

Memorandum



SG'S
OFFICE

Subject

Solicitor General Briefs in EEOC cases

Date

June 16, 1982

To

The Attorney General

From

John Roberts *JR*

Recent events indicate the need for greater coordination between the Civil Rights Division and the Solicitor General's office with respect to the development of Department of Justice positions before the Supreme Court in cases referred by the Equal Employment Opportunity Commission (EEOC). EEOC has responsibility for private employment discrimination, while our Civil Rights Division has parallel responsibility for public employment discrimination. The Civil Rights Division and EEOC frequently rely on the same statutes and regulations, and the issues which arise in EEOC cases are in most instances identical to the issues arising in Civil Rights Division cases. When an EEOC case goes to the Supreme Court, the Solicitor General's office typically works off a draft prepared by EEOC, and only intermittently consults with the Civil Rights Division concerning the position to be taken in the case. Thus, a Department of Justice position before the Supreme Court is developed without the advice of the Civil Rights Division, even though the issues are of great significance to the Civil Rights Division. For a variety of reasons the Solicitor General's office cannot be considered sufficiently sensitive to the policy views of the Civil Rights Division. Therefore, the end result is that Department policy in the civil rights area is not sufficiently addressed when the Solicitor General's office presents arguments on behalf of EEOC.

This is not merely a theoretical problem. This term two cases referred from EEOC presented significant issues in the civil rights area. In each instance, the Solicitor General's office, in consultation with EEOC, presented arguments to the Supreme Court which were totally inconsistent not only with general Administration policies but with specific and announced priorities of your own. In the American Tobacco case, the Solicitor General's office and EEOC presented an argument that would have expanded the effects test in employment cases -- despite the clear philosophical opposition to the effects test by the Department, most clearly articulated in the voting rights area. In the

Kremer case, the Solicitor General's office and EEOC argued against federal courts giving res judicata effect to state court determinations in discrimination cases -- despite the clear thrust by the Department to enhance and respect state courts and encourage finality in litigation. Fortunately, the Solicitor General's office and EEOC lost in these cases, each time by a vote of 5-4. This in itself demonstrates that the arguments presented by the Solicitor General's office were in no sense compelled by the law.

I think it would be helpful in avoiding such problems in the future if the Civil Rights Division were fully involved in EEOC cases reaching the Solicitor General's office. The issues often overlap, and the policy input of the Civil Rights Division is needed. Neither EEOC nor the Solicitor General's office itself satisfies the concern that the policy objectives of the Department be addressed. I recommend that you direct the Solicitor General's office to keep the Civil Rights Division fully advised of all EEOC filings, and to solicit their views as they would in a case coming from the Civil Rights Division itself.

cc: Ken Starr
Carolyn Kuhl

Memorandum



Subject

Background Material for Attorney General's
Speech to Conservative Groups

Date

February 16, 1982

To

Tex Lezar

From

John Roberts *JR*

In preparing material for the Attorney General's upcoming speech to conservative groups I reviewed all of the issues of National Review, Conservative Digest, and Human Events published since the Inauguration, as well as the Heritage Foundation's Mandate for Leadership and Year End Report and sundry other tracts. The Department of Justice does not really figure very prominently in this literature, despite the popular perception within the Department. Topics such as foreign affairs, national defense, and the economy are far more consistently addressed than legal issues. This perspective on the focus of the "new right" movement should be kept in mind in forming the speech -- we do not want to appear to protest too much in response to what actually amounts to very little critical ink. On the other hand, what has been written has almost invariably been negative.

The single unifying critique of the Department has been in the area of personnel, both management of career personnel and appointment of political personnel. On the career side, the repeated complaint is that Carter holdovers are thwarting implementation of conservative policy by presenting only established liberal legal dogma to their superiors, who are ill-equipped to refute the analyses presented to them. On the political side, the theme is that the policy positions in the Department have been filled with establishment lawyers who are not committed to the Reagan ideology, particularly on the so-called "social issues". Invariably when the new right disagrees with Department policy the attack is quickly converted into an ad hominem assault on the ideological credentials of the responsible appointee. [Heritage Year End Report 153; Human Events 1/30/82, 17-18; 8/15/81, 3-4; 12/12/81, 15; 8/22/81, 3-4; 6/13/81, 3; 5/2/81, 4; Conservative Digest, July, 19.]

