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 John G. Roberts, Jr. to serve as Chief Justice of the Supreme Court of the United States

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Many witnesses have detailed Judge Roberts' record of achievement and his reputation as one of the finest lawyers of his generation. All of this is true, and leaves no doubt that he has the intelligence and legal experience necessary to perform the role of Chief Justice. Others have nevertheless raised concerns that Judge Roberts may not be fair-minded and may arrive at the Court determined to implement a partisan agenda. I would like to explain why I do not share these concerns. I first met Judge Roberts in 1980 when he succeeded me as a law clerk for then-Associate Justice William H. Rehnquist. Since that time, I have come to know him as a colleague in the Solicitor General's Office, as a fellow appellate advocate in private practice, and as a friend. This 25-year history has given me the opportunity to take careful measure of the man the President has selected to lead the federal judiciary, and I am convinced there is no better choice.

First, it bears emphasis that Judge Roberts was admired by lawyers in the Solicitor General's Office regardless of their political affiliations. Lawyers in the Solicitor General's Office often spend many years or even decades working there, so the office is always made up of people with views from across the political spectrum. In that environment, Judge Roberts was not viewed as a political operative but as a brilliant lawyer and excellent advocate, reflecting the highest traditions of the office. He worked to craft consensus positions among government lawyers and served as a model advocate for us all. Indeed, thirteen of his former colleagues from the Solicitor General's Office signed a letter addressed to this Committee in 2001 explaining that, despite these lawyers' "diverse political parties and persuasions," they all confirmed that

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Judge Roberts was "attentive to and respectful of all views," had the "deepest respect for legal principles and legal precedent," and that he would be a "truly superb addition to the federal court of appeals." The years he spent in private practice only reinforced his reputation as an extraordinary lawyer who made it his hallmark to thoroughly understand every side of difficult issues.

Second, this Committee should not presume that positions advocated by Judge Roberts on behalf of the United States while serving as a Deputy Solicitor General represent the views that he will adopt as a Justice of the Supreme Court. It is not the responsibility of the Deputy Solicitor General to establish the policy of the Administration with respect to issues such as affirmative action and abortion. To the contrary, lawyers in the Solicitor General's Office have the responsibility to advance the policies of the Administration they are serving at the time, within the bounds of sound legal reasoning. An historical example illustrates the point well. While serving as Solicitor General, Thurgood Marshall filed a brief for the United States urging the Court to reject the rule adopted in *Miranda v. Arizona*, 384 U.S. 436 (1966). The brief Solicitor General Marshall filed on behalf of the Government asserted that "post-arrest interrogation . . . is an essential tool in law enforcement," and that immediate questioning after a crime "could be virtually precluded if the government were required to assure that every suspect under arrest had the advice of an attorney." Brief of the United States at 31, 40, *United States v. Westover*, 384 U.S. 436 (1966) (Case No. 761 consolidated with *Miranda v. Arizona*). The Solicitor General therefore asserted that an accused did not have a constitutional right to be informed during post-arrest interrogation that "he may consult with counsel if he chooses to do so," *id.* at 44, because such an inflexible rule would, "more often than not, cast out the baby with the bath." *Id.* at 38. After he was appointed to the Supreme Court the following year, Justice

Marshall nevertheless departed from the position he advocated as Solicitor General and dissented in cases limiting the scope of *Miranda*. *See New York v. Quarles*, 467 U.S. 649, 674 (1984); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985). Justice Marshall obviously understood the difference between the roles of the Solicitor General and a Supreme Court Justice in our legal system, and I have no doubt that Judge Roberts does too. This Committee should be confident that Judge Roberts will approach each case with an agile, open mind.

Third, I saw Judge Roberts almost every day in the Solicitor General's Office during this period, and he unfailingly treated everyone in the office with respect and dignity. I have been particularly troubled by suggestions in the news media that Judge Roberts is somehow biased against women or not concerned with their professional opportunities. In fact, Judge Roberts actively endeavored to advance the professional careers of women. I know this first-hand because he recruited me to join him in the Solicitor General's Office as one of the four deputies in 1991. This is a highly coveted position and Judge Roberts unquestionably knew many qualified men who could have served ably in the job. But there were only two women lawyers in the Solicitor General's Office at the time and Judge Roberts reached out to encourage me to apply. With his encouragement and assistance, I became one of the few women in history to hold this position and served as one of the highest ranking women in the Department of Justice. A year later, when a judge on the District Court for the Eastern District of Virginia retired, Judge Roberts again recommended me for the vacancy and helped shepherd me through the process that culminated in my nomination. No woman had ever served on that court and Judge Roberts tried to help me to be the first.

In summary, I can think of no better nominee to succeed Chief Justice Rehnquist -- the man Judge Roberts and I knew as a boss, a mentor, and a friend. I regard Judge Roberts'

nomination as particularly fitting because he exemplifies many of the characteristics so admired in our late Chief Justice. Both of these men were blessed with exceptional intelligence, a charming wit, and an abiding sense of modesty. Above all, Chief Justice Rehnquist understood that judges must approach the task of deciding cases with humility; and with the understanding that they have been asked to serve, not chosen to rule. I have no doubt that Judge Roberts learned that lesson well. While many will attempt to predict how Judge Roberts might decide this case or that, I can predict for you with certainty that however he decides, he will be guided to the result by his study of the law, and never the other way around. Judge Roberts should be confirmed as our next Chief Justice.