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REMARKS

TEXAS A&M UNIVERSITY SCHOOL OF LAW'S *Distinguished Practitioner Speaker Series* Keynote Speaker

By: Maureen E. Mahoney*

I have had the honor of spending over thirty years in various roles involving the Supreme Court, both as a law clerk and later as an advocate in the Solicitor General's Office and as a lawyer in private practice. I accordingly want to give you my perspective on some questions that are frequently asked about the Supreme Court.

The first question that I am often asked is: "Why don't the Justices allow cameras in the courtroom?" I assume you know that you cannot see what is going on at the Court on video, and that they do not allow photographs. They have courtroom sketches. But in this day and age, with our sophisticated telecommunications, this practice may seem like an anachronism that has to go. The press has been up in arms about it for years and writes about it frequently. I bring it up because I was asked to testify at a hearing before Congress last year on whether there should be cameras in the courtroom. I testified about why the Court should be the one to decide and what the constitutional implications would be if Congress passed legislation that mandates cameras in the courtroom, which is what Congress has been contemplating. I want to explain what the Justices have said about this topic so that you will have a better appreciation of the issue.

The answer is that the Justices are still studying it, but so far, they believe it could do more harm than good. Let me explain why. It is really a cost-benefit analysis. First, you look and say, "kay what is it that people don't know about the Court; what information is unavailable?" On that score, although a lot of people do not know it, there is a full transcript of every word that is spoken to the Court that is available at the end of every oral argument, usually released on the same day. You can also listen to every word on an audio recording, which is

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usually released by the end of the week if not the same day. Every word can be heard and read. So what do the images add?

I think Justice Souter best expressed the concern that the Justices have. The press says, "This is unfounded, how could it be a problem?" Justice Souter testified before Congress, of course he is gone from the Court now, but he was a very outspoken advocate on this point. He said that the case against cameras is so strong that, "the day you see a camera coming into our courtroom, it is going to roll over my dead body." He said this based upon his own personal experience. He had been a justice on the New Hampshire Supreme Court, and they brought cameras into the courtroom. He said that after they started to televise the proceedings, the lawyers acted up for the camera by being more dramatic, and that he, more importantly, was censoring his own questions because he did not want them to be fodder for the evening news. While you may say, "That can happen now with the audio," it does not happen that way because the media wants the sound bites with a picture of a justice peering over the bench.

Justice Souter was not alone either. There was a pilot project done a number of years ago in the courts of appeals of the thirteen circuits, and only two of them decided it would be acceptable to have cameras in their courtrooms; the other eleven said that it was detrimental. The Justices have also testified before Congress on this topic, explaining their reservations by saying "Look, the public has lots of information. We work well together; why mess with a good thing? We like the way our arguments are structured." Nonetheless, the Senate Judiciary Committee has been seriously considering bills providing that the Court *must* have cameras in the courtroom. Whatever your views are on this issue, I hope that we could all agree that the Court should get to decide in its own good time what is appropriate for its own proceedings because it is a separate, independent branch of the government. Perhaps, as my mother would say, "the Congress should mind its own business."

The second question that I am asked frequently is: "Why are there so few Supreme Court advocates who are women?" When I started doing this, I think there were only three women who could really say that they were Supreme Court advocates. What I mean by that is, not whether they ever argued a case, but whether they had repeat performances before the Court. Of course, thirty years ago the reason for the gender gap was obvious. There was rampant discrimination against women in the law. My favorite story about that occurred in 1962 when I was eight years old. I was seated at the dinner table with my father, who was a lawyer. I told him that I wanted to be a lawyer when I grew up, and he said that there was "no place for women in the law." The thing you have to understand is that my father was not biased against women; he was not trying to be mean. Rather, he was telling me what he accurately observed, based on his own experiences

at that time. If I had entered the law in 1962, I would have found my opportunities to be very limited.

My father's views reflected the experiences of Sandra Day O'Connor, who graduated at the top of her class from Stanford and could not get a job at a single law firm. The same occurred for Ruth Bader Ginsburg, who also graduated at the top of her class from Columbia and could not get a job at a law firm. Perhaps even more dramatically, Justice Brennan, who of course was a champion of liberal causes, refused to hire women clerks until the 1970s because he said he just did not feel comfortable with them in his Chambers. He even went so far as to say that, if a president were to appoint a woman to serve on the Court, he would probably have to resign. Justice Burger said something very similar. Fortunately, Ronald Reagan did not listen to them, and he introduced them to Justice O'Connor. So we were lucky about that!

