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ABSTRACT

In this speech, delivered by the Solicitor General of the United States at a meeting of the Hillsboro County Bar Association in Tampa, Florida, Lee addresses himself to allegations of inconsistency in the Reagan administration's positions on court cases involving civil rights issues. In defending the administration, Lee cites the Spirt v. TIAA-CREF and Hishon v. King and Spalding court cases. Both cases fall under the Title VII statute which prohibits employment discrimination. In the Spirt case, the issue in question was the payment of lower monthly pension annuity benefits to women than to men. The Hishon case regards law firms that discriminate against women in promotion from associates to partners. In both cases, the government argued that the Title VII principle requires that an individual be treated as an individual, rather than as an undifferentiated member of a group. Lee says that the same argument holds for the administration's position on employment quotas or the use of busing in school desegregation, since both are group oriented solutions. Lee asserts that the cornerstone of civil rights laws and public policy has been the securing of individual rights. Therefore, he concludes, consistency in civil rights cases should be measured by attempts to protect individual rights. (AOS)

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ADDRESS

OF

THE HONORABLE REX E. LEE
SOLICITOR GENERAL OF THE UNITED STATES

BEFORE

THE HILLSBORO COUNTY BAR ASSOCIATION

HILLSBORO HYATT REGENCY HOTEL
TAMPA, FLORIDA

A CONSISTENT CIVIL RIGHTS POLICY: INDIVIDUAL FOCUS OR GROUP FOCUS?

One of life's predictable certainties is that Solicitor General filings in the Supreme Court will please some people and displease others. Occasionally, they also cause some surprises. Several newspaper writers expressed surprise, for example, at the Administration's positions in Spirt v. TIAA-CREF, and Hishon v. King & Spalding. Both are Title VII cases, and Title VII prohibits employment discrimination. In the Spirt case we took the position that Title VII prohibits the payment of lower monthly pension annuity benefits to women than men where both had made equal contributions, and in Hishon we argued that that same statute prohibits law firms from discriminating against women in promoting from associates to partners.

Part of the newsworthiness of these positions lay in the journalists' conclusions that they were inconsistent with other positions taken by this Administration. One of the most astute of the reporters who cover the Supreme Court asserted, for example, that "both actions contrast sharply with the Administration's controversial opposition to affirmative action quotas, busing and denial of tax exemptions to discriminatory private schools."

What is the basis for this conclusion of inconsistency? The reasoning apparently runs as follows: if you are always on the same side as the groups that characterize themselves as civil rights groups, or if you are always on the opposite side of those groups, then right or wrong, you are at least consistent. If, however, you are sometimes on the same side as those groups and sometimes opposed to them, you are inconsistent.

And that, I submit, is an inadequate measuring rod for determining consistency. It assumes that the positions of those groups are, themselves, always consistent. The standard against which consistency should be measured is not consistency with the objectives of special interest groups. It is, rather, consistency with neutral principles.

There is such a neutral principle in the Spirt and Hishon cases. It is a principle to which this Administration has been faithful not only in those cases, but others as well. It is that under Title VII of the Civil Rights Act of 1964 each individual person should be treated as an individual and not as a member of a group.

I will begin with the Hisnon case. Because that case comes to the Court on a granted motion for summary judgment the issue is not whether the defendant law firm in fact

discriminates, but rather whether Title VII permits that firm or any other to discriminate if it wants to. It would not be proper for me to comment on the merits of that or any other pending case, and there is no need to do so. For present purposes, there are two relevant observations: (1) the case squarely involves the question whether Title VII requires law firms to consider candidates from their associate ranks for partnership on the basis of individual merit, or whether they may exclude all women associates as a group, and (2) our position on that issue is that Title VII requires individual consideration, and does not permit group treatment.

In Spirt, the analysis is a bit more sophisticated, but the issue is the same and so is the Government's position. It is a matter of statistically undeniable fact that women as a group live longer than men as a group. For this reason, it is argued that paying lesser lifetime monthly annuities to women who have paid the same amount as men into a pension fund violates no principle of equality. Since the monthly payments for women will last for a longer time, it is only fair -- the reasoning goes -- that each montly payment be smaller. Other things being equal, men and women have paid the same amounts into the fund. Since women will live longer, the period over which they will draw from the fund will be longer, and it is only fair that each individual draw be smaller.

Considering both men and women as members of the gender groups to which they belong, that reasoning is unassailable. It also represents the actuarial approach taken by many insurance companies, though not all.

