Issue Paper #35
Legal Implications
Version 2

Introduction to Laws Governing Diversity Policies

MLDC Research Areas

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This issue paper aims to aid in the deliberations of the MLDC. It does not contain the recommendations of the MLDC.

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Abstract

This document provides a brief introduction to the legal limits that frame what a military diversity program may do. Military diversity and equal opportunity programs are regulated by the U.S. Constitution and by internal military policies that generally follow the requirements of Title VII of the Civil Rights Act of 1964 (as amended). In general, military policies or actions that use different standards on the basis of membership in one or more *suspect classes*—namely, race, ethnicity, color, national origin, and religion (and, to a slightly lesser extent, gender)—in making admission, accession, assignment, promotion, or separation decisions are presumed to be unlawful under the Equal Protection clause of the Fourteenth Amendment. To overcome this presumption in a lawsuit, the government program must satisfy the *strict scrutiny* test. To do so, the government would have to persuade a court that the diversity program (1) advances a *compelling government interest* and (2) is *narrowly tailored* to successfully address that interest and to infringe as little as possible on the rights of others. However, a diversity program that does not use different standards on the basis of membership in one or more suspect classes in making admission, accession, assignment, promotion, or separation decisions is not presumptively unconstitutional and, thus, would not have to satisfy the strict scrutiny test. Instead, in a lawsuit, the burden would fall on the plaintiff to prove that those adopting the program did so with an intent to discriminate.

The MLDC has been chartered to "conduct a comprehensive evaluation and assessment of policies that provide opportunities for the promotion and advancement of minority members of the Armed Forces," including the military's diversity programs. The tasks of the charter indicate that the term *minority* is intended to include both women and members of underrepresented race/ethnicity groups. Also implicit in the tasks is the goal of increasing demographic diversity among the military's senior leadership.

Because U.S. law generally prohibits public employers from treating people differently based on race, ethnicity, and (to a lesser extent) gender, a series of three issue papers (IPs) is devoted to describing and explaining the legal framework surrounding diversity programs, particularly aspects of the legal framework that affect decisions regarding the recruitment, admission (to the military academies, to the Reserve Officer Training Corps, and to other officer accession programs), accession, assignment, promotion, and separation of military servicemembers.

This is the first IP in the series. It describes the laws governing the equal treatment of military members and introduces the *strict scrutiny* test used by courts to determine the legality of employment policies and practices that use different standards for individuals based on their membership in one or more *suspect classes*.[1] The strict scrutiny test has two prongs: Courts will uphold a policy or practice if the government can demonstrate that it both (1) pursues a *compelling government interest* and (2) is *narrowly tailored* to pursue that interest in a way that minimizes its burden on others. The second and third issue papers elaborate on the two prongs of the test. Compelling government interests are explained in Military Leadership Diversity Commission (2010a), and narrow tailoring is addressed in Military Leadership Diversity Commission (2010b).

Background

Any military diversity program must comply with existing law. In the United States, there is a hierarchy of laws. The Constitution is the supreme law of the land, which means that all

laws of all types must conform to it. The next level of law is Congressional statute. Below statutes are regulations, which are made by federal departments and agencies in order to implement statutes. Courts interpret the Constitution, statutes, and regulations. If a court determines that a statute does not satisfy the Constitution or that a regulation does not conform to its authorizing statute or to the Constitution, the court can strike down all or part of that statute or regulation.

The U.S. military has limited flexibility in designing programs to enhance the demographic diversity of its members and, ultimately, its senior leadership. Specifically, the law limits the military's ability to adopt policies that apply different standards in admission, accession, assignment, promotion, or separation decisions based on an individual's race, color, ethnicity, gender, or religion. The law is the product of the nation's history of invidious discrimination. Because of this history, federal law prohibits intentional and unintentional discrimination against employees based on these characteristics. Courts require that employers clearly demonstrate that any use of different standards based on these categories in employment decisionmaking is done for a legitimate, necessary purpose and not to invidiously discriminate. Two bodies of law govern the use of race, ethnicity, color, national origin, gender, and religion in the context of employment by the government: (1) the Equal Protection Clause of the Fourteenth Amendment and the cases interpreting it and (2) several statutes, of which the most relevant to the military in the current context is Title VII of the Civil Rights Act of 1964 (as amended).

As this and other IPs will make clear, current law forbids invidious discrimination, but it also makes it difficult for the military to make distinctions based on the above categories for benevolent purposes. The military is, however, something of an exception among public employers because it has been granted unusual flexibility to discriminate based on age and disability and, to, a very limited extent, gender, based on current perceptions of military requirements.

There are, however, efforts the military can undertake to improve its demographic diversity that do not carry a high risk of being successfully challenged in court. For example, programs that do not use different decisionmaking standards based on the categories set forth above do not face the same limits or risks that accompany programs explicitly based on membership in one or more suspect classes. Therefore, a program that ensures that recruiting resources are directed to historically low recruitment areas, that helps improve the qualifications of applicants, or that finds and then removes barriers to equal opportunity will face a lower level of (or no) litigation risk. In contrast, policies that use different standards in accession, admission, assignment, promotion, and separation *decisionmaking* based on suspect class membership are *not* likely to pass legal muster without a very strong justification and very careful program design.