Since this is the central critique of the management of the Department it merits a substantial and considered refutation. Although some of the attacks are completely unfounded and could be readily thrown back at the critics (e.g., the assertion that Reynolds had been "totally co-opted" by radical holdovers in the

Civil Rights Division, Human Events, 8/15/81, 4), such an approach would open us up to criticism from the left and even the center. I think the best approach would be to disparage attacks on the ideology of lower-level appointees as impertinent (in the pure, not popular sense of that word) and perhaps even as efforts to avoid or at least obfuscate discussion of the merits. The Attorney General is fully responsible for Department policy and the conduct of both career and political Department personnel. He sees to it that the personnel implement the policies of the President to the extent this can be done within the law. It is irresponsible to convert disagreement with this policy into an attack on the background of some lower-level appointee. That background is really irrelevant, and critique of it is actually an easy way to avoid the more difficult discussion of the merits. The Attorney General should be quite firm on this point, flatly condemning critiques of Department policy which are linked to the background of Department personnel. He can call for healthy and vigorous debate on the merits, but let there be no mistake that Department policy is his policy for which he is fully responsible.

A related criticism focuses on the screening and appointment of federal judges, highlighted by the O'Connor debate. The assertion is that appointees are not ideologically committed to the President's policies, again with particular emphasis on the social agenda. [O'Connor: Conservative Digest, August, 39-40; Human Events 1/30/82, 2, 18; 9/19/81, 3-4; 8/1/81, 14; 7/18/81, 5. General: Heritage Year End Report 158-159; Human Events 8/29/81, 4-5.]

Here again I do not think we should respond with a "yes they are"; rather we should shift the debate and briefly touch on our judicial restraint themes (for which this audience should give us some credit). It really should not matter what the personal ideology of our appointees may be, so long as they recognize that their ideology should have no role in the decisional process -- i.e., so long as they believe in judicial restraint. This theme has to be glossed somewhat, because of the platform, but we can make the point that much criticism of our appointees has been misdirected. Judges do not implement policy in the true conservative view of things, and the hot issues of today will not be those of ten or fifteen years hence, when our judges will be confronted with new social issues. Our appointments process therefore looks beyond a laundry list of personal views to ascertain if the candidate has a proper appreciation of the judicial role.

We could move from the foregoing to the "other side" of the judicial restraint theme and deal with criticism of our position in various cases. We have been criticized for not following Reagan policy in the Grove City, North Haven, and ERA cases.

[Heritage Year End Report 155; Human Events 12/26/81, 2; 9/5/81, 4; 8/15/81, 3-4.] Perhaps without naming specific cases, we can make the point that we must defend acts of Congress in the courts (ERA) and must enforce the laws as written, not rewriting them to comport with policy desires (Grove City, North Haven). This is the role of the Department in the constitutional system, and our conservatism believes in that system. Any other approach would be trying to use the courts to set policy, having policy set by the Executive rather than Congress (cf. Bob Jones), or inviting Congress or other intervenors to present the position of the United States in court.

The exception in the area of legislative veto can be noted, as an example of Congress' clear departure from the Constitutional allocation of powers, which the Department will not defend. [Pro-legislative veto: Heritage Year End Report 155; Human Events 8/15/81, 3-4.]

The new right generally supports the court-stripping proposals and the Human Life Bill, and has on occasion criticized the Department for not doing likewise. [National Review 6/26/81, 741; 3/20/81, 313; 1/23/81, 56-57; Conservative Digest, December 38; June 34; March 16; Heritage Year End Report 153; Human Events 8/15/81, 3-4.] I assume we will not touch upon these issues before this audience.

The Department has been criticized for not supporting Tuition Tax Credits, and for allegedly (?) preparing an opinion stating that they would be unconstitutional. [Conservative Digest, April 28; Human Events 8/15/81, 3-4.] The PACE consent decree has also drawn heavy criticism. [Human Events 9/5/81, 4; 8/22/81, 3-4.] Neither of these areas seems suitable for response.

Criticism of the proposed Criminal Code [Conservative Digest, December 4; Heritage Year End Report 156; Human Events 8/15/81, 3-4.] has focused on alleged reduction of penalties for drug and sex-related crimes, increase in penalties for business violations, and various other objections. Most penalties are in fact increased, because of the abolition of parole. Fine exposure for regulatory offenses is increased, but the suggestion that new grounds of liability are established is unfounded. Some of the more specific objections are absurd -- such as the assertion that a compensation scheme for victims of violent offenses (including rape) would create federal funding of abortions. Rather than defensively rebutting specific criticisms, I think it would be more effective for the Attorney General to stress the positive gains to law enforcement from the Criminal Code -- certainty in sentencing, clarification of federal authority, and so on. He could also check off other aspects of the crime program, including exclusionary rule and habeas reform.

cc: Ken Starr