By 1978 those obstacles were largely gone. The world changed in the early seventies when the all-male schools started admitting women and Title IX was passed. I think that, as of now, it is hard to say that the disparity between women and men in the Supreme Court Bar is attributable to those vestiges of discrimination, or at least entirely attributable to that. Right now, there are probably at least a dozen women who are Supreme Court advocates, which is a good show of progress even though it is still considerably less than men. One leading advocate said that she thinks this numerical gap is attributable to gender differences that make men more likely to enter into this field. She has described it this way: "The courtroom is a battlefield, and male lawyers are generally more fearless in this type of verbal battle, even though from my experience, many of those men are obviously clueless that they have no talent." She is a Democrat too. I just want to make clear that she is not politically conservative. She just believes that women are more likely, on average, to avoid this kind of combat.

There may be something to her observation, but I actually think the answer mainly lies elsewhere. I think it relates to differences in the value, on average, that women place on families. I am not criticizing men; I am just telling you my experience. When I had young children—and I have a wonderful husband—I was struggling with, "How am I going to do all of this work and raise our children?" My husband looked at me one day and said, "You know, you can choose to be less successful. You don't have to, but you can. You have to decide." I think that a lot of very highly talented women make the choice to be less successful. They choose not to seek arguments before the Supreme Court, and not to become the General Counsel of a corporation—and other very demanding jobs—so that they can preserve some time at home. Even in my case, I chose to be less successful. Now you may be thinking, "Well, what's she talking about? She has argued twenty-one Supreme Court cases." The answer is that I have

not argued fifty, and some of my peers have. Although there may be many reasons why I have not argued fifty, one of them is that I have actually turned down Supreme Court cases because I wanted to make sure that I retained enough time to get home at night. So I argued fewer cases. I even opted for a reduced schedule with my firm when my children were in middle school and high school.

Women are much more likely to make those choices than men, and I think that is why today only 15% of the equity partners in the country are women. Women managers at law firms are rare as hens' teeth. I think that the reality is, as long as men are willing to work more hours than women, they are going to have a major edge, whether it is in the Supreme Court marketplace or in any highly competitive field of law. That is really as it should be when you think about it. The lawyers who work the most, network the most, and learn the most are going to add the most value, and we should celebrate the fact that we have a meritocracy in this country. If you do all of those things, you deserve to be rewarded.

So what is the solution? I for one am not going to encourage women to put less value on mothering. Motherhood is a joy to be cherished; it is not a burden to be shed. For me, it is the greatest joy in life. Gender parity is just not the most important thing. But there is a different solution. Someday, men will put the same amount of value on family life as women. When they do, they will no longer retain this competitive advantage, because everyone will be trying to get home at six o'clock, or at least as often as they can, and men will not always be outworking the women. While you may say, "That's a pipe dream"—the world is changing pretty rapidly. Thirty years ago, the notion that men at my firm, Latham & Watkins, would take paternity leave would have been laughable. However, dozens of men at Latham took paternity leave last year. In fact, we recently had a year when there were more men who took paternity leave than there were women who took maternity leave. It is becoming very acceptable. I recently had a male colleague who came to me and said, "I can't go to that meeting with the client in California because my wife has to work, and I have to cover for the kids and be there." So, I think that thirty years from now, we may not really be debating this question in the same way. Others have different views on this, but I think that it is a leading explanation of why the gender disparities persist.

The next question that I am often asked is: "Why doesn't Justice Thomas ask questions at oral argument?" You are probably all aware of this, and the press likes to make fun of him for it. It really bothers me, and I want to address this issue because I admire Justice Thomas. I think that he is an extraordinary person, and he has an outstanding intellect. People have simply forgotten about the history of the Court with respect to oral argument.

