

**Statement of Maureen E. Mahoney in Response to the Request of the United States Senate Committee on the Judiciary to Provide Testimony at Its Hearing on the Judicial Nomination of Brett M. Kavanaugh to Serve as Associate Justice of the Supreme Court of the United States**

**September 7, 2018**

The American Bar Association has unanimously rated Judge Kavanaugh “well-qualified” to serve on the Supreme Court. Having worked with Judge Kavanaugh at the Solicitor General’s Office and appeared before him on the D.C. Circuit, I agree with that assessment. Indeed, it is hard to think of someone more qualified.

In my testimony today, I would like to make two further points. First, I want to share my view that Judge Kavanaugh has much in common with my friend and former colleague Chief Justice John Roberts, whom the Senate voted to confirm overwhelmingly. Second, I would like to discuss Judge Kavanaugh’s extraordinary record of mentoring female lawyers.

In 2005, I testified before this Committee in support of Chief Justice Roberts’ confirmation and I am struck by the many similarities between him and Judge Kavanaugh. Some are obvious: Both are extraordinary lawyers; both worked in the White House Counsel’s Office and the Solicitor General’s Office; and both served as judges on the D.C. Circuit. Perhaps less evident to some, the Chief Justice and Judge Kavanaugh also share a civility and evenhandedness on the bench that reflects their genuine effort to consider all sides of an argument thoroughly before reaching any conclusions. I have had the pleasure of arguing before both men. Like the Chief Justice, Judge Kavanaugh asks difficult and incisive questions of both parties; yet he is also polite and conveys his thoughts with an open mind. My experience is not unique. Don Verrilli, Solicitor General during the Obama Administration, has called Judge Kavanaugh a “brilliant jurist” who is

“a gracious person, both on the bench and off.”<sup>1</sup> Bill Clinton’s lawyer in the Paula Jones case, Bob Bennett, has called the Judge an “unusually balanced questioner” who has an “innate sense of fairness and civility.”<sup>2</sup> And a bipartisan group of appellate practitioners praise the “unfailing courtesy” that the Judge “extends to his colleagues and to counsel who appear before him.”<sup>3</sup> Judge Kavanaugh once wrote that “it is critical” for a judge to “demonstrate civility,” and to “guard against . . . arrogance.”<sup>4</sup> In an era when some appellate judges have behaved like brusque advocates for one side during oral argument, Judge Kavanaugh has been a model of the proper judicial disposition.

More importantly, the Chief Justice and Judge Kavanaugh both understand the proper role of a federal judge: to be an independent, neutral arbiter. During his confirmation hearing, the Chief Justice famously described judges as umpires who apply the rules “without fear or favor.”<sup>5</sup> I think it is fair to say that the Chief Justice has done so: At various times, both sides of the aisle have been disappointed by his rulings. And Judge Kavanaugh has similarly demonstrated impartiality and fairness over and over again in his 12 years on the D.C. Circuit. Most tellingly, he repeatedly ruled against the Bush Administration—where he worked prior to becoming a judge—in his first three years on the bench.<sup>6</sup> He has ruled for an al Qaeda terrorist and for a woman suffering

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<sup>1</sup> Interview with Marcia Coyle, LegalSpeak Podcast (July 13, 2018).

<sup>2</sup> Letter to Senators Grassley and Feinstein (Aug. 28, 2018).

<sup>3</sup> Letter to Senators Grassley and Feinstein (Aug. 27, 2018).

<sup>4</sup> Brett M. Kavanaugh, *The Judge As Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 689 (2016).

<sup>5</sup> *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 443, pp. 55–56 (2005) (Statement of J. John Roberts).

<sup>6</sup> See, e.g., *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008); *Tax Analysts v. IRS*, 495 F.3d 676 (D.C. Cir. 2007); *Felter v. Kempthorne*, 473 F.3d 1255 (D.C. Cir. 2007); *Baker & Hostetler LLP v. Department of Commerce*, 473 F.3d 312 (D.C. Cir. 2006).

from Battered Woman Syndrome.<sup>7</sup> He has ruled in favor of Emily’s List, a pro-choice Democratic interest group, and against the Republican Party.<sup>8</sup> And to the surprise of some, he has embraced greater Title VII protections for employees who suffer racial discrimination at work.<sup>9</sup> Even the ACLU has recognized that Judge Kavanaugh has been “sympathetic” to Title VII claims.<sup>10</sup>

As these cases show, and as Judge Kavanaugh has explained in multiple speeches over the years, a judge must “check any prior political allegiances at the door.”<sup>11</sup> I am confident that Judge Kavanaugh will stay true to that ideal.

