefully reviewed their records and the scoring results. Where there was any doubt as to the competitiveness of an officer, he caused the record to be rescored to resolve the doubt.[9]

In response to the plaintiffs' request for information, the Air Force had two generals and a colonel provide statements about the operation of the board. Gen Billy J. Boles, who had served as a commander of the Air Force military personnel system, provided examples of how minorities and women had been disadvantaged based on race and gender, respectively, within the Air Force, and he indicated that race or gender could be used as a "tie breaker" by individual board members.[10] Lt Gen John E. Jaquish, the president of the SERB at issue, gave a sworn declaration indicating that, during the scoring process, only he was given preliminary statistics on the selection rates for women and minorities. Despite the language in the report to the Secretary, Lt Gen Jaquish claimed that, besides the bottom 40 percent of records, which were automatically required to be rescored, he only directed the rescoring of one colonel, who had been a prisoner of war.[11]

Lt Col James L. Wilson, an administrative officer for the board, confirmed Lt Gen Jaquish's description of the rescoring process.[12] Finally, on November 9, 1995, at a hearing in

the Court of Federal Claims, a government counsel explained that the charge was designed as a mechanism to "level the playing field" by allowing board members to discount particular advantages in the records of nonminorities when such advantages were not similarly available to minorities and women.[13]

The Court of Federal Claims ultimately concluded that the wording in the charge—which did not include a compelled quota for the retention of minority and female officers—did not involve a classification "that prompted favoritism based on race or gender." It further determined that strict scrutiny did not attach to the review of the Air Force's charge.[14]

On appeal, however, the United States Court of Appeals for the Federal Circuit determined that the language in the charge, on its face, permitted the consideration of race and gender and that the lower court had overlooked the troubling language based on the declarations describing the fair operation of the board.[15] By the time the case reached the appellate court, however, the Department of Justice (DOJ) had written in a letter, "[B]ased on all information now available, we do not represent that LT Gen Jaquish was in a position to state the subjective interpretations of all Board members."[16] Of this letter, the appellate court noted, "By withdrawing support for the declaration of General Jaquish, the government's letter has severely undermined its case."[17] The appellate court determined that the DOJ letter weakened the strength of the declarations made by Lt Gen Jaquish and Lt Col Wilson. As such, the court could not determine whether the board was operated in a manner that provided an advantage to women and minorities.

The appellate court vacated the lower decision and remanded the case back to the Court of Federal Claims for further proceedings, where it was dismissed because the parties entered into a settlement agreement.[18] While the case, importantly, questioned whether heightened scrutiny should apply to selection board language of this type,[19] the outcome turned largely on the facts of the case describing the operation of the board.

Christian v. United States (2000)

Unlike *Baker*, which involved the charge to an Air Force SERB, *Christian v. United States* pertained to the Army Secretary's MoI to a lieutenant colonel SERB, which selected officers for forced retirement from among those who had twice failed to promote to colonel. The Secretary's MoI included an extended number of neutral factors to be considered by the board. It also directed that, "[i]n evaluating the records of minority and female officers, the board should consider that past personal and institutional discrimination may have disadvantaged minority and female officers."[20] The MoI guidance listed the following potential indicia of discrimination: "disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career building military schools." [21] In two phases of consideration in the SERB process,[22] the MoI indicated that the board should have a goal for the selection of women and minorities that was not greater than the overall selection rate.[23] Prior to its recess, the board was also required to identify and explain situations in which the selection rates for minorities and women were still greater than the overall selection rate.

The plaintiff made four challenges to the board's operations and decisions.[24] Relevant to the analysis here is that he alleged a violation of his Fifth Amendment equal protection rights based on the MoI language. Of this guidance, the court first determined that the MoI issued to the SERB did involve a racial and gender classification on its face because it "created a race and gender-based goal and . . . required consideration of different factors in evaluating minority and female officers."[25] Even though the court acknowledged that the board had no quotas for selecting minority and female officers, it determined that the existence of goals for selecting these officers, coupled with the special consideration and revoting process, resulted in preferential treatment.[26]

