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ADDRESS

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The Wednesday luncheon session
of The American Law Institute
convened in Salon III
of the Ritz-Carlton, Washington, D.C.,
on May 22, 2013.
President Roberta Cooper Ramo presided.

President Ramo: I hesitate to stop what I know are wonderful conversations, although I am thinking I am going to suggest, for the next person who is the President of The American Law Institute, we should get one of those things that the steward walked around with last night, you know, it is sort of like a small xylophone. What do you think? It's an idea.

All right. Well, this has been a fabulous few days, and to me the icing on the birthday cake is that I was lucky enough to persuade a woman that I had heard so much about, since she, too, went to a law school where everybody works, as I recall, the University of Chicago Law School. Some of you have accused me of not giving anybody responsibility that didn't go to the University of Chicago Law School, but that's not true, because Dan's father taught me at the University of Chicago Law School, so I have a broader vision of all of this.

But of all groups, this is a group that particularly is sensible of the enormous importance of the United States Supreme Court, and sometimes we think of the Court as a place where the Justices make all of the law, and that is true. But the advocates who appear in front of them help shape exactly what they hear.

Maureen Mahoney is a magnificent Supreme Court practitioner. She was a clerk for Justice Rehnquist. She has been written about as among the most eloquent, successful, and important advocates in front of the Court of our generation, and it was an honor for me, when I called her and asked her if she would come speak to us about the Court, that she said yes.

Ladies and gentlemen, Maureen Mahoney. (*Applause*)

Ms. Maureen E. Mahoney: This is such an august group. I actually want to compliment all of you on the work that you do. It is one of the professional organizations that actually does a lot of real work, hard work, and I think that is a really commendable thing.

The one honor that I would like to highlight, because she didn't talk about it, that I have had that a lot of you might not know about is I once argued a case relating to the America's Cup, and I was named Sailor Chick of the Week when we won it. Nobody ever talks about it. (*Laughter*)

Instead of talking about the Court's Term and the docket, I wanted to just focus on some questions that frequently get asked about the Court and give you my take on what I think the answer is. And the first one is: Why don't the Justices allow cameras in the courtroom? A lot of people think that that should be a no-brainer—that of course they should allow cameras—and they are just living in the past. So I want to give you the Court's perspective on it—why they are where they are right now. And the answer is that they continually study the issue. They have not settled for sure that there will never be cameras in the courtroom. But the current thinking, at this point, has been that it would really do more harm than good.

If you look at the situation, you have to look at what are the benefits and then what are the costs. And on the benefits side, how much would it really substantially enhance public education? One thing a lot of people do not realize is that every word that is spoken in the courtroom is available on tape and in a written transcript, and so every word of every argument is already out there in the public domain.

And then there is the issue of what impact would it have, and in particular, how will it impact the questions that the Justices ask, and how will it impact the answers that the advocates give. Many of us would think, well, probably it wouldn't impact it that much, and I can see why some people think that. I know that many members of the press—Linda Greenhouse is here; I bet she's got a view—think that this is just an unfounded concern. So I want to give you just a couple of statements from the Court that I found revealing about this.

Justice Souter testified before Congress, and he told Congress that the case against cameras in the courtroom is so strong that "the day you see a camera coming into our courtroom it is going to roll over my dead body." [*Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997, Hearings Before a Subcomm. of the House of Rep. Comm. on Appropriations*, 104th Cong. 31 (1996).] (*Laughter*) That is a true quote; I didn't make that one up. He explained this was actually a product of his personal experience. When he was on the New Hampshire Supreme Court, they actually did start allowing cameras, and he found that the result was that he was censoring his own

questions, that lawyers were acting up for the camera by being more dramatic, and that he was very concerned that essentially his questions would be used as fodder for the evening news. So he would basically act accordingly to try to prevent that from happening.

And Justice Souter is not alone in that view. There was a pilot project that was done on the federal courts of appeals a number of years ago, and after that pilot project concluded, only two of the circuits decided to allow cameras for some cases under certain circumstances.

