

**Statement of Jennifer L. Mascott
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**Hearing on the Nomination of the Honorable Brett M. Kavanaugh
to be an Associate Justice of the Supreme Court of the United States**

September 7, 2018

Mr. Chairman, Ranking Member Feinstein, and Members of the Committee: Thank you for the opportunity to testify today. I am honored to speak in support of my mentor and former boss, Judge Brett Kavanaugh, and to share with you why I believe he would be an outstanding Supreme Court Justice. My testimony will highlight three aspects of Judge Kavanaugh's character and judicial service that demonstrate his fairness and care in applying the law. Judge Kavanaugh's superb qualifications for Supreme Court service are complemented by his commitment to mentorship and instruction, his fair-minded and careful consideration of legal questions independent of personal policy preferences, and his commitment to following the law. These are qualities that I have witnessed firsthand as Judge Kavanaugh's law clerk and as a student of his opinions in the years to follow.

I served as a law clerk to Judge Kavanaugh during his first year on the bench, from 2006 to 2007. Already, Judge Kavanaugh demonstrated a commitment to seeking out diverse perspectives from a diverse group of law clerks. Our group of four clerks hailed from different parts of the country, came from diverse racial backgrounds, grew up among distinct religious traditions, and graduated from Ivy League as well as non-Ivy League law schools. I graduated from the George Washington University Law School—a top-flight law school but one that sends far fewer clerks to the D.C. Circuit than Harvard and Yale. Growing up in a family of modest means in a rural community, I graduated from the local public high school and attended my public state university on a scholarship. Judge Kavanaugh's decision to hire our group of clerks showed his value for perspectives of people from different walks of life. The Judge values hard work, achievement, and determination—not any specific pedigree.

We routinely had lively discussions in the Judge's chambers as the Judge prepared each month for oral arguments. The Judge encouraged us to ask tough questions of him and to debate legal issues with him and with each other. The camaraderie that the Judge facilitated during those discussions helped create an enduring bond between the four of us. The Judge wanted to hear and consider all sides of an issue, apply the law fairly, and along the way help train us to bring more rigor and precision to our legal analysis—skills that have stayed with me throughout my career. Now that I am a law professor, I view it as part of my job to pass along those skills to another generation of law students.

In addition to training us professionally, the Judge also mentored us on a more personal level. We had regular lunches with the Judge where we would discuss our families, our professional aspirations, and even sports. We attended a Nationals baseball game together, and a version of that outing has become one of several annual traditions, with current and former clerks

joining the Judge and Mrs. Kavanaugh each September to support the home team at Nationals Park.

Judge Kavanaugh's devotion to training female and male leaders in the legal profession does not conclude at the end of a clerkship in his chambers. He has remained a close mentor to me, providing advice at every major point in my career since the conclusion of my clerkship—which ended more than eleven years ago. And Judge Kavanaugh branches out to assist young lawyers far beyond the four corners of his clerk community—presiding over student moot court proceedings, speaking to student associations, and regularly teaching courses to students on law school campuses.

Judge Kavanaugh's record of mentoring and instructing young lawyers and his practice of hiring law clerks with diverse life experiences demonstrate his commitment to giving back to the legal profession and reveal him to be a jurist with an open mind. It also demonstrates that Judge Kavanaugh is aware of the impact that members of the judiciary can have on the legal profession, the state of the law, and the lives and futures of real people. Judges take an oath to decide cases according to the law and the Constitution. But care for people and the legal system in its entirety can make a jurist a more careful, modest, and thoughtful judge.

Judge Kavanaugh's determination to consider all relevant issues and hear discussion from all sides also evidences the Judge's humility. During my time in his chambers I witnessed a judge with a deep commitment to giving each legal question a fresh look when it comes before him in a particular case or controversy without predetermined ideas favoring a particular outcome. This commitment derives principally from Judge Kavanaugh's understanding of the constitutional role of the judge as the modest one of applying the law as enacted by Congress, rather than deciding cases to promote personal policy preferences.

Consistent with his judicial oath to "do equal right to the poor and to the rich," Judge Kavanaugh approached each case with the same in-depth level of care regardless of the identity of the litigants or the legal issues presented. He saw it as his job to consider all relevant statutory provisions, precedent, and history in every case. Claims that might affect only one or two individuals received the same level of attention as cases involving broader legal claims related to regulatory activity or governmental power.

Judge Kavanaugh's dedication to fairly administering equal justice to all under the law was also apparent through his meticulous attention to the opinion drafting process. The Judge worked through scores of opinion drafts before sending his final work product out the door. He wanted his opinions to reflect rigorous reasoning and legal precision. He wanted the opinions to be clearly written so that lower-court judges and litigants could more easily understand and apply them. He wanted the opinions to be accessible and transparent so that the public could understand them.

To this day, in my scholarly writing, I remember the Judge's constant admonition to simplify. Write short and clear sentences. Make sure each sentence contains only one idea. Present a concise summary of the principal reasoning up front in the introduction.

In the years since clerking for the Judge, I have become a professor who teaches and writes in the areas of administrative law and the constitutional separation of powers. Serving as a clerk for Judge Kavanaugh helped prepare me to analyze issues rigorously, write carefully, and think through issues from every angle to comprehensively evaluate all relevant aspects of complicated legal questions.