The court then subjected the Army's MoI guidance to strict scrutiny. It determined that the government had not identified a compelling interest that would justify the use of a racial classification. Specifically, the court rejected two nonremedial justifications for the policy: (1) to create the perception of equal opportunity among those in the Army and (2) to prevent possible past discrimination from negatively affecting the present consideration of the officers' professional attributes and potential for future contributions if retained on active duty. With regard to the first nonremedial justification, the court opined that private attitudes were too inherently subjective to be used as a basis to justify violating rights.[27] With regard to the second nonremedial justification, the court determined it could only be a compelling interest if there was a "special interest in minorities enjoying such opportunities which is not enjoyed by other groups."[28]

The court accepted that remedying actual past discrimination would be a compelling interest if there is proof a governmental unit is involved in the discrimination and there are "present effects of past discrimination."[29] Additionally, that proof must supply a "strong basis in evidence" for the conclusion that remedial action is needed.[30] Applying the affirmative action case law created for civilian matters,[31] this court found that the relevant inquiry was not whether the Army, in general, practiced discrimination but whether the SERB discriminated.[32] Even if the court accepted the Army as the relevant governmental unit to consider, the Army Regulations address personal and societal discrimination, and "[p]rivate personal discrimination does not supply a compelling interest for a racial classification."[33]

The court further determined that, because the statistical information the Army relied on was problematic, the

government could not prove that a remedy was necessary for curing the present effects of past discrimination.[34] Significantly, the Army admitted that it could not pinpoint a systematic reason for the race and gender disparities observed in promotions.[35] Essentially, the court recognized that contemporary statistical disparities are not necessarily the present effects of past discrimination. The court also claimed that the Army's program was not narrowly tailored to achieve its stated goal[36] and that curing the problem of underrepresentation is not a valid justification for employing a racial classification.

The court acknowledged that gender classifications involve a separate standard—intermediate scrutiny—which provides that the classification must serve an important governmental objective and be substantially related to the achievement of the objective.[37] Rather than analyze the facts under this standard, the court stated that its holding with respect to race was enough to find that the SERB policy was unconstitutional. The court then directed further proceedings on remedies.[38]

The significant contribution of the *Christian* case was that the court clearly articulated how the SERB guidance failed strict scrutiny. First, the court refused to recognize remedying personal or societal discrimination as a constitutionally acceptable compelling interest.[39] The present effects of past discrimination could be remedied, but not based on the evidence the military presented of systemic underrepresentation and statistical disparities in promotion rates. Second, the court claimed that the SERB guidance was not narrowly tailored because (1) it allowed the consideration of personal and societal discrimination rather than institutional discrimination alone and (2) the attempted remedy was of an "infinite life span" rather than a limited duration.[40]

Alvin v. United States (2001)

Alvin v. United States was filed by a group of Air Force officers who were selected for retirement, and it involved an equal protection challenge to the fiscal year (FY) 1994 SERB. The court's ultimate decision pertained to whether the case should be summarily dismissed, but the substantive analysis considered the question of whether equal opportunity guidance provided to the board resulted in the unconstitutional consideration of race and gender. In terms of its analysis, this case effectively answers the strict scrutiny question raised by the appellate court in *Baker*.

Based on the Secretary's MoI to the SERB, the plaintiffs claimed that minorities and women received unconstitutional special consideration from the board. The government defendants, however, claimed that the instructions merely required board members to provide "minority and female officers fair and equitable consideration and the same equality of opportunity being extended to all officers" by being alert to the possibility that discrimination had created career disadvantages.[41]

The MoI to the board directed that candidates be reviewed based on the "whole person concept."[42] The MoI also contained language substantially similar to the charge issued to the SERB in the *Baker* case, including the requirement that the board issue a report to the Secretary and Chief of Staff describing the comparative selection rates of women and minorities.

The board selected 166 colonels from promotion-year groups 1966 and 1968 for early retirement.[43] One nonwhite colonel and no female colonels were selected for early retirement. The plaintiffs claimed that, as a result of the MoI guidance relating to minorities and women, they were deprived of an opportunity to compete for retention on equal terms.

The court determined that the language in the Secretary's instructions was not neutral because the effect of the guidance was to create more-favorable reviews for the records of minorities and women.[44] The court characterized the MoI as a "directive to assign minorities and women candidates higher scores despite what may be lesser records."[45] Consistent with the appellate court's dicta in *Baker*, this court concluded that the MoI did employ a race- and gender-based classification. As such, the instructions could only survive if they could withstand the heightened scrutiny applied to race- and gender-based decisions.

