



*United States v. Virginia, 518 U.S. 515 (1996)*

*The Virginia Military Institute (“VMI”) case*

# VMI – what is it?

- Prior to the Civil War, the Commonwealth of Virginia maintained several arsenals of weapons in case of a slave revolt. One of these was in Lexington VA in the central northwest part of the state.
- The soldiers guarding the arsenal would get drunk and rowdy. The citizens wanted them replaced with a West Point-type military college and have the students guard the arsenal
- In 1836 the Virginia Legislature passed a bill creating the college. Thus the name “**Virginia** Military Institute” – it’s a public school where the only degree is a Bachelor of Science in
- Since 1860 the officers of VMI have been issued military commissions by the Governor and are recognized as part of the state’s militia.
- During the Civil War cadets were activated by the Confederacy 14 times to fight on behalf of the South

# 1996 – only 25 years ago—what else was happening?

- Most of you were just born or about to be born
- The Top Song was *Don't Speak* by No Doubt
- The Movies to Watch include *Jerry Maguire*, *The English Patient*
- Minimum Wage in 1996: \$4.75 per hour
- Red Bull energy drink entered the US Market.
- The Amber Alert was named after Amber Hagerman, a 9-year-old girl abducted and murdered in Arlington, Texas in 1996.
- TRUE CRIME: Theodore Kaczynski, the Unabomber was captured. JonBenet Ramsey was found killed in her basement
- Tupac Shakur was killed in a drive-by shooting in Las Vegas
- Prior to 1996, there was no requirement to present ID to board a plane.
- Oprah started her book club.
- Best Film Oscar Winner: *Braveheart* (presented in 1996)
- Notable books published in 1996: *A Game of Thrones* by George R.R. Martin, *Bridget Jones's Diary* by Helen Fielding, *Fight Club* by Chuck Palahniuk, *The Green Mile* by Stephen King, *The Horse Whisperer* by Nicholas Evans, *How Stella Got Her Groove Back* by Terry McMillan, *It Takes a Village* by Hillary Clinton, *The Runaway Jury* by John Grisham

# Procedural history – Round One

- **What did the plaintiff want?** For women to be admitted into VMI. The United States Department of Justice, on behalf of women capable of the physical activities required of VMI cadets, filed the lawsuit in 1990
- District Court in Virginia dismissed the complaint
  - Rationale: All-male VMI served State's policy of affording diverse educational programs
- Fourth Circuit (conservative) vacated that judgment
  - A diversity policy which “favor[ed] one gender” was not a diversity policy at all and did not constitute equal protection

# ... Round Two

- Back in the District Court
  - Virginia proposes a "separate" program for women at a different college called the "Virginia Women's Institute for Leadership (VWIL)". *They could have one all to themselves . . . Separate but equal?*
- Fourth Circuit says even though
  - a VWIL degree doesn't carry the history and prestige of a degree from VMI,
  - and the men's program is physically rigorous and adversarial (*read this as men are tough fighters*) while the VWIL program teaches cooperation (*women are nice and get along*)
  - Overall they were "sufficiently comparable" (*close enough – not too unequal*) that they met equal protection requirements

# The Lawyers

- Theodore “Ted” Olsen for VMI
  - Famous conservative legal scholar
  - Went on to serve as U.S. Solicitor General (2001-2004) under President George W. Bush
- Deputy Solicitor General Paul Bender for the U.S. Department of Justice
  - Former high school classmate of RBG and Harvard Law grad
  - Highlight of the argument was his response to J.Scalia’s question about why the VWIL remedy was inadequate. He asked the Justice to imagine whether a State law school set up in 1839 at a time when only men could be lawyers could refuse admission to women. And whether an all-women’s law school would have amounted to equal treatment of women and guaranteed their access to the profession ( J. O’Connor and J. Ginsberg both were denied legal employment despite graduating among the few women admitted to their law schools)



# VMI- The Legal Question

- The essence of the DOJ complaint was undisputed: that there are women who can meet the physical standards VMI imposes on men. These women are capable of all the activities required of VMI cadets, prefer VMI's methodology over available alternative schools and would choose to attend VMI if given the chance
- **Legal question facing the Court:** whether Virginia can constitutionally deny to women who have the will and capacity, the training and attendant opportunities VMI uniquely affords

