Presidential Commission on the Supreme Court of the United States

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Written Statement of Richard Lazarus

Howard J. & Katherine W. Aibel Professor of Law

Harvard Law School

Introduction

This statement addresses an important issue relating to the Supreme Court's internal operations rather than any of the high profile issues relating to the appointment, tenure, and number of Justices serving on the Court — which appear to be the principal focus of most submissions to the Commission. The statement focuses, in particular, on the internal processes that the Court currently uses to decide when to grant plenary review in individual cases and concludes that those processes warrant reform because of their existing potential for allowing those few parties represented by expert Supreme Court counsel to unduly influence the identity of the relatively few petitions for a writ of certiorari granted by the Court each Term. As described below, this concern with outsized influence, especially by those in the business community that can afford to pay for such advocacy expertise, can be significantly mitigated by the addition of an office of career staff attorneys at the Court with the competing expertise needed to assist the Justices in the identification of those cases warranting the Court's plenary review. The cost of such a reform is inconsequentially small and is likely to be embraced by the Justices should the Congress take the initiative by providing the modest of amount funding such an office would require.

The Distinct Importance of the Court's Jurisdictional Determination

While far below the radar of current public discourse relating to the Supreme Court, how the Court exercises its discretionary authority in reviewing petitions for a writ of certiorari to decide what handful of cases it will decide each year on the merits is enormously important. It is only because the Court has the power to decide *not* to hear every case brought to its attention that the Court is such a powerful institution. The discretionary nature of Supreme Court review is critical to the Court's function — which is why, to allow the Court to do its job well, Congress decided during the twentieth century to pass legislation that largely eliminated the Court's mandatory jurisdiction. Absent the power to decide which cases to hear, our Court, like supreme courts in some other countries, would quickly be so overwhelmed by the responsibility of deciding thousands of cases each year on the merits that the Justices would be unable to devote the significant time required to deliberate and craft thoughtful written opinions in those relatively few cases they considered the most important.

The identity of the legal issues that the Court decides to review on the merits, moreover, can be as important as how the Court decides those legal issues after full briefing, oral argument, and internal deliberations. Absent judicial review, legal issues important to the nation go unaddressed that, if the Court were to review, the Justices might well conclude are being ruled upon erroneously by the lower courts with significant adverse consequences to affected persons. And, absent a sound basis for choosing cases to review, the Court risks instead devoting its scarce resources to deciding cases that in fact fall far short of warranting the Court's attention — a significant waste of the Court's time that undermines the essential trust that the public places in the Court.

My view is that the Court should reform how it selects cases for plenary review to ensure that the Court is deciding the most important legal issues facing the nation rather than, as is currently occurring, those legal issues of greatest concern to whichever party is best able to enlist the assistance of those attorneys most expert in Supreme Court advocacy. The Court's decision at the jurisdictional stage that a particular case warrants plenary review is, as described, one of the most consequential rulings that the Court makes. Yet, as the number of petitions has significantly increased over time, the Court's resources to identify which cases warrant full briefing and argument have necessarily been stretched increasingly thin and, as a result, increasingly susceptible to be unduly influenced by expert members of the Supreme Court Bar.

I have no comparable concern relating to the Court's decision-making process for those cases granted plenary review. Especially now that the Court decides only sixty to eighty cases a year, the Justices and their chambers have ample time to immerse themselves fully into those cases and potentially make up for any possible deficits in the advocacy in any specific case. Advocacy deficits are also effectively addressed in most cases that the Court has decided to review with full briefing and oral argument by the sheer number of amicus briefs filed these days in those merits cases, many of which are crafted by outstanding lawyers on all sides of a case. My concern is instead limited to the jurisdictional stage, where mismatches in the advocacy skills of the competing parties favoring and opposing review are likely to be present and the Court lacks the time and resources to make up for the difference. It is at the jurisdictional stage, not the merits stage, that the Court is most vulnerable.

The Deficiencies in the Court's Current Internal Processes at the Jurisdictional Stage

The Court currently considers between five and six thousand petitions each year and, as described above, grants review in about sixty to eighty cases. Although the Justices themselves plainly commit significant time to deciding — based on full briefing and the merits, oral argument, and circulation of draft opinions — those cases in which review is granted, it is an open secret that the individual Justices spend relatively little time reviewing individual petitions at the jurisdictional stage. To be sure, the Justices are the ones who formally vote on the question whether review is warranted, but given the thousands of petitions to be considered and all of their other responsibilities, especially deciding the cases granted review, the Justices themselves spend no time at all on the vast majority of cert petitions and only minutes even on those

relatively few petitions in which review is seriously considered. The Justices instead must, as they do, depend heavily on their law clerks to identify which cases warrant the Court's attention.