An Unclear Area of Law

It is important to recognize that the law in this area suffers from significant confusion and contradiction. There are several reasons for this, many of which are rooted in the politics of the segregation era and in typical characteristics of the judicial process.

First, the relevant bodies of law were created to end explicit segregation and discrimination, which makes them an awkward fit in modern efforts to improve diversity.

Second, the Equal Protection clause of the Fourteenth Amendment gives no guidance beyond guaranteeing "the equal protection of the laws." All interpretations of this text are made by judges as they preside over an adversarial process.

Third, judges make decisions in each individual case based on the particular facts and arguments of that case. The cases that are ruled upon by the Supreme Court or courts of appeal often involve unusual facts or particularly poorly designed policies, and this has resulted in a body of law that is presented as being general but is actually based on marginal cases. Most Supreme Court decisions in this field are not unanimous, with many recent decisions having been decided by a 5-4 majority.[2]

Fourth, litigation is literally trial and error. Some programs that were struck down in the past might now or in the future likely be upheld (or vice versa) based on successful arguments used in other, later cases, in front of other judges, or with the benefit of new evidence from the social sciences.

Fifth, judges are human and fallible. Judges may make their rulings based on their perceptions or presumptions. They may be friendly or hostile to diversity or affirmative action as a matter of principle. Judges of different viewpoints may replace these judges when they retire (as happened, for example, when Supreme Court Justice Sandra Day O'Connor retired).

In sum, it is extremely difficult to predict whether a particular good-faith policy or program designed to further diversity will pass Constitutional muster.

The Law Governing Diversity Programs

1. The Fourteenth Amendment's Equal Protection Clause. The first body of law comprises court decisions interpreting the guarantee of "the equal protection of the laws" in the Fourteenth Amendment, one of the Civil War–era amendments to the U.S. Constitution.[3] Courts have interpreted the brief statement in the Fourteenth Amendment to mean that government laws or programs that use different standards based on individuals' race, color, ethnicity, national origin, and religion (and, to a lesser extent, gender)[4] unlawfully discriminate on the basis of membership in a suspect class.

However, because using these *suspect classifications* may sometimes serve an important, positive purpose (such as remedying the types of discrimination that the Equal Protection clause forbids), courts do not automatically strike down all uses of suspect classifications. Instead, courts subject suspect classifications to a test called *strict scrutiny*. The test is intended to "smoke out" invidious discrimination and, at the same time, allow the implementation of policies that pursue important, legitimate goals.[5] But even well-meaning policies can do harm if they are poorly crafted; hence, there are two prongs of the strict-scrutiny test: Courts will uphold a policy if the government can demonstrate (1) that the use of the suspect classification pursues a *compelling government interest* and (2) that the use of the classification is *narrowly tailored* to pursue that interest in a way that minimizes harm to others.

The test places the burden on the government to justify the legality of the program. This is different from the usual judicial approach to reviewing government action. Typically, the burden is on the plaintiff to demonstrate that the government acted illegally, and then the government has an opportunity to show that its action had a rational basis. Accordingly, military programs that use different standards based on classifications that are *not* suspect—such as skills, credentials, height, and weight—face only rational basis review of their legality, a test that the government usually satisfies.

However, given the history of gross denial of fundamental rights based on the use of suspect classifications in U.S. history, courts presume that any use of suspect classes violates the Constitution, and so the burden is on the government to demonstrate the legality of the program with a strong, not merely plausible, justification.

In essence, the strict scrutiny test requires the government to demonstrate that an important problem actually exists, that the policy is actually designed to fix the problem, and that the policy is designed to minimize the harm done to the rights or interests of people who do not benefit from the policy.

In some situations, it is unclear whether a suspect classification is being used or whether different standards are being employed on the basis of suspect classifications. If suspect classes are mentioned explicitly, a court would probably find that the policy is employing suspect classifications. However, if a policy does not explicitly mention suspect classes but has, in practice, a disproportionate impact on individuals based on their membership in one or more suspect classes (known as *disparate impact*), a plaintiff might claim that the policy was implemented with a discriminatory intent. For strict scrutiny to apply to a program that does not explicitly treat people differently on the basis of suspect class membership, a plaintiff would have to prove that the government program is intended to discriminate on the basis of suspect class.[6] Only if the plaintiff were successful in doing so would the burden switch to the government to justify the program. Otherwise, the program would undergo rational basis review.