To the extent that this court determined that strict scrutiny would apply to the MoI guidance issued to the SERB, the ruling here was quite similar to the ruling in *Baker*, but its fact were less convoluted. This court, however, answered a question that the *Baker* court did not. The plaintiffs in *Alvin* requested not only that strict scrutiny apply but that the court also find that the Secretary was precluded, per se, from issuing the MoI guidance as a method to remedy past racial and gender discrimination because the guidance was not sufficiently narrowly tailored. The court declined to rule that the Secretary had other, less intrusive means to remedy past discrimination and stated that the Secretary should be allowed to demonstrate that the narrow tailoring prong was satisfied.[46] Post–*Alvin*, then, it still is possible that race- and gender-specific guidance to a SERB could pass strict scrutiny.

Berkley v. United States (2002)

Berkley v. United States was a military-pay class-action case against the Air Force that alleged discrimination in the operation of the FY93 RIF board.[47] The plaintiff class, a group of officers involuntarily terminated by the board, alleged a constitutional equal protection violation based on the language in the MoI to the board. Like the MoIs in *Baker* and *Alvin*, the MoI's challenged language included words instructing that, in evaluating the records of minority and female officers, the board should be sensitive to possible effects of past individual and societal attitudes that could have placed these officers at a disadvantage. The RIF board was also required to report the comparative selection rates of minorities and women to the Secretary and Chief of Staff. Although the language was similar to the language found to employ a race and gender classification in the earlier cases, the *Berkley* court determined that it could perform a separate analysis because

"the balance of the words" in the MoIs in the cases was different and because it determined that other circuits had treated the MoI language more favorably than the court in *Baker*.[49]

The Court of Federal Claims denied the class claim, finding the policies did not involve the use of a race or gender classification[50] and that the MoI was designed to "guarantee equal treatment and opportunity to all those subject to review by the FY93 RIF Board."[51] Ultimately, the court determined that the policy neither provided a benefit to women and minorities nor burdened white male officers.[52] Additionally, the Court of Federal Claims cautioned that deference to military decisionmaking should be exercised in this case.

The Court of Appeals for the Federal Circuit, by a vote of two to one, overturned the Court of Federal Claims decision. This court held only that the language of the MoI involved the use of racial and gender classifications and that strict scrutiny should have been the standard applied by the lower court.[53] It made this determination based on the fact that (1) the MoI required the board to treat the records of minorities and women differently than the records of white males and (2) racial classification could exist even where there was no compelled racial preference. The court also emphasized that the lower court underappreciated the significance of the requirement of reporting the comparative selection rates of minorities and women.[54] In the discussion of the issues, like the courts in *Baker* and *Alvin*, the court relied heavily on U.S. Supreme Court cases dealing with remedial affirmative action plans, which had determined there were no benign uses of racial classifications to which strict scrutiny would not apply.[55]

The appellate court remanded the case back to the Court of Federal Claims for the case to be reconsidered under strict scrutiny.[56] Although the court did not decide whether the policy could meet the standard, it did comment that the U.S. Supreme Court had previously stated that societal discrimination alone was an improper basis on which to impose a racial classification system.[57] It also pointed out, however, that nothing in this decision foreclosed a factual hearing regarding whether the military could supply a compelling interest to justify the policy.[58] Like the court in *Alvin*, then, the *Berkley* court determined that military policy guidance could be lawful if the justification for the guidance survived review under strict scrutiny. The most important additional determination made by this court was its finding on deference. On this subject, the court provided that deference should apply in cases involving "'discipline, morale, composition and the like . . . .'"[59] In the present instance, however, the court concluded that deference did not "preclude . . . [its] review of the Instruction in light of constitutional equal protection claims raised."[60]

Promotion Board Cases

Promotion boards have also been subject to equal protection challenges. Like retention boards, promotion boards receive Secretary-level guidance indicating how the candidates are to be evaluated and directing that the board select the best-qualified candidates. In the challenged promotion cases summarized below, as in the retention cases, the relevant guidance included special rules for the consideration of the records of women and minority officers.