But if you consider the individual man or woman not as a member of his or her gender group, but rather as an individual, the analysis changes. For while it is true that out of two groups, 1000 women and 1000 men, all sharing the same actuarial characteristics except their sex, the 1000 women as a whole will live longer than their male counterparts, it is equally true that as to the overwhelming majority, there are no sex-based differences in their life expectancies. As explained by Drs. Bergmann and Gray:

> While the "average woman" dies later than the "average man," considerable overlap exists in the distribution of death ages. If at a single point in the time we were to pick at random 1000 men age 65 and 1000 women age 65, and follow them through and observe their death ages, we would find an overlap of 84 percent. This means that we could match up 84 percent of the men with 84 percent of the women as having an identical year of death.

Only a fraction of the members of each group, therefore, will account for the difference in group longevity. From the perspective of any individual woman, there is a very high probability that paying the entire group of 1000 women a

lesser monthly amount than the men will be discriminatory to her as an individual.

What this comes down to is that there are good arguments on both sides of the underlying policy issue -- whether women who have paid the same amounts into a pension fund as men should receive lesser monthly annuity payments. Those who favor taking into account the actuarial realities of female longevity have a reasonable basis for that position. But it is also reasonable to take the opposite view, because for any given person it is more likely than not that the group approach will discriminate.

The individual approach is particularly reasonable in light of the fact that while some insurance companies have reflected the statistical reality of women's longer lives in their actuarial practices, those same companies have not taken into account other actuarially relevant group characteristics. As stated by Dr. Mary Gray:

> I have one life expectancy as an American, a longer life expectancy as a woman, a shorter life expectancy as one who works in the District of Columbia, a longer life expectancy as a nonsmoker, a shorter life expectancy as one who is overweight and who never stay home from work to go to the doctor. Why use only my sex to pay me less in a pension and to charge me more for health insurance?

Regardless of whether you conclude that the Government's position on this issue is right or wrong, therefore -- and I have found no shortage of adherents to either view -- our position is certainly a reasonable one. And it is consistent with the position in Hishon that Title VII requires treating individuals on their own merits rather than as members of groups to which they belong.

But, you say, no one ever questioned the intellectual symmetry of the Government's positions in Spirt and Hishon. Those who applauded one applauded the other, and our critics were also of one voice in both cases. The "sharp contrast" observed by the commentators was between our filings in Spirt and Hishon, on the one hand, and the Administration's stand on such issues as employment quotas and busing -- the two areas in which we differ with our critics concerning the most effective means for securing basic civil rights objectives.

I submit that there is no contrast. Measured by the neutral Title VII principle that each individual should be treated as an individual and not as some fungible, undifferentiated member of a group, our position concerning quotas neatly fits the same analytical mold as our filings in Spirt and Hishon. And while the busing issue does not involve

Title VII, this Administration's policy on that issue is also one that serves the interests of the individual.

With respect to quotas, the question, who is and who is not consistent, is not even close. Issues concerning employment preferences for minorities or women -- either in hiring or in promotion -- are deeply divisive. But on at least one proposition there can be no serious disagreement: the underlying issue is whether individuals should be treated as individuals or as members of a group. The opposing arguments are well-known. In favor of quotas, it is contended that a preference is necessary to counteract past instances of discrimination against minority groups. Discrimination which has deprived these groups of opportunities over extended periods in the past, it is argued, cannot be adequately remedied by a sudden cessation of the discriminatory treatment. The opposing argument is that whatever the need to eliminate the effects of past wrongdoing, that objective is not served by a dragnet approach which gives preferential treatment to all members of a group, regardless of whether they have in fact been victimized. The appropriate remedy, focuses on individuals and not on groups. The compensating preference should be reserved for those persons who have in fact suffered from discrimination, rather than bestowing a windfall on those who have not, and in the process bringing

into being a new class of victims who are themselves innocent of any wrongdoing.

Regardless of your views on the merits of this controversy, two things should be obvious. The first is the applicability of Title VII, at least where the quotas involve employment, since the basic issue is whether hiring, promotion, or layoff quotas constitute employment discrimination. And the second is that the underlying policy dispute is over the comparative merits of a group approach versus an individual approach. Quota advocates are not seeking to identify individuals whose progress has been impeded by discrimination. Whether the individuals who benefit from the quota have in fact suffered from discrimination, or are in any relevant respect other than group membership distinguishable from the non-favored persons is immaterial. The objective is to extend a preference to all members of specified groups and the sole criterion for the preference is group membership. In the Boston Firefighters case, for example, the first case in which the Government opposed employment quotas in the Supreme Court, the issue was whether under Title VII layoff protection should be extended to members of minority groups or according to seniority. Minority status is a group characteristic; seniority status is an individual matter.