A number of Justices have testified before Congress, and expressed the same views—that it would actually impact the questions and answers—which is a critical part of oral argument. Nonetheless, the Judiciary Committee actually advanced a bill out of committee that would mandate the Court to have cameras in the courtroom. Whatever you think about the merits of the issue, I would hope we could all actually agree that it should be for the Court to decide whether and when it is going to introduce cameras, and that they are in the best position to assess the impact on their independent branch of government. Or as my mother would say, "Congress should mind its own business." (*Laughter*)

Second question: Why are there so few women Supreme Court advocates? When I started practice more than 30 years ago, the reason for the gender gap was obvious. When I was growing up in 1962, I was eight years old, and my father, who was a lawyer, actually said at our dinner table—when I announced that I wanted to be a lawyer—that there was no place for women in the law. He was not being mean, he was actually just assessing the situation at the time. He did not want my heart to be broken, and he did not want me to try to advance into a career where there was no room for me. That, of course, was the era when Sandra Day O'Connor and Justice Ginsburg had graduated at the top of their law schools, Stanford and Columbia, and they couldn't get a single law firm to hire them.

Even as late as the early '70s, Justice Brennan still was not hiring women clerks because he was not comfortable with them. He even said that if the President appointed a woman to the Court, that he thought

he would have to resign. Chief Justice Burger made the same statement. Fortunately, Reagan did not listen to them and introduced them to Justice O'Connor.

But by 1978, when I graduated, those obstacles were largely gone. And I would say probably now there are more than a dozen women who can fairly call themselves Supreme Court advocates. There are six assistants, I think, in the Office of the Solicitor General who are women, but this is still a substantial disparity. But I find it difficult to attribute the disparity between women and men in the Supreme Court bar to vestiges of discrimination at this point. It is interesting that one leading female advocate thinks that it is attributable to gender differences that make men more likely to succeed in the courtroom. She's written that "The Courtroom is a battlefield," and "[m]ale lawyers generally are 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." [Lisa S. Blatt, *In Front of the Burgundy Curtain: The Top Ten Lessons I've Learned About Advocacy Before the Nation's Highest Court*, 14 Green Bag 2d 9, 22 (2010).] (*Laughter*)

There may be something to this, but I actually think the answer primarily lies elsewhere. I have a very wise husband. We had two children. I was practicing and trying to argue cases before the Court and trying to raise the kids, and he said, "Maureen, you have to choose to be less successful." That phrase has stuck with me always. It is something I think men and women alike have to remind themselves sometimes that life is varied, and it offers us so many different opportunities. I think what happens, or what has happened for a long time is that, on average, many highly talented women do tend to choose to be less successful more frequently than men. I think that is why only about 15 percent of equity partners even now are women, and female leaders of law firms are rare as hen's teeth. We have one wonderful woman who is the managing partner of Latham's Washington office now, Alice Fisher. But it is really very, very rare, and I think it is because women, on average, are choosing to be less successful so that they can spend more time with their family.

If we look at it, you could say, well, it's just discrimination. But in my own law firm, really it is a meritocracy. The lawyers who work the hardest and who learn the most are going to contribute the most to the law firm, and they are going to be rewarded the most. They are more likely to be the equity partners, and I don't think we can say that is a bad thing. We want to live in a meritocracy.

So what is the solution? I for one would not advocate that women put less value on their families or on mothering. Motherhood is a joy to be cherished, not a burden to be shed. From my vantage point, gender parity is not that important if you have equal opportunity, which I think we are approaching. So I want a different solution.

I want men to value time with their children just as much as women do. And I know many of you do, but on average you do not. And when that happens, the competitive advantage that men currently have will dissipate, because right now they have a competitive advantage because they will work more. It is going to dissipate, and I think it is actually starting to happen.

When I first started at Latham, a man would never dream of taking paternity leave—never. No one would have asked. But last year, dozens and dozens of male lawyers took paternity leave at Latham & Watkins. It has become expected, and I think that there is just a very serious shift.

My son, who has been very successful in New York in a finance career, is moving across the country with his wife, because she wants to pursue a dermatology residency in a different city. I don't think that would have happened many years ago either. So I think we are moving in the right direction.

Third question: Why doesn't Justice Thomas ask questions at oral argument? (*Laughter*)

It is a serious question. In a nutshell, he is too polite, and I want to give a little bit of history about this.

In the current Court, there is rapid-fire grilling. That is the norm. So it seems odd if there is someone there who does not ask questions, or very often.

In 1979, when I clerked, that was not the way it was. There were not that many questions at oral argument. Let me give you the example of Justice Brennan. He has been described as the guy who choreographed the liberal takeover of the Court, but he didn't do it by asking questions at argument. I hardly ever saw him ask a question. I was at an argument where he asked a couple, and I asked somebody, "Well, what's that about?" And they said his grandchild was in the courtroom. (*Laughter*)

He told his biographer that most arguments were "boring as hell," and that he was generally thinking when are we going to get this "damn day over with" so we can go home?