Judge Kavanaugh also stands out as a mentor to, and champion of, female lawyers. You have no doubt heard the statistics before, but they are worth repeating. Over half of Judge Kavanaugh’s law clerks—25 of 48—are women. Twenty-one of those twenty-five law clerks have been hired to clerk on the U.S. Supreme Court. That is astounding. Judge Kavanaugh’s female law clerks have gone on to serve in all three branches of government, including in prestigious positions in the White House and the Solicitor General’s Office. Four are federal prosecutors; one is Deputy Solicitor General of the District of Columbia; and one serves as a judge on the Eleventh Circuit.

It is difficult to overstate how important opportunities like these can be for a lawyer’s career—especially in appellate practice. Credentials like a Supreme Court clerkship or a job at the Solicitor General’s Office are keys that unlock doors at the

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<sup>7</sup> *Hamdan v. United States*, 696 F.3d 1298 (D.C. Cir. 2012); *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016).

<sup>8</sup> *Emily’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *Republican National Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010).

<sup>9</sup> *Ortiz-Diaz v. HUD*, 867 F.3d 70 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

<sup>10</sup> *Report of the American Civil Liberties Union on the Nomination of Judge Brett M. Kavanaugh to Be Associate Justice of the United States Supreme Court* 30 (Aug. 15, 2018).

<sup>11</sup> Kavanaugh, *The Judge As Umpire*, 65 CATH. U. L. REV. at 686.

highest levels of the legal profession. And very few women have historically held these elite positions. When I clerked for Chief Justice Rehnquist in 1979, for example, just over 20 percent of the law clerks at the Supreme Court were women. This gender imbalance endures today. Almost twice as many men as women have been hired as Supreme Court clerks since 2005.<sup>12</sup> In the most recent Supreme Court Term, women delivered just 12 percent of the oral arguments.<sup>13</sup> And women make up only 19 percent of law firm equity partners.<sup>14</sup>

I was one of the lucky few. I argued 21 cases before the Supreme Court, and this never would have happened without the efforts of two mentors: Chief Justice Rehnquist and Chief Justice Roberts. Rehnquist helped launch my appellate career by hiring me as his law clerk at a time when some justices were still uncomfortable with women working in their chambers. And then he arranged for me to argue my first Supreme Court case: In 1988, I was the first woman to receive the honor of being appointed by the Supreme Court to argue a case by invitation.<sup>15</sup> With that maiden argument under my belt, Chief Justice Roberts recruited me to join him in the Solicitor General's Office as one of four deputies in 1991—a position that very few women in history had held at that time. These were the opportunities that made it possible for me to me compete with the men who dominate the Supreme Court bar.

For more than a decade, Judge Kavanaugh has been instrumental in opening these doors for a new generation of women lawyers. He has been a teacher, adviser, and

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<sup>12</sup> Tony Mauro, *Shut Out: SCOTUS Law Clerks Still Mostly White and Male*, NATIONAL LAW JOURNAL (Dec. 11, 2017).

<sup>13</sup> Mark Walsh, *Number of Women Arguing Before the Supreme Court Has Fallen Off Steeply*, ABA JOURNAL (Aug. 2018).

<sup>14</sup> AMERICAN BAR ASSOCIATION, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2018).

<sup>15</sup> *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988).

advocate for women in ways that unquestionably demonstrate his commitment to equality and that will ultimately reduce persistent gender disparities in the legal profession.

In short, Judge Kavanaugh's independence, his civility and open-mindedness, and his generous mentorship are just a few of the many characteristics that make him superbly qualified to serve on the Supreme Court. Like Chief Justice Roberts, Judge Kavanaugh deserves the Senate's overwhelming support.