Saunders v. White (2002)

Saunders v. White involved the most comprehensive consideration of Army promotion board equal opportunity guidance by a court. LTC Raymond Saunders, a member of the Judge Advocate General's Corps, challenged the Army's 1996 and 1997 colonel promotion boards, claiming that the instructions given to the boards and the way in which they were interpreted denied him equal protection of the laws by favoring women and minorities. LTC Saunders was allowed to proceed with his claim even though he was ultimately reconsidered and redenied by a Special Selection Board (SSB) convened after the 1997 board.

The *Saunders* case is influential for a number of reasons, including that it deals with promotions rather than force reductions or retirements, and, as in *Christian*, the court substantively applied heightened scrutiny to an Army equal opportunity policy. It is, however, a decision from a federal district rather than an appellate court, and it largely confines itself to analyzing remedial justifications for considering race and gender in promotions.

Three of the challenges in *Saunders* are germane to present considerations of equal opportunity in the Services: (1) whether Saunders had standing to challenge the board results, (2) whether the Army could limit liability by demonstrating LTC Saunders would not have been promoted under identity-neutral criteria, and (3) whether the Army's policy facially violated the constitution.[61]

To seek either prospective or retrospective relief from a federal court, a plaintiff must have standing, which requires, among other things, the existence of an injury in fact. In this case, the court determined that, with regard to retrospective relief, LTC Saunders's injury could have been either that the consideration of race and gender deprived him of the ability to compete on equal footing or that he was actually denied the benefit.[62] The court determined that, for the purpose of deciding standing, it must assume the truth of LTC Saunders's claims about the boards, and, in so doing, it determined that it was possible that LTC Saunders was either subject to a process that left him on unequal footing or that race or gender were motivating factors in the decision not to promote him.

Standing could arguably have been defeated if the government had shown that LTC Saunders would not have been selected even if the board had considered only identity-neutral criteria.[63] Even if standing were present, the government could, as a matter of law, use the fact that it would have made the same decision without identity-conscious considerations to limit its liability.[64] The court, however, noted that the records of the challenged boards had been destroyed and that it would not consider the deliberations of SSBs with different or no

equal opportunity guidance as a substitute for the challenged boards. Finally, in its discussion of standing, the court believed that the following facts undermined the claim that LTC Saunders would not have otherwise been selected. First, the Army failed to provide any evidence that the 1996 and 1997 boards, using identity-neutral criteria, would still not have selected LTC Saunders. Second, whether a board did or did not use the revote procedure is not the determining factor in proving whether the plaintiff would have been selected. Third, the fact that minorities and women were promoted by the 1996 and 1997 boards indicates that the equal opportunity instruction could have prevented the plaintiff from being promoted.[65]

The substance of the equal protection challenge centered on the language in Department of Army Memorandum (DA Memo) 600-2, which contained equal opportunity language for the 1996 and 1997 colonel promotion boards. Much like the guidance in *Christian*, DA Memo 600-2 indicated that the results of the board should bear out that race and gender were not impediments to promotion to support the perception of equal opportunity among Army personnel. The directions for considering the potential effects of discrimination were similar in substance to the challenged language in *Christian*.[66] DA Memo 600-2 also included a selection rate goal for minorities and women that was not less than the selection rate for all first-time considered officers and guidance for reevaluation, revoting, and reporting for minority and female selections.

The court divided its analysis into two parts: (1) the consideration of race and gender in the initial evaluation procedure and (2) the revoting and reporting requirements. For the initial evaluation, the court determined that DA Memo 600-2 involved a direct statement of preference for minorities and females, which did constitute the use of a racial classification. The court in effect determined that, by not considering the effects of past discrimination on white men, even where goals were used instead of quotas, the procedure de facto included a race and gender preference. In its analysis, the court embraced the *Christian* decision and it chose not to follow the initial *Berkley* decision in the Court of Federal Claims, ostensibly because the Air Force board in *Berkley* used no goals.[67]