The law clerks of the nine judicial chambers, however, neither spend much time on individual petitions nor do those clerks necessarily possess the competence to decide on their own which cases present legal issues of sufficient important to warrant plenary review. To ease the burden on the law clerks in reviewing thousands of cert petitions, seven of the nine chambers of the Justices at the Court voluntarily participate in a "cert pool" in which only one clerk within those seven chambers spends any substantial time reviewing the petition and then supplies a memorandum to all the participating chambers in the pool that summarizes the argument and recommends whether plenary review is warranted. A law clerk in the other six chambers reviews the cert pool memorandum but as a general matter is not otherwise looking closely at the underlying documents unless the memorandum recommends that review be granted or the legal issues presented otherwise make especially clear the case's importance. The clerks in the two chambers not participating in the cert pool are nominally responsible for sifting through all of the thousands of cert petitions themselves. Consequently, at best, only one Supreme Court law clerk may spend several hours reviewing the briefs and drafting a memorandum on the question whether the Court's review is warranted — a critically important undertaking delegated as a practical matter to a single law clerk.

In addition to the absence of significant time to commit to the decision whether an individual cert petition warrants review, the law clerks lack much competence in identifying which cases are most deserving of the Justices' attention. The law clerks include many of the nation's brightest recent law graduates. They have spectacular academic records, have successfully clerked for wonderful lower court judges, and are generally brilliant, thoughtful, and hard-working persons. But, precisely because they are recent law school graduates, they necessarily lack the one ingredient most important in evaluating the merits of many cert petitions — the experience and accompanying judgment necessary to make a considered determination of both a legal issue's importance and timeliness for Supreme Court consideration and, no less important, whether the case at hand provides a suitable vehicle for consideration of the legal issue purportedly presented. The central issue at the jurisdictional stage — whether a case warrants review — is distinct from the question whether the ruling below was erroneous as a matter of law. The law clerks are far better able to address the latter question than the former.

As a result, the law clerks and, accordingly, the Justices, are highly dependent at the jurisdictional stage on the quality of the advocacy reflected in the petition for a writ of certiorari seeking review, amicus briefs filed in support of the petition, and those in any briefs opposed to review. And, most simply put, as good as those law clerks are, they are no match at the jurisdictional stage when time is so limited for the nation's most skilled Supreme Court advocates. The latter, many of whom were once themselves Supreme Court law clerks but are now seasoned Supreme Court lawyers with years and decades of experience, know precisely how to pitch cases both to persuade a law clerk that a case is worthy of the Court's review when it is not, and to persuade the clerks that a case is not worthy of review, when it is.

They are especially effective when representing petitioners in reframing cases in ways that make the cases seem very attractive for the Court's consideration when in fact such reframing bears little actual resemblance to how the case was litigated and decided by the lower courts. They are very good at their jobs, which is why they are paid so well, and it frequently requires an equally expert opposing counsel to expose to the law clerks what petitioners' counsel is doing. Expert Supreme Court counsel and their clients are well aware that often their greatest value is the legal assistance they provide at the jurisdictional stage in persuading the Justices either to grant review, or not to do so, depending on their client's interests.

Many of those expert members of the Supreme Court Bar, moreover, are not only mini-celebrities well known by the law clerks, but the clerks' future employers. The vast majority of Supreme Court law clerks go directly from their clerkships to the law firms that host those expert Supreme Court practices and the clerks currently receive signing bonuses of $400,000 or more, even though they are formally barred from practicing before the Court for two years following their clerkships.

To be clear, although I worry about the appearance of impropriety inevitably created by such extraordinarily large bonuses, I harbor no concerns that any of the law clerks favor particular attorneys because they might be their future employers who pay them such bonuses. I have never heard any remote hint of such a problem. My concern is instead that on top of the skill these expert practices have, they enjoy a celebrity and stature within the law clerk community that results in their naturally being more influential especially at the Court's jurisdictional stage when clerks are most at sea in assessing a case's importance and its suitability as a vehicle for the Court's plenary docket.

Were the assistance of the most skilled Supreme Court advocates equally available to all persons, especially our society's most vulnerable, their potential for outsized influence would neither be realized nor a problem. The Justices and their chambers would always have the advantage of exceedingly able lawyers on all sides of a case. In many cases, with the modern rise of the expert Supreme Court Bar during the past four decades, that is now true for the cases the Court decides after full briefing and oral argument. That development is very much a good thing. But it is not true at the jurisdictional stage which is both why the Court remains particularly vulnerable to undue influence by certain advocates and reform of the Court's procedures is warranted.

Until relatively recently, the problem of skewed advocacy expertise was less concerning because so few attorneys possessed it outside of the Office of the Solicitor General of the U.S. Department of Justice, That Office has long been a repository of such advocacy expertise and has long enjoyed an impressive record of success before the Court: in persuading the Justices to grant review, deny review, and to rule in the federal government's favor on the merits. Much of that success can be traced to the obvious institutional advantage of representing the United States before the Court, and the resulting deference the executive and legislative branches receive before the judicial branch. But much of that success has also resulted from the extraordinary depth of advocacy experience that career attorneys within the Solicitor General's Office possess before the Court.

Until the late 1980s, the Office of the Solicitor General enjoyed the equivalent of a monopoly on such expertise, but the emergence of a modern Supreme Court Bar has since dramatically changed that dynamic, and a handful of national law firms now fairly boast of highly skilled and successful Supreme Court practices frequently staffed by veterans of the Solicitor General's Office and former Supreme Court law clerks. They match, and sometimes even best the Solicitor General's Office in the depth and breadth of their advocacy expertise. Year after year, they now dominate the cases the Court decides to hear at the jurisdictional stage and disproportionately employ the attorneys who file the briefs and present oral argument on the merits.

