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December 27, 2011

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

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Re: "Access to the Court: Televising the Supreme Court"

Dear Senator Leahy and Committee members:

As you know, I testified before the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts at a hearing entitled "Access to the Court: Televising the Supreme Court" on December 6, 2011. Senator Charles Grassley subsequently submitted the following question for my response: "If a bill mandating televised Supreme Court proceedings were limited to only apply to cases of appellate jurisdiction, explicitly exempting cases of original jurisdiction, do you think it would violate the Separations of Power doctrine? Please explain." My response follows.

This question appears to be based on the view that Article III, Section 2 provides Congress with broad textual authority to adopt rules controlling the manner in which the Court adjudicates cases falling within its appellate jurisdiction, while withholding that authority for cases within the Court's original jurisdiction. I addressed this possible interpretation of Article III in footnote 7 of my written testimony. It is based on a misreading of the wording of Article III and it is implausible. Article III does not grant Congress textual authority to control the manner in which the Supreme Court adjudicates *any* case properly within its jurisdiction.

As I previously explained, Article III provides that, for certain enumerated controversies, "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such Exceptions, and under such Regulations as the Congress shall make."¹ That wording, however, only grants Congress authority to create "Exceptions" and "Regulations" to "appellate jurisdiction," which plainly refers to the scope of the Court's jurisdiction over certain types of controversies, and not to the procedures the Court uses to control its own courtroom in cases that properly fall within its jurisdiction. It is also implausible to conclude that Congress would have

¹ U.S. CONST. art. III, § 2.

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the constitutional power to mandate cameras in an “appellate” case heard at 10:00 a.m. but not in an “original” case heard at 11:00 a.m. in the same courtroom.

In summary, the scope of Congress’s power to strip the Court of its authority to control its own courtroom is no greater in appellate cases than it is in original cases. My written and oral testimony--which expressed serious doubts about the constitutionality of legislation requiring the Supreme Court to televise oral arguments--applies fully to cases within the Court’s appellate jurisdiction. Those constitutional concerns cannot be evaded by adopting legislation limited to cases within the Court’s appellate jurisdiction.

Respectfully,



Maureen E. Mahoney
of LATHAM & WATKINS LLP