After deciding that the initial evaluation procedure involved the consideration of race and gender classifications, the court applied heightened scrutiny to the Army's justifications for the policy. For race, the court leaned on the ruling in *Christian* and other U.S. Supreme Court affirmative action cases to conclude that the Army's desire to create the perception of equal treatment was not a "sufficiently important non-remedial government interest" to meet the compelling interest/narrowly tailored standard.[68] The court's criticism focused heavily on the inherently subjective nature of perceptions. The court also rejected the Army's claim that the policy was justified as a remedy to correct the persistent underselection of women and minorities by Army selection boards. Although the court stated that remedying past and present discrimination by government actors would suffice as a compelling interest, it turned to the Army's statistical and testimonial data to test the existence of such discrimination.[69] The court rejected the publication *Race Relations Research in the United States Army in the 1970's: A Collection of Readings* as supplying the needed strong basis in evidence.[70] The court claimed that the publication, which covered 1962–1982, suffered from three significant problems. First, it did not necessarily reflect conditions in the Army in 1993. Second, the data and conclusions pertained to the Army in general rather than to the plaintiff's career field (the Judge Advocate General's Corps). Third, the publication contained inconclusive statistical data pertaining to racial discrimination.[71]

The court also found that the use of the gender classification in the initial evaluation procedure failed intermediate scrutiny, which requires the classification to serve an important governmental objective and to be substantially related to the achievement of that objective. The court found the first justification—to create the perception of equal opportunity—was also too subjective in the gender context and that the Army provided no evidence of how manipulating perceptions of how it treated officers was an important governmental objective.[72] The court also rejected the Army's second justification that it was seeking to remedy the "persistent underselection of minority and female officers by Army Selection Boards."[73] As it claimed in the matter of using racial classifications, the court maintained that this justification could meet the important governmental objective standard but that the government failed to provide the "sufficient probative evidence of discrimination that was needed."[74] Moreover, the court commented that, for race and gender, it is crucial that the military explain how the data support the use of the protected classification by boards in order to make the statistical evidence "meaningful to the trier of fact."[75]

Finally, for the review and revote policy the court found that "these instructions, alone and independent of" the other DA Memo 600-2 instructions, constituted the use of a racial and gender classification. Based on the reasons discussed in the initial evaluation procedure, the court found that the Army's justifications for considering race and gender in reviewing and revoting procedures did not meet the standards of strict or intermediate scrutiny.

Saunders was a promotion case, but much of the decision in *Saunders* imports the legal analysis developed in the *Christian* case in the retention context. Importantly, the *Saunders* opinion also identifies three issues related to equal opportunity policy guidance that will have to be carefully considered moving forward: (1) the effect of including in board guidance "goals" for the selection of minority and female officers, (2) reliance on remedial justifications for the consideration of race and gender that are not well supported by empirical data, and (3) failure to articulate for the court how the empirical data support the decision to use the race or gender classification.

Ricks v. United States (2002)

In an Air Force case challenging guidance to a promotion board, Timothy Ricks, a retired Air Force major, contested being passed over for lieutenant colonel in November 1992. Before being considered for promotion a second time, he applied and was approved for early retirement.[76] In October 1993, he was passed over again for lieutenant colonel, and he retired in August 1994. Both of the boards that failed to select Maj Ricks received instructions substantially similar to the MoI in *Berkley*.[77] In 1997, Ricks filed an application with the Air Force Board for Correction of Military Records to be reinstated to the Air Force and retroactively promoted to lieutenant colonel due to irregularities with his promotion boards. When this application was denied in 2000, he filed suit alleging he was passed over by boards that employed unconstitutional race and gender preferences.

The case was originally dismissed by the Court of Federal Claims due to Ricks' voluntary retirement, which was approved prior to the convening of the second promotion board. The dismissal was vacated and remanded back to that court by an appellate court.[78] On remand, the parties agreed to stay the case until *Christian* was decided. After *Christian* was decided, the *Ricks* court decided that the MoI language at issue involved the unconstitutional use of a race and gender classification. The court, however, ultimately decided the matter should be returned to the Secretary of the Air Force to determine whether harmless error had occurred in this case. In other words, the Secretary was to determine whether then–Maj Ricks would have been promoted absent the consideration of unconstitutional instructions to the promotion boards.[79]

Ricks, then, is an example of a court applying principles and holdings from *Christian* and *Saunders*. From *Christian*, the court determined that the MoI language pertaining to the selection procedures for minority and women officers involved an unlawful use of gender and race classifications. Consistent with the *Saunders* opinion, however, the court indicated that the plaintiff would only be entitled to a remedy if he could prove that he would have been promoted if identity-neutral guidance was in place.

