USA TODAY

Jeff Sessions' Justice Department goes after affirmative action's institutional racism

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August 4, 2017

Who could have predicted that one of President Trump's projects would be to root out institutional racism? Yet that's the upshot of an internal memo which apparently launches a push to review university admissions policies for race-based discrimination. The memo is still not public but the Justice Department has said that, at least so far, the focus will be on one complaint filed by Asian-American groups against Harvard.

To be sure, the Supreme Court has said three times in the last 30 years that race can be "a factor" in admissions decisions, to be used to achieve the "compelling interest" of educational diversity. At least for another decade, when the 25-year clock that swing Justice Sandra Day O'Connor set in two 2003 University of Michigan cases runs out. In those cases, the Court struck down the use of a mechanical points system — five points if you're a violin virtuoso, 20 points if you're black — but upheld the law school's supposedly more individualized, "holistic" review.

But invoking the word "holistic" isn't the end of the constitutional inquiry. As Justice Anthony Kennedy wrote for a 7-1 majority (Justice Ruth Bader Ginsburg dissented) in the 2013 case Fisher v. UT-Austin, universities bear "the ultimate burden of demonstrating that, before turning to racial classifications, workable, race-neutral alternatives do not suffice."

Although the Supreme Court two years later okayed the University of Texas system, college officials don't have carte blanche just so long as they avoid points or quotas. Even after Fisher II, a school with a race-conscious process must show three things to pass constitutional muster:

(1) that its program is necessary to achieve diversity; (2) that its chosen means properly "fit" its ends; and (3) that it provides individualized consideration, such that colleges don't make race the "defining feature."

But can any school show how or when race affects admissions decisions? Can anyone offer evidence that would enable a court to evaluate whether the use of race is narrowly tailored to achieve its purported goal? The black-box nature of admissions policies makes it impossible to ascertain whether race is a thumb or brick on the scale.

Admissions programs frustrate accountability because schools wield "holistic review" as a shield to frustrate scrutiny, judicial or otherwise. Holistic review can serve as a cover for the illegitimate use of race.

For example, Princeton professor Thomas Espenshade found that Asian students applying to selective private colleges are six times less likely to be admitted than Hispanic students with the same academic qualifications and 16 times less likely than black students. And despite being the fastest-growing population in America, Asians are admitted at Ivy League schools in remarkably similar numbers and percentages year-to-year.

That's strong evidence that schools are discriminating based on race. It all hearkens to the less-than-illustrious history of the so-called Harvard Plan, which began as an alternative to explicitly capping the number of Jewish students

Those are the sorts of things that the Justice Department should look into. Government lawyers must open the "holistic" black box and hold administrators' feet to the constitutional fire. And that's before we even get into the harm to the beneficiaries of racial preferences!

I have my policy disagreements with Attorney General Jeff Sessions over the drug warand related issues, but I applaud him here. When he was nominated, his supporters argued that he was a civil-rights advocate who had no truck with racial discrimination. Six months later, he's proving their point.

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