In a nutshell, Justice Thomas does not ask questions because he is too polite, and here is the history. Right now, the Court is in an era where grilling advocates is the norm. It is the way the Justices do their job. I get it. If I were a judge, grilling advocates would be fun and interesting for me. But it was not that way in 1979 when I was a clerk there. First of all, oral arguments were not filled with questions. Advocates got up and told their story. They would get interrupted now and then, but it was not constant interruption. Justice Brennan, who has been described as the justice who choreographed the liberal takeover of the Court, did not do it by asking questions at oral argument. He did not ask many questions at all. In fact, one day I was at an argument—it was not a particularly burning issue—and he asked several questions. I said to someone, “What was up with Justice Brennan today asking all these questions?” They said, “Oh, his granddaughter was in the courtroom.” He actually told his biographer that most arguments were “boring as hell,” and he was generally thinking, “When are we going to get this thing over with, so we can go home?”

Back to Justice Thomas. He has not said that arguments are boring as hell, but he has said that he is old school. He put it this way: “If I invite you to argue your case, I should at least listen to you. Instead, we look like a family feud.” He has gone on to say: “Why do you beat up on people when you already know the answer? I refuse to participate. I don’t like it, so I don’t do it.” Dahlia Lithwick, who writes for *Slate*, has told readers who try to make an issue out of this that “Justice Thomas is an original listener and original thinker with a constitutional architecture that is fully worked out in his mind. Don’t underestimate him.”

The next question that I often hear is: “How do you become a highly effective oral advocate?” Some of you might want to know the answer to this because you want to be an advocate. But my answer is not solely relevant to the Supreme Court. It is about any court or even about meetings that you are running; it is relevant to many types of performances. Of course, in order to be a highly effective advocate, it helps to be six feet tall with a low voice and a commanding presence. But that is not necessary; nor is it sufficient. And that is good news because some of us are not six feet tall. There are two things that you absolutely must do at the Supreme Court or in any court where you practice. The first is that you must truly master the material. Second, you must maintain your credibility. If you do those two things, you can get the Justices to listen to you, and if you get the Justices to listen to you, you have a chance of persuading them.

On mastering the material, I am going to start with a line from Bobby Knight. I am a Hoosier and went to college in Indiana. He was the IU basketball coach at the time. He was asked about the dividing line between the good and the great players on his team. Indiana was a powerhouse basketball program at the time, and he said, “Well, they

all come to me with the will to win. Very few come with the will to prepare.” It is really the same thing for advocates: you have to have the will to prepare. It is really tough and takes a large amount of time. To give you some concrete examples, I will use the *University of Michigan*. I prepare for all my cases very hard, like an athlete training for the Olympics. But in the *University of Michigan* case, I am sure that I spent more than 200 hours preparing for the argument. It is like preparing for a law school semester exam in the sense that you read everything, you outline it, you study it, and you memorize it. The thing that I always recommend to people who are going to argue a case is that, when you start reading the material, start making a list of questions by topic. I constantly ask myself questions: What will they want to know about the facts of this case, about prior precedents, about the consequences for other areas of law, and about other fact patterns? Just start writing those questions down. You cannot answer them yet, or at least a lot of them, but you want to try to think of every question that a judge might want answered.

In the *Michigan* case, I identified several hundred questions. What do you do with that many questions? You identify which ones are hard to answer, which ones are most likely to be asked, and which ones are most likely dispositive. You want to know about anything that the judges might ask you, or at least that is the goal. Then you narrow that down to maybe fifty questions that you think are really important and hard. Then you have to identify how to write the most concise and persuasive answer to those questions. Being concise is important. You only have a very small amount of time for argument—thirty minutes per side—sometimes less. If you happen to have an amicus supporting you, it can be a twenty-minute argument. So you have to be ready to deliver really concrete answers that are persuasive in a very small amount of time. You get interrupted so often that if you do not have it down to just a few phrases, you are in trouble. But those phrases cannot be general; they need to be precise. You need to know the record; you need to memorize the pages of the record; you need to be able to quote the cases and the testimony. You cannot be searching around trying to find it. It has to be on the tip of your tongue.

Having a law school for a client is a very challenging engagement—although they were an absolutely wonderful client. I did several moot courts, including one with faculty at the University of Michigan, and then others in Washington. You practice, and you have people ask you questions, whatever questions they want for as long as they want. When the argument came, I was asked fifty-six questions in thirty minutes, and I don’t think there was a single question that I had not anticipated. I do not mean that I gave the answer I intended to give to every question, because it does not always work out that way. But you can get yourself to a point where you have mastered the material, and that is very important.