And now back to Justice Thomas. He has not said that he is bored as hell, but he has explained that he is old school. He's put it this way: "If I invite you to argue your case, I should at least listen to you." [See Adam Liptak, *No Argument: Thomas Keeps 5-Year Silence*, N.Y. Times, Feb. 13, 2011, at A1.] Instead, "we look like the Family Feud." [Kevin Merida & Michael A. Fletcher, Supreme Discomfort: The Divided Soul of Clarence Thomas 312 (2007); see also Alan Cooper, *Thomas: Internet Offers New Issues*, Rich. Times Dispatch, May 20, 2000, at B3.] He has gone on to say, "why do you beat up on people if you already know" the answer? "I refuse to participate. I don't like it, so I don't do it." [Jay Reeves, *Clarence Thomas to Fellow Justices: Hush!*, Press-Register (Mobile, Ala.), Oct. 24, 2009, at B5, available at 2009 WLNR 21853769.]

And so I like to remind people that only the uninformed equate silence with lack of interest or influence. As Dahlia Lithwick, who writes for *Slate*, has told readers who have asked what to make of his reticence, "He is an original thinker" with "a constitutional architecture that is fully worked out in his mind." [Dahlia Lithwick, *FiveBooks Interviews Dahlia Lithwick on US Supreme Court Justices*, The Browser, http://old.thebrowser.com/interviews/dahlia-lithwick-on-us-supreme-court-justices?page=3 (last visited June 14, 2013).]

Fourth question: Why did Chief Justice Roberts join with four liberal members of the Court to uphold core provisions of the health-

care law? [National Federation of Independent Business v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012) (construing the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified in scattered sections of the U.S. Code)).]

Some legal commentators have speculated that he sacrificed his own view of the Constitution in order to protect the Court from public criticism in an election year in order to avoid charges of partisanship—that he supposedly didn't want a 5-4 opinion with five Republican appointees in the majority and four Democratic appointees in dissent. This view was typified by a commentator who said that the Chief Justice was "inspired by a simple noble leadership impulse at a critical juncture in our history" to resolve the case through a bipartisan compromise. [Thomas L. Friedman, *Taking One for the Country*, N.Y. Times, July 1, 2012, available at 2012 WLNR 13712510.]

At first, that might sound noble, but I actually think that would seriously undermine our constitutional structure. And while I do not have inside information, I do not think that is what happened.

First, why would it undermine our structure? If you just look to The Federalist Papers, you will see that life tenure was designed to insulate judges from public criticism. It was designed to give them what they called the fortitude to rely on their best reading of the law and not try to anticipate how the public would react. And just think about *Brown*. Brown v. Board of Education [347 U.S. 483 (1954)] was met with public outrage, violence, massive defiance. A hundred congressmen signed a petition, a resolution saying it was a clear abuse of judicial power. If the Court had allowed fear of public criticism to influence how they voted in the case, it would have had to have been decided the other way. And so, just as in *Brown*, if a majority believed that the Affordable Care Act was unconstitutional, then it was their duty to strike it down. There is no difference between an unconstitutional law that segregates schools and one that requires Americans to buy products that they don't want.

So the question is, did the Chief Justice do that anyway? Is that what he did? I just do not think that there is any evidence to support the notion that he did. I won't go through it all, but when he was testifying at his own confirmation hearing, he told the Senate that the Civil War may have been caused by the Court's attempt to resolve the public controversy over slavery in the way that it thought was best for the nation instead of just reading the law.

I think he holds very dearly the notion that he has to decide cases on their merits. And if you carefully review his opinion, what you will see is that his disagreement with the dissenters was actually quite narrow. Really the dispute was over competing interpretations of Supreme Court cases that talk about how much weight you should give the label that Congress attaches to taxes and penalties. And whether he was right or wrong, I think his opinion was sufficiently well reasoned that he probably just genuinely disagreed with the dissenters on this key point of law.

A final thing I would like to talk about is: What is the most important lesson that I have learned about advocacy before the Court? This comes up a lot, and I learned this from Justice Blackmun. I heard, a number of years ago, that he had taken notes during oral argument, and these were available at the Library of Congress. So I had somebody look them up for me to see what he had said about me, so that I could learn something about my advocacy. And what I learned was that in 1991, I appeared before him, and he wrote "young blond." (*Laughter*)

And in 1993, I appeared before him again and he wrote "more blond today." (*Laughter*)

So the lesson is that if you are going to appear before the Supreme Court, you gotta get your hair done. (*Laughter*)

If anybody has any questions, we have a little time. (*Applause*)

President Ramo: Let's start over there. Would you stand up when you speak, because that way everybody can hear you.

