

JUSTICE JOHN PAUL STEVENS (Ret.)

GERALD R. FORD PRESIDENTIAL FOUNDATION
2011 WILLIAM E. SIMON LECTURE
IN PUBLIC AFFAIRS

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Football is a dangerous game. When I was in grammar school I was a pretty good defensive lineman because I had been taught to "hit 'em low" - to go for the running back's ankles or knees. I did not have the opportunity to play football when I attended high school because the son of the school's athletic director had suffered a fatal injury in a game a few years earlier and soccer, rather than football, was the sport that we played during the fall. Football was too dangerous for my classmates and me.

Perhaps that is one of the many reasons why I have especially admired four men who first achieved fame as football players. All played 60-minute games. Two were linemen and two played in the

backfield. And two played against each other. All four served with distinction in the Navy during World War II. While all were fierce competitors on the gridiron, in social settings they were quiet-spoken, modest gentlemen who avoided discussion of their exploits on the field or their heroism in combat. Each impressed me with his quiet confidence in his ability to evaluate the talents of his potential adversaries as well as his friends and associates. And they shared an important virtue - courage.

The youngest, Norman J. Barry, was my contemporary. Jack was an end on the undefeated Notre Dame team coached by Frank Leahy in 1941. We became friends and associates in a large law firm in 1947 and, along with Ed Rothschild, formed our own three-man partnership in 1952. I am sure that Jack's experience in competitive football enhanced his skills as an advocate in our adversary system of justice. It was his superb judgment that made

him one of the best - if not the best - trial lawyer at our bar when I was practicing law in Chicago.

The second was Byron White, an All American from Colorado, a Rhodes Scholar, and the leading ground gainer for at least one year in the National Football League. I first met him in Pearl Harbor during World War II, but did not have the opportunity to get to know him well until after we became colleagues on the Supreme Court. I think two of his many fine qualities are attributable to his experience as an athlete. He never took what he characterized as a "cheap shot" at anybody, and he was the quintessential team player. Whenever it was necessary for a Justice to undertake a burdensome and unpleasant assignment, he was always the first to volunteer.

The third, Jay Berwanger, was the first winner of the Heisman Trophy and a fraternity brother, friend and classmate of my brother Jim. They

graduated from the University of Chicago in 1936. I was then a student at the high school affiliated with the University of Chicago, and therefore eligible to purchase a "C-Book" for five dollars that included season tickets for all athletic events at the University. In the 1930's, Chicago was in the Big Ten Conference, playing its home games in Stagg Field, which later became famous because the research that produced the atomic bomb was conducted in a secret location under the field's West stands. The secrecy of that location had been a University tradition because - for reasons that I have never understood - the Senior Men's Honor Society had been conducting clandestine meetings there for many years.

On October 13, 1934, I was in the stands when the Michigan Wolverines played an exceptionally memorable game against the Chicago Maroons. Jay Berwanger and my fourth hero, Gerald Ford, played against each other in that game. During the first

quarter neither team scored; during the first half Berwanger gained a total of just four yards on ten carries. When Ford tackled Jay on one of those carries, as Ford later recounted, Jay's "heel hit my cheekbone and opened it up three inches." The injury both left a scar that would accompany Ford for the rest of his life and caused Ford to be taken out of the game. Chicago then went on to win by a score of 27 to nothing. That may have been the greatest victory in the history of the University of Chicago football team.

I have referred to this history because of its relevance to my first meeting with Gerald Ford in November of 1975. Unfriendly cartoonists liked to portray the President in a squashed football helmet, presumably implying that repeated physical contact on the football field had had an adverse impact on his mental acuity. I think he also had stumbled once when getting off Air Force One, an incident that the cartoonists used to suggest that

he was a clumsy guy. My view of the collateral effects of his athletic career, which point in precisely the opposite direction, were overwhelmingly confirmed during our first never-to-be-forgotten meeting.

At the suggestion of Attorney General Edward Levi, the President hosted a dinner at the White House for a number of federal judges, including several who had been identified in the press as likely successors to Justice Douglas, who had resigned a few days earlier. While after-dinner coffee was being served, President Ford came to our table, pulled up a chair next to me, and told us about the status of his negotiations concerning a potential federal bailout of New York City. The City, it appeared, was on the brink of bankruptcy. In a matter of seconds, I found that I was talking to an extremely competent lawyer, who also happened to be an extremely nice guy. My principal memory of that conversation has nothing to do with the

Supreme Court; it is rather about a man who I knew immediately that I would like to have as a friend.

This afternoon I am going to say a few words about President Ford's impact on an important Supreme Court decision involving the University of Michigan's affirmative action program and then comment briefly about one exceptionally important decision that he made shortly after becoming President. The source of Ford's interest in fair treatment of minorities dates back to his days as a football star, and the decision to which I shall refer was unquestionably influenced by his respect for the University of Chicago.