Another example that I give about mastering the material comes from the *Arthur Andersen* case. When you are mastering the material, it is not just about regurgitation. You are trying to figure out what the law should be—what makes sense. I would plead with you to remember that. When you are reading those cases and looking at statutory language and trying to figure out what the law is, always, always, always, remember that common sense is a key touchstone. That does not mean that it answers all the questions, but you have to look at these issues through a lens of common sense. Judges will not just ignore plain and clear statutory language for an answer that they think is preferable; but they do use common sense as a lens.

Arthur Andersen is a great example of this. This was a case where Arthur Andersen was convicted of a form of obstruction of justice because they had destroyed documents at a time before they had received a subpoena, and before they had been notified that they were going to receive a subpoena. The documents were destroyed under the terms of a standard document destruction policy. The Andersen employees were not ferreting out the bad facts in the bad documents and destroying them; they were just following their document retention policy. In fact, some wrote and preserved memos about facts that they thought might be damaging. There were a dozen employees who testified that they did this with the belief that their conduct was absolutely appropriate. They did not believe they were doing anything wrong. But the jury was instructed that this testimony did not matter and that Andersen should be convicted even if its employees destroyed the documents in good faith with no intent to hide facts or violate the law. The Fifth Circuit upheld the conviction, saying, “ignorance of the law is no excuse.”

We have all heard that maxim. But we looked at the situation and said, ignorance of the law is no excuse, but does that make any sense here? Does it make any sense to put people in jail for following a standard document retention policy in good faith when they thought that they were not doing anything that was a violation of the law? Was that what Congress really meant? Did Congress intend to send someone to jail for ten years for doing that? Our insight was that the phrase “ignorance of the law is no excuse” makes sense when talking about crimes that are *malum in se*—things that everyone would know are wrong. But what if you are acting in the context of highly regulated corporate activities where only a lawyer might know where the lines are? It makes a world of difference whether you are acting in good faith or not, and surely Congress, without clearer language, would not have intended to impose severe criminal penalties for such conduct. Even though many courts around the country read the statute and strictly construed it, the Supreme Court ruled in Andersen’s favor 9-0. So, every time, make sure that you check your gut and think about

what makes sense. Try to read the precedent, and the statutes, to conform to what would seem like the sensible answer.

The second key point on being an effective advocate is to maintain your credibility. I heard a judge once say something that has really stuck in my mind. He said that advocates should remember there is a jar sitting on the bench for your credibility. When you say things that are not credible, they take some out of your jar. When you perform in a really credible way that inspires confidence, they put some back in your jar. Always remember that the jar is sitting there, because you will probably be appearing before the same judges on a regular basis, especially if you stay in this community. You need to have a jar that is full of credibility.

To clarify, you do not have to believe that every argument that you are making is absolutely right. There are times that you cannot settle a case. There are times that you are not certain how the court will come out. I am not saying that you cannot advance any argument that you are not one hundred percent sure of, but you do need to be careful. You need to acknowledge your weaknesses; you need to answer the questions. Evasion is not persuasive; it does not enhance your credibility. You have to be willing to confront the bad facts and not just hide them. I do not mean that you stand up and say, "let me tell you what all the bad facts are," but you cannot just hide them. You have to explain why, "even with that bad fact, we are still right; we still win because . . ." When you do those things, you gain enormous credibility. Think about the art of persuasion. Who can persuade you? The answer is someone you trust. You are not persuaded by someone who you think is basically a soap salesman. You have got to have some trust in them to believe in them.

So you need to forego arguments that just are not going to fly. Narrow it down to the ones that you have a chance to win. As an example, one time before the Supreme Court, an advocate for the state was advancing a very broad interpretation of the state's power under the Fourth Amendment. Chief Justice Rehnquist leaned over and said: "Counsel, do you have a fallback argument?" The counsel said: "Well, yes I do." The Chief Justice responded, "Then I suggest you fall back." The advocate already lost a lot of credibility in making the argument so broadly that he could not even interest Chief Justice Rehnquist. So be really careful. This is not about ethics, because you are not going to lie to a court. But it is about professionalism and how to best serve the interest of your clients. Have enough confidence in your position to know when you can give some ground.