During my clerkship for Judge Kavanaugh, it was clear that the Judge himself always wanted to learn more. He kept abreast of current legal scholarship and opinions from other federal courts to have a fuller, more comprehensive, understanding of the law. From Judge Kavanaugh's example, I acquired a sense of the value of better understanding legal theory, the constitutional structure, and the role of the judiciary in the legal system. This understanding has helped to guide my own scholarship.

Judge Kavanaugh's view of the role of the independent judiciary, which he has called "the crown jewel of our constitutional system," leads him to independence, rigor, and fair-mindedness when he considers cases. He is not looking to reach a preconceived result and then justify it after the fact. Rather, he wrestles with every relevant legal issue and precedent, one by one, and only then reaches a decision.

In addition, Judge Kavanaugh works to build consensus and evenhandedly decide each case. For example, during the year that I clerked for Judge Kavanaugh, he wrote a unanimous opinion deferring to the National Labor Relations Board on two collective bargaining determinations, rejecting challenges to the Board brought by both a corporation *and* a labor union. *See E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007). Then-Judge Merrick Garland (now Chief Judge Garland) and Judge David Sentelle both joined Judge Kavanaugh's opinion upholding agency action.

Judge Kavanaugh also sticks to the law regardless of the policy outcome to which it leads. One representative example of many is embodied by his opinions in two cases addressing Environmental Protection Agency (EPA) regulation of greenhouse gases. In a 2012 dissent from the denial of rehearing en banc in *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, Judge Kavanaugh concluded that a greenhouse gas regulation exceeded the EPA's authority to regulate under the Clean Air Act. But the very next year, Judge Kavanaugh concluded that the proper interpretation of the Act and precedent called for more expansive greenhouse gas regulatory activity. In *Center for Biological Diversity v. EPA*, the Judge concluded in a concurring opinion that the court's precedent interpreting the Clean Air Act required the EPA to impose broader permitting requirements on facilities emitting greenhouse gases. *See* 722 F.3d 401 (D.C. Cir. 2013). Judge Kavanaugh's rulings against greenhouse gas regulation one year but then for expanded regulation the next were driven by Judge Kavanaugh's careful application of all the relevant law. Judge Kavanaugh's opinions indicated that he understood the outcome in each case was not dependent on whether he as an individual thought increased regulation was best as a policy matter but instead hinged on his task as a judge to accurately apply the law.

Judge Kavanaugh's commitment to follow the law regardless of party or policy outcome is also on display in two opinions addressing campaign finance regulations. In 2010, Judge

Kavanaugh *rejected* a claim by the Republican National Committee that certain contribution limits violated the First Amendment. *See Republican National Committee v. Federal Election Commission*, 698 F. Supp. 2d 150 (D.D.C. 2010). But in 2009, Judge Kavanaugh *granted* a First Amendment challenge brought by Emily's List against certain campaign finance regulations. *See* 581 F.3d 1 (D.C. Cir. 2009). The contrasting outcomes for campaign finance-related challenges in those two cases were not driven by Judge Kavanaugh's personal policy views but by careful application of the relevant law and precedent.

The Judge's record further includes rulings both for and against the government in cases involving criminal defendants. During my clerkship with the Judge, he joined a per curiam opinion with Judge Garland and Judge Karen Henderson vacating a drug sentence and remanding it for resentencing. *See U.S. v. Henry*, 472 F.3d 910 (D.C. Cir. 2007). In his concurring opinion in the case, Judge Kavanaugh emphasized the importance of adherence to the constitutional requirement that a criminal sentence be increased only on the basis of facts that a jury finds to be true beyond a reasonable doubt.

Finally, Judge Kavanaugh's record reveals his understanding that adherence to the constitutional system of separation of powers is not just a matter of formality or technicality but is essential to the protection of individual liberty. Sometimes the judge's role within that system, as explained by Judge Kavanaugh, is to step in and enforce the law when its boundaries have been violated. But where the text of statutes and the Constitution and history do not mandate a particular outcome, the judge should refrain from imposing his or her policy preferences and let the electorally accountable federal branches and state governments govern.

For example, in *El-Shifa Pharmaceutical Industries Company v. United States*, Judge Kavanaugh wrote a concurring opinion explaining that courts must step in to interpret and apply relevant statutory restrictions on executive foreign affairs and national security activities. *See* 607 F.3d 836 (D.C.Cir. 2010). If courts instead treat the question of whether the Executive has violated a statutory restriction as a political question that courts may not resolve, courts would inadvertently favor the Executive Branch over Congress without fully evaluating the relevant separation of powers considerations. Judge Kavanaugh showed similar respect for the role of Congress in defining the law in national security matters when the Judge vacated a conviction for material support of terrorism in *Hamdan v. United States* because Congress had not yet criminalized the offense as of the time of Mr. Hamdan's conviction. *See* 696 F.3d 1238 (D.C. Cir. 2012).

Judge Kavanaugh's commitment to constitutional principles and an independent judiciary, his mentorship of young lawyers, and his willingness to listen to diverse perspectives demonstrate that Judge Kavanaugh would be an excellent Supreme Court Justice. I strongly support his confirmation.