Strict scrutiny has been described as "strict in theory, fatal in fact" (Gunther, 1972, p. 8), but this is not true: In an empirical study of court decisions between 1990 and 2003 that applied strict scrutiny in lawsuits alleging discrimination based upon suspect classifications, Winkler (2006, p. 842; 2007, p. 1938) found that the court upheld the federal government's use of suspect classifications half the time. The specifics of compelling government interests and narrow tailoring are discussed in the IPs that treat those topics.[7]

2. Title VII of the Civil Rights Act of 1964. The other body of law that governs the federal government's employment practices is a series of statutes, Executive Orders, regulations, and guidelines that forms the rest of U.S. antidiscrimination law. This body of law prohibits discrimination against several *protected* classes (not all of which have been determined to be suspect under the Fourteenth Amendment).[8] Of these laws, the most important to military diversity is Title VII of the Civil Rights Act of 1964, as amended and interpreted over the years (42 U.S.C. § 2000e).[9] Title VII generally forbids discriminatory employment decisions or actions based on a person's race, color, religion, sex, or national origin (42 U.S.C. § 2000e-2). When members of the National Guard or reserves hold hybrid military and civilian positions, Title VII applies to their civilian capacities. And, although several courts have held that Title VII does not apply to uniformed military servicemembers,[10] Title VII is nonetheless relevant to military diversity programs for three reasons.

First, Title VII made equal opportunity the law, and DoD military equal opportunity policies extend this principle to servicemembers as a matter of policy. Although Title VII and other related statutes do not apply to all military areas—the military does discriminate on the basis of gender, age, and disability, for example—the military does abide by these statutes in many aspects of its operations.[11] For example, the Services make efforts to remove intentional or unintentional barriers to career progress that are linked to membership in a protected class.

Second, there is an internal administrative process for servicemembers that is similar to that which Title VII provides for civilian government employees.[12] And, although servicemembers cannot bring lawsuits in court based on Title VII, they can bring lawsuits based upon the Equal Protection clause (after they have exhausted all internal administrative procedures).

Third, most cases involving public employers have involved claims brought under both Title VII and the Constitution's Equal Protection clause. Judges accordingly interpret one provision in light of the other, which has led to a degree of convergence between the two bodies of law.[13] This is most important for the narrow tailoring prong of the strict scrutiny test, as discussed in Military Leadership Diversity Commission (2010b).

Conclusion

This IP describes the two major bodies of law that limit the military's flexibility in designing diversity programs. There are four key points to take away from the discussion:

- Military diversity and equal opportunity programs are regulated by the U.S. Constitution and by internal regulations that generally implement Title VII of the Civil Rights Act of 1964 (as amended).
- If the military uses different standards in making admission, accession, assignment, promotion, or separation decisions based on an individual's membership in a suspect class, it will have to satisfy the strict scrutiny test.
- Programs that do not use different standards on the basis of membership in one or more suspect classes at the moment of decision generally do not face strict scrutiny.
- The legal landscape is not completely clear—it is continuously changing and, therefore, open to challenge.

Notes

[1]Courts also apply strict scrutiny to other areas of law (Winkler, 2006). These IPs consider only strict scrutiny cases involving diversity and affirmative action programs in public employment. Please note that these IPs provide a basic introduction to the relevant law. Any specific policy would require a fuller legal analysis.

[2]The Supreme Court has ruled 5-4 in most recent cases involving diversity issues, such as Ricci et al. v. DeStefano et al., 129 S.Ct. 2658 (2009); Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003). For earlier cases, see Spann, 2000, pp. 162–163.

[3]U.S. Const., amend. XIV, § 1. This provision applies to governments, not the private sector (except when it acts on behalf of the government). It applies to the federal government by way of the Fifth Amendment (Bolling v. Sharpe, 347 U.S. 497 (1954)).

[4]Courts are highly skeptical of differential treatment on the basis of gender. However, they have upheld that there are some legitimate reasons to treat women differently from men, one of which is pregnancy. For the sake of simplicity, gender is treated as a suspect class in these IPs.

[5]City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989).

[6]Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229, 238-39 (1976). Disparate impact claims can be brought under Title VII without proof of discriminatory intent, but, as the next section discusses, Title VII has been held not to apply to servicemembers.

[7]See Military Leadership Diversity Commission (2010a, 2010b).

[8]Race, color, national origin, and religion are considered protected classes as well as suspect classes under the Fourteenth Amendment, and gender is both a protected class and a nearly-suspect class. Federal protected classes that are not considered to be suspect classes are age (over 40), familial status, disability, and veteran status. Other classifications, such as sexual orientation, are considered protected or suspect by some states and municipalities.

[9]Unlike the Equal Protection clause, Title VII also applies to the private sector.

https://www.deomi.org/EOAdvisorToolkit/complaintmatrix.cfm.

[10]See Roper v. Dept. of Army, 832 F.2d 247, 248 (2d Cir. 1987); Gonzalez v. Dept. of Army, 718 F.2d 926, 928-29 (9th Cir. 1983); Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981). Because servicemembers cannot bring lawsuits under Title VII and the Supreme Court has interpreted the Equal Protection clause to apply only to intentional discrimination, servicemembers have no ability to bring lawsuits based on unintentional, disparate impact discrimination.

[11]Information on each Service's Equal Opportunity program can be found at https://www.deomi.org/EOAdvisorToolkit/index.cfm.

[12]Charts explaining the Services' complaint processes are available at https://www.deomi.org/EOAdvisorToolkit/complaintmatrix.cfm.

[13]See, e.g., Tilles (2004).

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