Mr. Paul E. Freehling (Ill.): Can you explain to us why the Justices would not tell us the reason for recusing themselves?

Ms. Mahoney: No. (*Laughter*) Maybe somebody else here really knows. I do not know why, but I assume it is because they feel that these are decisions that they have to make according to their own code of conduct and that they do not think that that is something that ought to be publicly debated. But I really do not know the answer to that.

Mr. Norman L. Greene (N.Y.): Could you reflect on what John Roberts was as an advocate before he went to the Supreme Court? Because I have heard, in certain circumstances, people would say, "What would John Roberts have done?"

Ms. Mahoney: Yes, I did have the privilege of working with John. He was the principal deputy in the Solicitor General's Office at the time that I was there, when I was a deputy there. Also, I saw him in private practice over the years, and he was a phenomenal lawyer. And I think really everybody, at least when I was there in the Solicitor General's Office, viewed him as the advocate everybody wanted to go see—that he was the one that you were going to learn from.

What made him a little different is, well, first of all he is just incredibly brilliant. I don't think he worked harder. I mean, he worked as hard as anyone really, but I don't think he worked harder. I think he had a natural brilliance. He also had a very calm demeanor, and he really could approach the Court as equals. If they were to ask him a question about history, for instance, he would know the answer. I would never know the answer. I would know all the things about the case, the other precedents that had been decided—but John's depth of knowledge on so many subjects was extraordinary. He could really engage with them on virtually anything, at any time, and I think the Court respected him tremendously for his candor and for his skill. He was just a phenomenal advocate.

President Ramo: Anybody else? Back there. I can't see who it is. Would you stand up, please.

Unidentified Speaker: There has been a good deal of discussion within the ethics community about the recusal issue, with some people maintaining that Congress should act to create a code of conduct for

which the Court would be answerable. Putting aside separation-of-powers issues, (*inaudible*) (*laughter*) would you be in favor of that?

Ms. Mahoney: No, for a couple of reasons. First of all, I think the separation-of-powers issues could be extraordinarily important. It is an independent branch of government. Yes, it is true that the Constitution gives Congress limited power to regulate the jurisdiction of the Court on a variety of issues, but that might be an overreach. I also do not know why we would assume that Congress would be in the best position to figure out what the ethics should be for the Supreme Court.

I think we are blessed with an extraordinary Court across the bench, from the most liberal Justice to the most conservative. They are incredibly talented, they are people of integrity, and I can't really imagine why we think that Congress would be in a better (*laughter*) position to determine what rules should govern.

The federal judiciary is incredibly well run. I think the quality of the decisionmaking from the courts is exceptional, and they are doing a great job of self-regulating. I just wouldn't trust Congress to get into the act at all.

Judge Paul L. Friedman (D.C.): Maureen, do you have any explanation for why the number of cases in which the Court grants cert. has gone down so dramatically, say, from the time when you were clerking to today?

Ms. Mahoney: Yes. I've heard lots of people talk about it. I have read a few things here and there. I do not know the answer. But the most persuasive answer I have heard—and I can't tell you if it checks out completely—is that the number of cases has dropped in part because major Congressional statutory initiatives declined significantly. A lot of cases were an outgrowth of all the statutes that were enacted in the '60s and early '70s. Laws were being reformed enormously: Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.] and Title IX [of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.], and on and on and on. Congress slowed the pace of new substantial statutory initiatives and, as a result, there were fewer cases that had to be decided by the Court. So that, I think, is at least a contributing

factor. Whether that explains the whole thing or not, I can't say. We don't really need any more opinions, though, do we?

President Ramo: It depends on who you are.

Maureen, thank you so much. (*Applause*)

Well, I had heard that Maureen was the most persuasive of advocates, but I have to tell you, shockingly to me, after sitting with her at lunch, she has almost convinced me to take up golf, which no one would have thought was possible. (*Laughter*)

This has been a wonderful opportunity to hear the most extraordinary people over the last three days, and, as I thought, it was a magnificent thing to end with listening to a superb advocate, a superb lawyer, and I hope an active member of the ALI soon. Thank you very much. (*Applause*)