The next question that I often hear is: "Is the Roberts Court going to end affirmative action?" I get this question a lot because I argued *Grutter*, and my husband says that I am the "heroine of Ann Arbor." We are representing the University of Texas in the *Fisher* case, so there is not too much I am going to say. I hope that I am not being too

bold here, but I am not sure why people think that the Court is poised to end affirmative action. I think they just infer this from the fact that the Court took the *Fisher* case. But I would just remind people that Justice Kennedy has twice written opinions that say *Bakke* was correctly decided—that Justice Powell’s opinion in *Bakke* was correct and states the right rule; that diversity is a compelling interest. That is what he did in his dissent in *Grutter*, and it is what he did in his opinion in *Parents Involved*, the Seattle school case. He dissented in *Grutter* because he thought that the University of Michigan had put too much weight on the numbers and was not actually following *Bakke*. That is very different than saying “affirmative action is dead.” Justice Kennedy was just saying, “You are not doing it right.” So, I do not know what the Court is going to do, but it is probably going to do it really soon—certainly before mid-June or the end of June. But I would find it very surprising if Justice Kennedy suddenly reversed course and said, “Justice Powell was wrong. Diversity is not a compelling interest, and you cannot use affirmative action at all.” So that is my guess.

Another question that often comes up is: “Were you ever surprised by the Justices’ questioning?” I told you before about how I prepared for cases with moot courts, so hopefully I am not surprised too often. But it does happen. I am going to give you my favorite example, which was a case in 1993 involving the Haitian refugees. I was in the Solicitor General’s Office at the time. Many people in Haiti were fleeing and trying to get the United States to seek asylum. There was a mass migration at the time, and there were differences in opinion about why people were migrating. Some people said it was because of political oppression, which is a ground for asylum. Others said it was because of horrific economic conditions, which is not a ground for asylum. The bottom line was thousands of people were trying to flee Haiti and get to Miami. George H.W. Bush was president at the time, and he signed an order to try to stop the migration. He adopted a policy providing that the Coast Guard should rescue people at sea and not bring them to the United States to conduct asylum processing. Instead, they were to take them straight back to Haiti, and asylum processing would be done there. Then, if they qualified, they would be brought to the United States. That was the policy that was put in place, and a legal clinic at the Yale Law School sued the federal government claiming that the policy violated international law and a federal statute. I was set to argue the case because the Solicitor General, Ken Starr, had left after the election and the new Solicitor General had not yet arrived.

One of the really interesting things about the case was that Bill Clinton, when he was campaigning, stated that the policy that Bush adopted was illegal. I was defending the legality of a policy that the new President had called illegal while campaigning. But President Clinton did not stop us from arguing the case. Instead, he continued

the policy when he got into office. At the argument, Justice Blackmun said: "Ms. Mahoney, are you familiar with a book called 'The Comedians,' by Graham Greene?" "I responded: No, Your Honor, I'm sorry, I'm not." Justice Blackmun: "I recommend it to you." I was totally unprepared for this question, and *Vanity Fair* then ran a little article that said, "Ms. Mahoney needs to do her summer reading." For those of you who also did not do your summer reading, this was a novel about repression in Haiti, and it is still sitting on my bookshelf. The moral of the story is that, if you want to be really prepared for Supreme Court arguments, you need to read more fiction.

In closing, I want to give you one more lesson about advocacy that I learned from Justice Blackmun. I heard Justice Ginsburg speaking one time about when she had been an advocate before the Court. She argued some very important women's rights cases before she became a Supreme Court justice. She said that she learned that Justice Blackmun had taken notes at oral argument and that the notes were given to the Library of Congress and made public. So she went to see the notes to learn what he said about her oral arguments. His notes said that she wore a red suit, and she found that really surprising, because she never wore a red suit. I decided that I would also see what he said about me and this is what I learned. In 1991, I argued a case before him, and he wrote: "young blonde." In 1993, he wrote: "more blonde today." Apparently, you need to take special care of your hair if you are arguing before the Supreme Court.