

Dismantling affirmative action in higher ed

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A couple of weeks ago the Trump Administration rescinded two Obama-era guidelines on affirmative action in higher education. The two guidelines, issued by the Obama administration in 2011 and 2016, respectively, gave colleges a lot of leeway in determining whether considering applicants' race was necessary to achieve a diverse campus as part of the institution's goals.

The bases for these guidelines were the multiple U.S. Supreme Court decisions since the 1978 *Bakke* case, which basically said that although race quotas were not permissible, considering race in the admissions process was acceptable as long as it serves to achieve institutional missions. The most recent decision on this matter was in 2016, in *Fisher v. University of Texas*, a decision written by the now retiring Supreme Court Justice Anthony M. Kennedy, which allowed race to be considered in the admissions process of any university.

The question is, what are the real intentions of the Trump Administration in abolishing the Obama-era policies? Is it just another of his ideological tantrums to keep his base happy, or something else? Let's analyze the facts.

Republicans have long had an issue with affirmative action, a policy created by the Kennedy Administration in 1961 intended at developing laws, policies, guidelines, and administrative practices to end and correct the effects of a specific form of discrimination. This has been contested by Republicans in the courts for a long time. The justices involved in those

decisions have affirmed the value of such practices, although in a limited way.

For example, in 2003 the George W. Bush Administration told colleges that they could not consider race in the admissions process unless it was "essential" to achieving their mission. The Bush-era guidance seemed to discourage the use of race, which it said, "must have a logical end point." The currently nominated U.S. Supreme Justice Brett M. Kavanaugh was part of the Bush legal team then, although his exact influence on that policy is unknown.

The Obama Administration issued in 2011 a joint guidance by the Education and Justice departments replacing Bush's. It said that affirmative action programs "greatly contribute to the educational, economic, and civic life of this nation," effectively encouraging colleges and universities to consider applicants' race as a means of increasing the diversity of their student bodies.

Last November the Trump Administration's Department of Justice announced it was investigating Harvard University – a private university – for alleged discrimination against Asian-American applicants. This is a very convenient and savvy approach to the issue. By attacking Harvard they are aiming at a favorite target of their concerted animosity towards higher education. Harvard is not only very famous, but also has been painted by Trump officials as a "nest of liberals." By appearing to defend Asian Americans, the Trump Administration is siding neither with African Americans nor Latinos on this issue, but with a group that tends to vote conservative and are more palatable to the party's white base.

Then, in March of this year, "The Students for Fair Admissions," a conservative group that has always challenged the notion of affirmative action, filed a lawsuit in the U.S. District Court in Boston claiming, among other things, that Harvard's actions were "unconstitutional." The leader of this group, Edward Blum, is notorious for recruiting plaintiffs, hiring sympathetic lawyers, and raising millions of dollars from conservative groups to challenge voting rights and affirmative action policies, often successfully. He was the one behind bringing the *Fisher v. University of Texas* case to the U.S. Supreme Court, which claimed that Abigail Fisher was denied admission because she was white. That case was decided (4-3) in favor on the university with the pivotal vote by Justice Kennedy.

This latest lawsuit against Harvard seems to be designed to end up in the U.S. Supreme Court, where Kavanaugh, the presumptive replacement for Kennedy, will tilt the court's decision against affirmative action, thus reversing the previous decision in *Fisher v. University of Texas*. As has been disclosed since his nomination last week, Kavanaugh is a very conservative justice who has opposed (or at least been very critical of) voting rights, abortion rights, the right of government to regulate industrial pollution, and health care, among other matters.

Kavanaugh has been endorsed by the Federalist Society, a very active group in conservative circles that has been very successful in getting conservative lawyers appointed to judiciary positions and that emphasizes a literal interpretation of the U.S. Constitution, a document that was written when slavery still existed and

women did not have the right to vote. In fact, the Trump Administration in repealing Obama Administration guidelines, saying that those recommendations, "advocate policy preferences and positions beyond the requirements of the Constitution."

Beyond the constitutional issues, and despite the fact that guidance documents by federal agencies do not have the same legal authority as court decisions, these actions by the Trump Administration may be designed to send the message to colleges and universities to watch their steps or risk losing federal assistance.

So, what would be the next step for the dismantling of affirmative action in higher education? The lawsuits filed against Harvard (and a similar one filed against the University of North Carolina) are still at an early stage, since they are still in federal district court. After that they will likely proceed to the U.S. Supreme Court. Then, with a very conservative new justice, such as Kavanaugh, the original majority opinion written by Justice Kennedy will be overturned. The basis? Not only that affirmative action is not constitutional, but that by discriminating against Asian Americans, Harvard is violating Title VI of the landmark 1964 Civil Rights Act, which prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. This would be a perverse use of a law aimed at protecting non-whites from discrimination in order to favor a white supremacist ideology.

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