Conclusions

The applicability of the above legal opinions should be understood to be somewhat limited by the very specific facts of the cases. There are, however, some legal determinations within the cases that should inform decisions about equal opportunity guidance moving forward:

- The majority of courts in these cases did not excuse from review under strict or intermediate scrutiny language merely directing boards to consider the effects of discriminatory attitudes and practices on the careers of minority and women officers.
- Although goals for minority and female selections are not unlawful, the courts in these cases were reluctant to find their use constitutional, at least when such practices as revoting and reporting comparative race and gender statistics are a part of the selection process.
- Courts in a number of these cases indicated that Secretary-level equal opportunity policy guidance to promotion and retention boards, could, in theory, survive strict or immediate scrutiny, but, on the facts of the cases considered, none of the policies was upheld.
- When the consideration of race or gender is one factor in an evaluative selection process, the government may limit liability by proving that the plaintiff would not have been promoted if considered under race- and gender-neutral criteria.
- The courts did not find either personal discrimination by military members or curing the effects of societal discrimination to be valid compelling interests under strict scrutiny.
- The government has a compelling interest in remedying past and present racial discrimination by state actors, but courts will require **a strong basis in evidence** prior to accepting such a justification as meritorious.
- An important government objective may exist in eliminating the persistent under-selection of female officers by selection boards, but the government has to present **sufficient probative evidence** of discrimination for the use of the gender classification to be justified.
- Based on the cases, the statistical data that will most likely suffice as evidence to justify the use of protected classifications will need to be recent, particularized by career field, consistent with using the classification(s) for a limited duration, demonstrative of the present effects of governmental discrimination, and presented in a way that **meaningfully explains to the trier of fact** how the data should be interpreted and how they demonstrate the need to use **protected classifications** in evaluative procedures.
- None of these cases involved gender and racial considerations premised principally upon diversity as a strategic imperative.
- It is uncertain how the U.S. Supreme Court would approach a military affirmative action case, but, in past civilian cases, the Court has been deeply skeptical of plans designed to remedy past societal discrimination in contracting and employment. The military-focused dicta in *Grutter v. Bollinger*, an affirmative action case that upheld diversity as a compelling interest in higher education admissions, does, however, support the argument that the Court—as then constituted—understood racial diversity in the military as a strategic imperative.[80]

Notes

[1]Saunders v. White, 191 F.Supp.2d 95 (2002); Ricks v. United States, 65 Fed. Cl. 826 (2005).

[2]Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002).

[3]Baker v. United States, 127 F.3d 1081 (Fed. Cir. 1997); Alvin v. United States 50 Fed. Cl. 295 (2001); Christian v. United States, 46 Fed. Cl. 793 (2000).

[4]In this paper the phrase, *heightened scrutiny* is designed to capture any judicial scrutiny greater than rational basis and hence pertains to any case considering the use of a race or gender classification. Judges and legal scholars have used *heightened scrutiny* interchangeably with the *strict scrutiny* standard applied to racial classifications and the *intermediate scrutiny* applied to gender classifications. For example, with racial classifications, scholars have referred to the applicability of "heightened or 'strict' scrutiny of a law that singles out a racial, ethnic, or religious group for a unique burden" (Muller, 1999, p. 1423). For gender, see, for example, Miller v. Albright, 523 U.S. 420, 434 FN. 11 (1998), where the Supreme Court stated, when referring to the intermediate scrutiny standard, "the *heightened scrutiny* that normally governs gender discrimination claims applied in this context."

[5]*Facial discrimination* refers to language that is explicitly (or "on its face") discriminatory within a document, which is typically a statute or regulation. See Berkley v. United States 287 F.3d at 1092 (Dyk, J., dissenting). Even when a statute or regulation is facially neutral, it may be applied in a discriminatory manner (see Berkley, 287 F.3d at 1084).

[6]Baker, 127 F.3d at 1083-84

[7]Baker, 127 F.3d at 1084. Unless otherwise indicated, this is substantially the same language issued to each of the Air Force promotion and retention boards discussed in this paper.

[8]Baker, 127 F.3d at 1084.

[9]Baker, 127 F.3d at 1084.

[10]Baker, 127 F.3d at 1084-85.

[11]Baker, 127 F.3d at 1085-86.

[12]Baker, 127 F.3d at 1086.

[13]Baker, 127 F.3d at 1086.

[14]Baker v. United States, 34 Fed. Cl. 645, 656 (1995).