Therefore, in arguing for seniority as the basis for protection against layoffs, the Reagan Administration's position was identical to its position in the pension annuity and law firm hiring contexts: Title VII's guarantees against employment discrimination treat individuals as individuals, and not as members of groups to which they happen to belong.

In the busing context, the analysis is more complex, but leads to the same result. The busing issue is not governed by Title VII. The governing law is the Constitution. Moreover, the choice between group treatment and individual treatment may not be so readily apparent. But it is clear that here also the Administration's policy opposing the use of busing as a remedy for school segregation is solidly based on concern for the individual, and that it represents, in at least some respects, a choice between individual concerns and group concerns.

It is true that with busing, unlike minority preference quotas, the proponents' position is based partly on individual concerns -- the educational advantage to the individual student of attending school as a member of a racially mixed student body. But the case for mandatory busing to remedy racial imbalance is dominantly group-based: larger numbers of designated ethnic groups are enrolled in one school than in

another, and the objective -- achievable only by transporting designated quantities of group members from one school to another -- is to alter the number of the group members at each school. Thus, whether busing is to be employed at a particular school depends on the number of persons in one racial group as compared with the number of persons in another racial group. And whether a particular person is or is not bused depends solely on whether he or she belongs to a racial group.

On the other side, the case against mandatory busing concentrates on the individual school child. While it is undoubtedly true that some people oppose busing for the same reasons that some people supported separate but equal school facilities, it should be equally obvious that many people who oppose that practice, probably most, do so on grounds that are themselves rooted in legitimate concerns for the welfare of the individual. They are concerns that bear no relationship to racial discrimination or any other kind of group sterotyping.

Let me give just two examples. First, for any person the number of hours in the day available for productive, useful activity is limited. For young children the number of those hours is even smaller. We pay a heavy price when we consume up to one or two of those hours -- prime time hours when the

potential for learning is at its highest daily point -- transporting them back and forth across the city. There are better uses for that prime time. It could be used for schoolwork, homework, or family activities.

Second, the most effective teaching, particularly in the lower grades, involves a combination of effort by teachers and parents. Parent involvement may take a variety of forms, such as PTA leadership, service as room parent or teaching adjunct, field trip sponsor or other. It should also involve contributions of a more intimate, individualized nature: assistance and reassurance in cases of physical injury or other health problems, or emotional upsets, or discipline problems. These are the kinds of problems that do not occur every day, but when they do, no other assistance can be as effective as that of a parent. The practicality -- indeed the bare possibility -- of any kind of parent participation either in routine academic activities or the handling of special problems diminishes as the number of miles between the home and the school increases.

In my view the cornerstone of civil rights law and policy in this country has been and must continue to be, the securing of individual rights. The struggle to eliminate racial, sexual, religious or other discrimination is a struggle to

break away from group stereotypes or assumptions, and to concentrate on the individual. The controlling question should not be, how can we classify this person -- what is his or her group, black or Hispanic, Asian , Jew, bald, short, woman, or Presbyterian? It should be, what are the accomplishments, the needs, and the merits of this particular human being? Because it is this human -- this one person -- who really counts. Any group to which he or she may or may not belong ought to be irrelevant. As Justice John Harlan, the Elder, noted over 85 years ago in his famous dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1869) (Harlan, J., dissenting), "Our constitution is colorblind, and neither knows nor tolerates classes among citizens * * *."

But what about consistency? I have not forgotten the caution by Emerson and Holmes that consistency is not always a virtue. But neither is it to be ignored. It can be the hallmark of careful minds as well as the hobgoblin of little ones. In any event, the point for present purposes is that consistency in civil rights cases should be measured by principle -- in the civil rights area, the foundational objective of securing individual rights. This is particularly true in Title VII cases, where we have the benefit of a congressional judgment favoring individual concerns over those

of the group to which that individual belongs, either by choice or because there was no choice.

The struggle for civil rights in this country has been as protracted as it has been difficult. The struggle is far from over. Today, as in the past, government litigation represents one of the important ways of achieving civil rights objectives. I submit that the central focus of civil rights always has been -- and should be today -- on the individual. The securing of individual dignity and individual equality of opportunity is, almost by definition, the very essence of civil rights objectives, the very reason for any civil rights effort, whether by government, non-government groups, or individual citizens. We must not lose sight of that fact, and simply assume that the achievement of civil rights is anchored not to principle, but to the objectives of special interest groups.