Nor does the significant pro bono work many of those same law firms commendably engage in effectively close the advocacy gap. Such work is necessarily both secondary to their need to earn profits and limited by the professional requirement that they avoid any formal conflicts of interests with their paying clients as well as by the practical need to avoid taking on pro bono causes that might upset their business clients that pay full freight for legal representation. Consequently, it is the business interests that can afford to pay their high billable rates that have greatest access to their expertise.

To be sure, a few public interest organizations, such as the NAACP Legal Defense Fund, Public Citizen, and the American Civil Liberties Union, can fairly boast of impressive Supreme Court expertise. Their representation, however, is as a practical matter still very limited in its reach at the Court's jurisdictional stage and many parties, such as non-white-collar defendants in federal and state criminal defendants, lack the distinct advantage of their assistance. As a result, potentially successful cert petitions representing those parties are either not filed at all or, if filed, poorly executed. And petitions filed by government prosecutors drafted by expert Supreme Court counsel in the U.S. Solicitor General's Office, or their counterparts in many States, are granted, even though an effective opposition to the petition might well have resulted in a denial of review instead.

The Proposed Addition of a Career Staff Attorney Office at the Court

My reform proposal for the Commission's consideration is a modest one that does not purport to address the more serious and pervasive underlying problem of the profound lack of effective legal representation of the nation's most vulnerable populations. Consistent with the Commission's charge, my proposal is instead narrowly aimed at improving the internal decision-making process that the Supreme Court uses to identify the cases it determines warrant its plenary review. Although a significant problem, it is also one that I believe can be effectively addressed in a relatively simple way and at relatively little cost.

The Court should hire a staff of career attorneys whose exclusive responsibility would be to provide the Court with assistance in deciding which cases warrant the Court's review. The office would be staffed by seasoned, highly accomplished attorneys with significant experience in appellate and Supreme Court advocacy. Following general guidance provided by the Justices, these staff attorneys would review the petitions in the first instance, identify those petitions warranting closer attention by the Justices and their law clerks, and write up memoranda for their

consideration in deciding whether review should be granted. The staff attorneys would possess both the time and the years of professional experience that the law clerks currently lack in evaluating the cert petitions. That would include, when needed, reading closely the briefs, the cited authorities, the lower court opinions, identifying how expert counsel may be overreaching in their framing of the case, and otherwise making up for gaps in advocacy. But also important, the staff attorneys would, as now, leave the final decisions to the Justices, assisted by their clerks as each Justice sees fit.

The Court would easily be able to attract to such an office a spectacular group of seasoned attorneys interested in performing such a public service, most of whom would be pleased to do so on a long term career basis. The job would be highly prestigious and a very attractive option to attorneys who have spent the first part of their professional careers working as appellate lawyers at the Justice Department, leading law firms, State Solicitor General's Offices, and nongovernmental organizations. The job would not only have the advantage of offering interesting, important work that assists the Justices, but also a highly attractive workload that, while full-time, was better than most prestigious law jobs at allowing attorneys to balance their professional lives with their personnel lives, including any related family responsibilities.

After a decade plus of practice, many outstanding attorneys are looking for just such a professional opportunity. As a result, the Court should have no difficulty attracting and retaining truly terrific senior attorneys to any newly-created staff attorney office. Those attorneys would appreciate the importance of their work, adhere to its strictly confidential nature, and readily embrace their role as objective, neutral, non-ideological legal advisors to the Justices.

The cost of such a staff attorney office would border on the inconsequential given the immense service it would provide to the Court and the nation. Attorney salary would be commensurate with the pay received by veteran attorneys in the Justice Department's Office of the Solicitor General and the appellate sections of the Department's several litigating Divisions. There would be no need to offer salaries competitive with private sector law firms. For the kind of person that the Court would be seeking to hire, the professional and personal advantages of the position would far outweigh the value of such higher salaries.

The Supreme Court's overall annual budget is already stunningly small — currently approximately $ 108 million. And the cost of a new Court staff attorney's office would be very little and certainly no more than the annual budget of the Solicitor General's Office, which is only $ 12.5 million. There would not be physical space for the staff attorney office in the Supreme Court building itself, where space is already very tight, but there should be ample space in the nearby Thurgood Marshall Building.

Finally, this reform proposal should be relatively noncontroversial because while it would require a decision by Congress to provide the necessary funding, whether to adopt this proposal would ultimately be for the Court to decide. Unlike some of the other reform proposals suggested to the Commission, others outside the Court would not be seeking to make unilateral changes to the Court itself or its operations. Only the Justices should decide how they prefer to organize their internal decision-making operations, including their procedures for considering petitions for

writs of certiorari. But, notwithstanding the Court's natural tendency to oppose change, I am optimistic that, so long as Congress took the initiative to provide the necessary modest budgetary support, the Justices would appreciate the reform's wisdom and welcome its adoption.

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Thank you for considering this submission.