# Bench Announcement by Justice Ruth Bader Ginsberg

June 26, 1996

- 7 to 1 Decision
  - **Majority held that under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Virginia could not deny women admission to the all-male public military college**
  - RBG plus 5 others join in majority opinion, including Justice Sandra Day O'Connor, the only other female Justice on the Court
  - Narrow legal question –
    - **What it is:** DOJ only questioned whether denial of admission to women violated equal protection.
    - **What it is not:** DOJ did not raise challenge the “adversative” methods which stressed rituals and practices glorifying male superiority. In the end, women could be admitted but the environment did not have to change
    - **What it is not:** DOJ did not challenge whether it was constitutional for the State to fund an institution premised on questionable gender roles



# RBG's VMI opinion in a nutshell . . .

- Best known of RBG's majority opinions and arguably the most important. She wrote 15 drafts to build consensus
- In 2018 when RBG visited VMI she explained the decision in its simplest terms: "There are women who are ready and willing and able to undergo the tough training at VMI and they want that opportunity."
- Often quoted: "[G]eneralizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."

# Standard of Review “skeptical scrutiny”

- **Standard of Review:** Court held precedent required defenders of sex-based government action to demonstrate an “exceedingly persuasive justification” for the action. How? By showing “at least, that the [challenged] classification serves important governmental objectives and that [any] discriminatory means employed [is] substantially related to the achievement of those objectives”
- Heightened review standard applicable to sex-based classifications does not make sex a proscribed classification, but it does mark as presumptively invalid (because its incompatible with equal protection) a law or policy that denies to women, simply because they are women, equal opportunity to aspire, achieve and participate in society based on their abilities.
- RBG traced development of the standard in a straight line from *Reed v. Reed* to *Mississippi University for Women v. Hogan*
- What does “skeptical scrutiny” mean? “genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preference of males and females”.

# Vote #7 against VMI

- J. Rehnquist files a concurring opinion
  - He initially sided with the Fourth Circuit but was eventually convinced by RBG
  - However, he questioned Justice Ginsberg's use of "skeptical scrutiny" . He thought new language might confuse sex-based discrimination analysis

# Justices Thomas & Scalia

- **Justice Thomas** does not take part in the decision because his son was attending VMI
- **Justice Scalia dissented** – He tries to defend VMI using all the "usual" defenses:
  - *"It's not what it appears to be ... this isn't discrimination"* Single-sex education was actually a legitimate example of diversity in public educational options. **Excluding women promoted diversity in educational choices (for men) who could choose between a co-ed or single sex college.** Same reasoning initially used by the District Court
  - *"You're not applying the rule correctly"* Criticized majority for redefining "intermediate scrutiny" in a way that made it indistinguishable from "strict scrutiny"
  - *"This is going to ruin everything!"* VMI was unique and had a history as a leadership training ground which produced civilian and military leaders. Allowing women to be admitted would effectively "destroy[ ]" the institution
- "[T]he tradition of having government funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat".
- "The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics smuggled into law."

# VMI – Justice Sandra Day O'Connor's role

- The only case cited by RBG in the VMI bench announcement was *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) another gender discrimination case in which Justice Sandra Day O'Connor wrote the majority opinion
- Justice O'Connor was the only woman on the Supreme Court when that case was decided 14 years before VMI
- VMI was originally assigned to Justice O'Connor. She gave it to RBG
- Writing for the 5-4 majority Justice O'Connor's opinion held unconstitutional the exclusion of a man from the university's all-female school of nursing
- Often quoted: State actors cannot deny entry based on "fixed notions concerning the roles and abilities of males and females"

# VMI Admits Women in 1997 : “a savage disappointment”

- VMI was the last U.S. military college to admit women.
- Superintendent at the time called this a "savage disappointment".<sup>1</sup>
- Following the ruling, VMI contemplated going private to exempt itself from the 14<sup>th</sup> Amendment to avoid complying with the ruling.
- Assistant Secretary of Defense under President Clinton threatened the school that the Department of Defense would withdraw ROTC programs from the school if it privatized.
- In August 1997, VMI enrolled its first female cadets.
- In November 1997, Congress passed a resolution prohibiting the Department of Defense from withdrawing or diminishing any ROTC program at VMI.



# How was VMI influenced by other events in RBG's career?

- 20 years earlier she lost a case for her client Susan Vorchheimer who sought admission into an all-male Philadelphia high school.
- When her husband Marty was considering the male-only Harvard business school, her alternative was the management training program at Radcliffe which paled in comparison based on faculty, prestige and alumni

# VMI – why are we still talking about it?

- RBG's opinion clarified how states may regulate “inherent differences” between men and women:

In ways that are designed to include groups long denied full citizenship stature on equal terms in the country's history but not in ways that perpetuate stereotyping and discrimination.