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Dissent of Commissioner J. Clay Smith, Jr., Re: The September 16, 1980 Vote of the Equal Employment Opportunity Commission on Freedom of Information Act Appeal No. 80-7-Foia-377

J. Clay Smith Jr.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

48a

DISSENT OF COMMISSIONER J. CLAY SMITH, JR., RE: THE SEPTEMBER 16, 1980 VOTE OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON FREEDOM OF INFORMATION ACT APPEAL NO. 80-7-FOIA-377

On Tuesday, September 16, 1980 the Equal Employment Opportunity Commission voted to deny a Freedom of Information Act Appeal (hereinafter FOIA) requesting certain documents which pertained to a policy determination on the issue of contribution. Among the documents requested and which the majority of the Commission voted not to release was my dissent of July 7, 1980 outlining my reasons for opposing the positions taken by the Commission on the issues of contribution under the Equal Pay Act and under Title VII at a Commission meeting on July 1, 1980. Because I strongly believe that every Commissioner has the inherent right to explain his or her vote on matters involving policy considered in either open or closed session, I must respectfully dissent from the majority's decision* to deny release of my earlier dissent. I therefore believe my dissent issued on July 7, 1980 should be released.

Background

For over two years, the Equal Employment Opportunity Commission has been participating in a case involving the issue of contribution. Three months ago the Supreme Court voted to hear this case and at that time the Court also suggested that the government file a brief on the contribution issue.

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*Commissioner Ethel B. Walsh, abstaining.

The Commission's General Counsel brought the issue of contribution under Title VII before the Commission's Steering Committee on EEOC Policies (SCEP) for a full and vigorous pre-decisional agency policy discussion. The issue was also brought before the Commission at a meeting, July 1, 1980 for a vote on the broad policy issue stated above. I voted against the Commission changing its position to opposing contribution. Since the Commission majority's views would later be communicated through a draft brief to the Solicitor General, I filed a dissent to be associated with the official minutes as a public document and directed that my dissent be transmitted to the Solicitor General along with the majority's brief.

Persons interested in the policy determination on the issue of contribution have now requested certain Commission documents on the contribution issue under the Freedom of Information Act. I am of the opinion that the dissent of July 7, 1980 outlining my views on contribution should be released.

Argument

The Equal Employment Opportunity Commission is composed of five individuals appointed by the President of the United States and confirmed by the Senate. The policy of the Commission is set by these five individuals voting on items brought before them. Each Commissioner has one vote.

As I mentioned earlier, the Commission on July 1, 1980 voted to oppose the right of contribution by employers against unions under Title VII. I voted against this position but, I believe that it was necessary and would be more meaningful to explain my vote by issuing a dissenting opinion setting forth my policy differences with the majority. My dissent should be released for the simple reason that the right to explain one's vote is inextricably tied to the right to vote itself. The right to explain is personal, the prerogative of the individual casting the vote, and on matters resulting in the crystallization of agency policy cannot and should not be abridged by the majority. Release of my dissent is particularly compelling in this case since the Commission reversed a policy position it had cultivated for two years. The purpose of my dissent was to explain to the public why I opposed this policy shift.

I believe that the General Counsel's characterization of the July 1st Commission vote on contribution as a vote on a legal matter was erroneous and does not provide a legal basis for withholding release of the dissent. All the evidence establishes that the Commission's vote on contribution was in fact a policy determination and did not involve litigation strategy. The issue before the Commission at the July 1st meeting was simple--whether to file a brief supporting contribution or whether to file a brief opposing this principle. Policy considerations predominated the discussion leading to the ultimate vote. Indeed, the

Commission's own conduct on the contribution vote establishes the policy character of the issue. Legal strategy and trial tactics issues are within the domain of the General Counsel's office and therefore are not brought before SCEP. The issue of contribution, however, was brought to SCEP, not for discussion of legal strategies, but to weigh the merits of favoring or opposing contribution.

The procedural posture of the case in which the contribution issue arose also establishes the policy character of the vote. The Supreme Court requested the government to file a brief on the issue of contribution. The Commission's vote determined only what conclusion the proposed brief would say--whether EEOC favored or opposed contribution. Since the EEOC was not a party to the suit, but had already been participating as an amicus in the case for over two and a half years, no litigation strategy was involved. Cumulatively these arguments establish the policy character of the Commission vote on contribution.

It is also significant to this discussion to emphasize that "the FOIA [Freedom of Information Act] requires that the disclosure requirement be construed broadly, the exemption narrowly," Vaughn v. Rose, 523 F.2d 1136 (D.C. Cir. 1975). I believe this holding was ignored by chracterizing my dissent on contribution as a vote on a legal matter thereby establishing a justification to withhold its release.

Finally, let me put to rest the argument that the release of my dissent is inherently unfair to the majority since they have no corresponding vehicle for dissemination of their opinions. The rebuttal to this is obvious; the majority, if it so chooses, can address the points the dissent raises. If anything is inherently unfair, it is the present situation where the majority can muzzle the minority and create the appearance that an agency governed by a collegial and politically constituted body speaks monolithically, when in fact among equal Commissioners there is disagreement over a policy matter. Indeed, since any vote by a Commissioner counts as much as any other Commissioner, there must be an institutional mechanism for the public to know the extent and details of those opposing the majority, unless a dissenting view is the property right of the "Star Chamber."

The majority's views are expressed in the item they approved--in this case, the position to be taken in the draft brief to be submitted to the Solicitor General for filing in the Supreme Court. Thus, here, if my dissent on contribution were released, and the majority who voted to oppose contribution felt a rejoinder to it were necessary, they would have the option of issuing a statement pointing out deficiencies in my dissent or alternatively they could even release the draft brief. The fact of the matter is that because the majority need not justify its position, they have decided to forbid a dissenter from utilizing an institutional vehicle within the Commission to publically justify his position.

I respectfully dissent, and direct that this dissent be made part of the official minutes of the Commission.

/ Clay Smith L.
J. Clay Smith, Jr.
Commissioner

cc: Commission
General Counsel