[15]Baker, 127 F.3d at 1087.

[16]Baker, 127 F.3d at 1088.

[17]Baker, 127 F.3d at 1088.

[18]Baker v. United States, 1998 U.S. Claims LEXIS 336 (1998).

[19]Baker, 127 F.3d at 1087.

[20]Christian, 46 Fed. Cl. at 803 (2000).

[21]Christian, 46 Fed. Cl. at 798.

[22]The MoI concept of operations established four phases for the SERB decisionmaking process. Phase I, which covered the initial scoring of records, announced a goal for the percentage of women and minorities to be selected and created separate criteria for considering the records of women and minorities, both included to combat the effects of past discrimination (Christian, 46 Fed. Cl. at 797). In Phase II, the number of officers to be retired was determined, and the board also ensured that the selection rate for women and minority selectees were not greater than the overall selection rate for in-zone candidates (Christian, 46 Fed. Cl. at 798). Phases III and IV were used for managing selections across career fields and for final voting, respectively (Christian, 46 Fed. Cl. at 798).

[23]In Phase I, disparate selection rates for gender and race were to be reevaluated; if these disparate selection rates remained in Phase II, a reevaluation and revote was required (Christian, 46 Fed. Cl. at 797-98).

[24]The first three challenges pertained to the statutes governing the operation of the board and decisions issued by the Army Board for Correction of Military Records.

[25]Christian, 46 Fed. Cl. at 803.

[26]Christian, 46 Fed. Cl. at 804-05.

[27]Christian, 46 Fed. Cl. at 806-07.

[28]Christian, 46 Fed. Cl. at 807. In dicta, the court indicated that this justification was similar to "diversity and role model rationales" rejected in other affirmative action contexts. At least one of the cases the court cited for this proposition, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), was effectively overruled by the decision in Grutter v. Bollinger, 539 U.S. 306 (2003).

[29]Christian, 46 Fed. Cl. at 808.

[30]Christian, 46 Fed. Cl. at 810.

[31]Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

[32]Christian, 46 Fed. Cl. at 808.

[33]Christian, 46 Fed. Cl. at 809.

[34]The Army presented a report consisting of statistical data showing that minorities were promoted at different rates than whites (Christian, 46 Fed. Cl. at 810). The court criticized the following elements of the report: (1) that the author of the report appeared to consider societal discrimination as part of the harm to be remedied; (2) that the report only separately considered minority groups other than blacks starting in 1980; and (3) that Hispanics and women were often promoted at faster rates than other officers, that there were insignificant data on American Indian promotions, and that data on Asian Americans were not included (Christian, 46 Fed. Cl. at 810 FN 4).

[35]Christian, 46 Fed. Cl. at 810.

[36]The court indicated that this was an affirmative action program and that practicing affirmative action in the area of minority retirement selection was not the least intrusive means to remedy Army discrimination. The court took issue with the open-ended nature of the consideration of race and gender. It also indicated that the Army ignored race-neutral alternatives, such as applying the goal and revote procedure to all races and both genders, expanding the pool of qualified applicants by providing additional preparation for military schools, and fixing assignments for applicants with weak backgrounds (Christian, 46 Fed. Cl. at 811-14).

[37]Christian, 46 Fed. Cl. at 815. The court further noted that the standard had been somewhat muddled by an additional case requiring the government to demonstrate an exceedingly persuasive justification in gender cases. See United States v. Virginia, 518 U.S. 515, 529-31 (1996).

[38]The Court of Federal Claims first ruled that each class member was entitled to reinstatement to their previous rank and to back pay due to unconstitutional instructions given to the boards (Christian v. United States, 49 Fed. Cl. 720 (2001)). An appeals court reversed this decision because it was possible that not all of the officers had been improperly retired. The court directed the case be directed back to the Secretary of the Army with an instruction to determine which nonselected officers were the victims of harmless error (i.e., would not have been selected even without the consideration of unconstitutional classifications) (Christian v. United States, 337 F.3d 1338 (Fed. Cir. 2003)).

[39]Christian, 46 Fed. Cl. at 809.

[40]Christian, 46 Fed. Cl. at 812.

[41]Alvin, 50 Fed. Cl. at 299.

[42]Alvin, 50 Fed. Cl. at 299.

[43]Alvin, 50 Fed. Cl. at 298.

