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Affirmative Action Case Goes Before Court

Associated Press

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WASHINGTON - Supreme Court justices vigorously debated the role of race in higher education Tuesday in a pair of cases that could rewrite the rules for affirmative action on campus and beyond.

The justices aggressively questioned lawyers, focusing on likely consequences of discrimination and educational opportunity.

It was the first time in 25 years that the court had taken up the polarizing question of racial preferences in admissions. People eager to get courtroom seats lined up hours before the cases were heard and a crowd estimated by police at between 5,000 and 7,000 people gathered outside and on the nearby Mall.

Three white applicants rejected by the University of Michigan and its law school are challenging the school's admissions policies as unconstitutional racial discrimination. They contend that black, Hispanic and American Indian candidates with the same qualifications are given preferential treatment.

"I have to say that in looking at your program it looks to me like this is just a disguised quota," Justice Anthony M. Kennedy told a university lawyer.

Justice Sandra Day O'Connor, who with Kennedy is considered a crucial swing vote on the issue, asked skeptical questions of the white applicants' lawyer.

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“You say (race) can't be a factor at all. Is that it - is that your position, that it cannot be one of many factors?” O'Connor asked lawyer Kirk Kolbo.

Told yes, O'Connor replied that the constitutional argument isn't so simple.

“You're speaking in absolutes and it isn't quite that,” she said. “I think we have given recognition to the use of race in a variety of settings.”

The court amassed more than 100 friend of the court filings on the affirmative action cases, an apparent record. Most of the filings backed the idea that affirmative action has a place in American life, from the classroom to the boardroom.

In another measure of the issue's resonance, the court agreed to release an audio tape of the arguments the same day. The court had done that only one other time, after the last presidential election.

The race issue is awkward for the Bush administration, whose most conservative supporters hope the cases will spell the end of all preferences or set-asides for minorities. Bush has not gone that far, pointing instead to what he calls racially neutral ways to achieve campus diversity.

The Michigan undergraduate school uses a point system to screen the thousands of applicants it receives each year. A minority member can get a 20 point bonus out of a the system's possible 150, while various measures of academic performance, extracurricular activity and other attributes are generally worth less.

The law school uses a vaguer system intended to yield a “critical mass” of minorities in each class, generally around 10 percent or more.

The resulting mix of students from different racial, ethnic, geographical and economic backgrounds benefits everyone, including whites, lawyer Maureen Mahoney argued.

“Sure, they're in already,” Justice Antonin Scalia exclaimed. “The people you want to talk to are the high school seniors who have seen people visibly less qualified than they are get into prestigious institutions where they are rejected. If you think that is not creating resentment, you are just wrong.”

Justice Clarence Thomas, the court's only black member, broke his customary silence during oral arguments to question the premise that race-conscious admissions policies furthered a broader social goal of racial understanding and harmony.

Thomas, Scalia and Chief Justice William H. Rehnquist have opposed affirmative action in the past. The court's more liberal justices seemed to embrace the notion that racial preference programs can serve laudable goals in education and other spheres.

``The reason for it is they want to produce a diverse class," Justice Stephen Breyer said. ``They think it breaks down stereotypes within the class, they think it's educationally beneficial, they think ... a legal profession, like business and the military, that is diverse is good for America."

In 1978, the court outlawed the use of quotas, but allowed race to be used as one factor in tax-supported university admissions.

That ruling has been widely criticized as muddy and inconclusive, but it was far from clear Tuesday that the current court intends to strike it down.

The Bush administration's top Supreme Court lawyer, Theodore Olson, stepped delicately around the question of ending affirmative action.

``We're reluctant to say never," he said.

Several justices pressed the Bush administration and Kolbo to respond to a friend-of-the-court filing from retired chairmen of the Joint Chiefs of Staff and other military officers.

Adm. William Crowe, Gen. Hugh Shelton and Gen. John M. Shalikashvili and others argued that the military needs affirmative action to maintain a racially diverse officer corps.

``We respect the opinions of those individuals, but the position of the United States is that we do not accept the proposition that black soldiers will only fight for black officers or the reverse," Olson said.

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On the Net:

Michigan admissions lawsuit site: [http://www.umich.edu/\(tilde\)urel/admissions/](http://www.umich.edu/(tilde)urel/admissions/)

Lawyers for rejected white applicants: <http://www.cir-usa.org/>

Supreme Court site: <http://www.supremecourtus.gov>

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