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U. of Texas' Chief Might Have Exposed Its Admissions Policy to New Supreme Court Challenge

By Peter Schmidt

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William C. Powers Jr., president of the University of Texas at Austin, might have provided grounds for a new U.S. Supreme Court review of his institution's race-conscious undergraduate admissions policy by overseeing a separate, side-door process for considering favored applicants.

The separate admissions process, which the Supreme Court did not know about when it examined Texas' admissions practices two years ago, undermined the "holistic" admissions process that has been the subject of the federal courts' scrutiny, according to a Cato Institute brief urging the Supreme Court to re-examine the constitutionality of race-conscious admissions on the Austin campus. The separate process also provided the university with a second, undisclosed means of giving extra consideration to minority applicants, the brief says.

The Cato brief cites the findings of an investigation, commissioned by the University of Texas system, that determined that race and ethnicity were "an important consideration" in many favorable decisions made through the previously undisclosed alternative admissions process. The investigation also found that admissions decisions made through the separate process were often based on "factors other than individual merit" and that the university had destroyed records and notes from meetings where it decided on such applicants.

The university "routinely bypasses its 'holistic review' process to shunt applications into a secret admissions system that places enormous weight on race in an entirely arbitrary fashion," the Cato brief alleges. It calls the campus's diversity rationale for race-conscious admissions a pretext in light of the investigation's findings that the campus operated the alternative admissions system mainly to serve political interests.

The workings of the campus's alternative admissions process remained unknown to the public until February, when the university system released its investigation's results. The Supreme Court had not been informed of the alternative process before rendering its 2013 decision ordering the lower courts to subject the campus's policies to greater legal scrutiny than they had previously undergone.

The U.S. Court of Appeals for the Fifth Circuit similarly remained in the dark about the alternative process last year in upholding Texas' holistic admissions upon a second review.

Edward Blum, who has led the legal challenge to Texas' race-conscious admissions policy as director of the Project on Fair Representation, on Tuesday blamed "an issue of timing" for the failure of his advocacy group's lawyers to mention the alternative admission system in their own brief urging the Supreme Court to take up their appeal of the Fifth Circuit's latest decision. His group filed its brief days before the Texas system's release of its investigative report.

He said his group's lawyers did not plan to focus heavily on the alternative admissions process because it is not part of the court record in the case, Fisher v. University of Texas at Austin, but that process "very well could come up" if the Supreme Court agrees to revisit the dispute.

The Cato brief is one of several filed this week by critics of affirmative action who are urging the Supreme Court to take up the Fisher appeal. Along with raising questions about the constitutionality of the separate admissions process that President Powers maintained, the Cato brief seeks to hold against the Austin campus an article published in August 2014 by Mr. Powers in The National Law Journal. The Cato brief argues that in the article, "Why Schools Still Need Affirmative Action," Mr. Powers justifies his campus's holistic admissions policy based partly on rationales that the Supreme Court had previously declared off-limits.

Among the other briefs filed this week is one jointly submitted by the Pacific Legal Foundation, the Center for Equal Opportunity, the National Association of Scholars, and two other groups. It argues that the center and the association have been able, through open-records requests, to raise doubts about whether selective colleges have ever followed the Supreme Court guidance in its 2003 Grutter v. Bollinger decision, which requires them to consider race-neutral alternatives before adopting race-conscious admission policies to promote diversity.