One of Ford's good friends and teammates on the 1934 squad was Willis Ward, who happened to be an African-American. While that fact would have no special significance today, it was then a matter of critical importance to the Georgia Tech team that was scheduled to visit Ann Arbor to play against Michigan that fall. They presented an ultimatum to

the University, announcing that they would boycott the game unless they were assured that Ward would not be allowed to play against them. Gerald Ford was so offended by the ultimatum that he told the coach that he would not play unless Michigan rejected the Georgia demand. Ultimately, however, Ward persuaded him to play because Ward thought it more important to beat Georgia Tech than to cancel the game. I am happy to note that Michigan did win by a score of nine to two – no small achievement in an otherwise victory-less season. I'm sure the incident must have left an indelible impression on Ford.

In 2003, which of course was some time after I joined the Supreme Court and after Ford had left the White House, the Court upheld the Michigan Law School's affirmative action program in the case known as *Grutter v. Bollinger*, 539 U. S. 306 (2003). The Court's deliberations in the case were assisted, and indeed significantly influenced, by

an amicus curiae brief filed on behalf of a number of senior military officers by two Washington, D. C. lawyers, Carter Philips and Virginia Seitz. After my retirement from the Court, I wrote to Carter Philips asking if there was any truth in the rumor that Gerald Ford had played a role in the decision to file that brief. Taking pains to make sure that he did not breach any attorney-client privilege, Carter's response acknowledged not only that Ford was the "but-for" cause of the brief's preparation and filing, but also that President Ford had been the first person to suggest that former military officers as a group had a very important message to present to the Court.

Three aspects of that message merit special comment - its legal reasoning, its historical context, and the prestige of its authors. As Justice O'Connor acknowledged in her opinion for the Court, there was a good deal of language in the Court's earlier opinions that had suggested that

remediating past discrimination was the only permissible justification for race-based governmental action. Rather than discussing any need for - or indeed any interest in - providing a remedy for past sins, the military brief concentrated on describing future benefits that could be obtained from a diverse student body. The authors of the brief did not make the rhetorical blunder of relying on a dissenting opinion to support their legal approach, but they effectively endorsed the views that I had unsuccessfully espoused in an earlier case that involved a black high school teacher in Jackson, Michigan. The Court's holding - that the Law School had a compelling interest in attaining a diverse student body - emphasizes the future, rather than the past.

The brief recounted the transition from a segregated to an integrated military. Within a few years after President Truman's 1948 Executive Order abolishing segregation in the armed forces, the

enlisted ranks were fully integrated. Yet, during the 1960's and 1970's they were commanded by an overwhelmingly white officer corps. The chasm between the racial composition of the officer corps and the enlisted personnel undermined military effectiveness in a number of ways set forth in the brief. In time, the leaders of the military recognized the critical link between minority officers and military readiness, eventually concluding that "success with the challenge of diversity is critical to national security." They met that challenge by adopting race-conscious recruiting, preparatory, and admissions policies at the service academies and in ROTC programs. The historical discussion did not merely imply that a ruling that would outlaw such programs would jeopardize national security, but also that an approval of Michigan's programs would provide significant educational benefits for civilian leaders.

The identity of the 29 leaders who joined the brief added impressive force to their argument. Fourteen of them - including men like Wesley Clark and Norman Schwarzkopf - had achieved 4-star rank. They were all thoroughly familiar with the dramatic differences between the pre-1948 segregated forces and the modern integrated military. President Ford, who also rendered heroic service during World War II, played the key role in selecting them.

Writing for the Court, Justice Sandra Day O'Connor quoted from and embraced this argument from the brief:

''[T]he military cannot achieve an officer corps that is *both* highly qualified and racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies.' . . . To fulfill its mission, the military 'must be selective in

admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.' . . . We agree that '[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective.' . . . Effective participation by members of all racial and ethnic groups in the civil life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." 539 U. S., at 331-332 (alterations in original).

Given the fact that Gerald Ford played a central role in the filing of the military brief, it is certainly reasonable to conclude that he

shared the views that the Court adopted in that case.

Gerald Ford made a decision shortly after he became President that I want to highlight before concluding. It is not his decision to pardon Richard Nixon. Although that decision was unquestionably both courageous and correct, I need not add my endorsement because history has already done so so effectively. The one that I do want to mention has been less widely acclaimed, but sheds a similar light on the quality of Ford's judgment. It was his decision to accept Donald Rumsfeld's recommendation to appoint Edward Levi as his Attorney General. Edward was then the president of the University of Chicago, a man well known and well respected in the academic community, but one who had no political credentials whatsoever. I think he was asked at his confirmation hearing whether he was a Republican, and after stumbling with his reply, finally said he didn't know.

The qualifications for the job of Attorney General of the United States should be exclusively legal rather than political. As President William Howard Taft explained when he set about choosing his Attorney General and other cabinet members, the goal should be to "get the best men[,] . . . the men with the best qualifications for the place." Appointments based purely on political considerations, Taft explained, "are as much an enemy of a proper and efficient government system of civil service as the boll weevil is of the cotton crop." This was particularly so in the case of the selection of the Attorney General because Taft depended on the Attorney general to help him select federal judges, which Taft described as "the most sacred duty I have to perform." Like any other cabinet officer, the Attorney General's tenure is limited by the pleasure of the President. The country will be well served whenever a President uses the criteria that Gerald Ford used

when he or she selects the Attorney General in future administrations.

Finally, I shall close with a quotation from one of my favorite opinions written by Louis Brandeis because it reminds me of my football heroes:

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty as both an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."

Thank you for your attention.