[44]Alvin, 50 Fed. Cl. at 299.

[45]Alvin, 50 Fed. Cl. at 299.

[46]Alvin, 50 Fed. Cl. at 300.

[47]Berkley v. United States, 48 Fed. Cl. 361 (2002).

[48]Berkley, 48 Fed. Cl. 361, 375.

[49]Berkley, 48 Fed. Cl. at 376.

[50]Berkley, 48 Fed. Cl. at, 363-64.

[51]Berkley, 48 Fed. Cl. at 379.

[52]Berkley, 48 Fed. Cl. at 374.

[53]Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002).

[54]Berkley, 287 F.3d at 1085-86.

[55]The *Berkley* appellate court cites the case of *Adarand Constructors, Inc. v. Pena* for the proposition that racial consideration that provides no racial preference still involves the use of a racial classification to which strict scrutiny applies (Berkley, 287 F.3d at 1081-82, 1087-88). The court also cites the U.S. Supreme Court decisions in *Wygant v. Jackson Bd. of Educ*. and *City of Richmond v. J. A. Croson Co.* to assert that societal discrimination is not a proper basis on which to consider a racial classification (Berkley, 287 F.3d at 1085).

[56]The case settled after being remanded back to the Court of Federal Claims (Berkley v. United States, 59 Fed. Cl. 675 (2004)).

[57]Berkley, 287 F.3d at 1085 FN5 (citing Wygant, 476 U.S. at 275-76, and Croson, 488 U.S. at 498).

[58]Berkley, 287 F.3d at 1085 FN6.

[59]Berkley, 287 F.3d at 1091 (quoting Woodward v. United States, 871 F.2d 1068, 1077 (Fed. Cir. 1989)).

[60]Berkley, 287 F.3d at 1091.

[61]Saunders v. White, 191 F.Supp.2d 95, 104 (2002).

[62]Saunders, 191 F.Supp.2d at 110.

[63]Saunders, 191 F.Supp.2d at 112 (court citing the decision in Texas v. Lesage, 528 U.S. 18 (1999) and its progeny).

[64]Saunders, 191 F.Supp.2d at 119.

[65]Saunders, 191 F.Supp.2d at 113-14.

[66]While similar, the language in DA Memo 600-2 was somewhat enhanced, describing the problematic past discrimination as "intentional or inadvertent—in the assignment patterns, evaluations, or professional development of officers in those groups for which you have an equal opportunity selection goal" (Saunders, 191 F.Supp.2d at 121).

[67]Saunders, 191 F.Supp.2d at 127.

[68]Saunders, 191 F.Supp.2d at 129.

[69]Saunders, 191 F.Supp.2d at 129-30.

[70]Saunders, 191 F.Supp.2d at 130-31.

[71]Saunders, 191 F.Supp.2d at 133. With regard to the strength of the data, the court found that the data undermine the Army's position because, in the five years preceding 1993, black officer promotion rates were comparable to or better than the promotion rates for whites, and there needed to be evidence of gross statistical disparities to justify the use of racial classifications.

[72]Saunders, 191 F.Supp.2d at 134-35.

[73]Saunders, 191 F.Supp.2d at 135.

[74]The court refused to accept an Army Research Institute publication that looked at data from 1974–1983 as proof of discrimination because it found the evidence too remote (old) to prove discrimination in 1993 and because, except for the grade of O-7, women officers promoted faster than men in all grades.

[75]Saunders, 191 F.Supp.2d at 136.

[76]Ricks v. United States, 65 Fed. Cl. 826, 828 (2005).

[77]Ricks, 65 Fed. Cl. at 828.

[78]Ricks v. United States, 278 F.3d 1360 (Fed. Cir. 2002). The court held that the characterization of Maj Ricks's retirement was determined at the effective date of his retirement, not at the date on which he applied for retirement. When he retired, it was after failing to select twice, so the retirement was involuntary (Ricks, 278 F.3d at 1365-66).

[79]Ricks, 65 Fed. Cl. at 834-35. Part of the court's analysis related to determining the effect of the passage of the Defense Officer Personnel Management Act on this case. The court concluded the availability of the Secretary to direct SSBs under the act for those who twice failed to select did not affect the harmless error standard.

[80]Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (Justice O'Connor, noting that "[a] racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security.").

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