

SENATE JUDICIARY COMMITTEE

**HEARINGS ON NOMINATION OF JUDGE BRETT
KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES**

Testimony of Theodore B. Olson

Thank you, Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Judiciary Committee for the opportunity to appear before you today to present my views on the fitness of Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

I have had the privilege of practicing law for over 50 years in trial and appellate courts in several states including State Supreme Courts, every federal appellate court except one, and 63 times before the Supreme Court. During the past 35 years, I have argued to twenty different Supreme Court Justices appointed by eleven Presidents, from President Eisenhower to President Trump. That amounts to nearly one-

fifth of all of our nation's Justices appointed by one-fourth of our Presidents.

I believe that my experience is relevant, because it has given me first-hand exposure to the Justices our Presidents have selected for the Supreme Court, the qualities those Justices have exemplified and the standards they have established for themselves and their successors.

Each of the Justices before whom I have practiced has manifested the highest professional and jurisprudential standards. These qualities are what we expect in Justices appointed by Presidents of any political party to our nation's highest court. I have won and lost my share of decisions from Justices appointed by Presidents of every political background. I can say that in every case, my clients and arguments have been treated with respect, understanding and great care. Americans are rightly proud of the Supreme Court and its Justices. Our courts are the envy of the world.

Because our time is limited, I will elaborate on only five of these characteristics.

1. Intelligence and learning. A Justice on the Supreme Court must understand and respect the Constitution, the separation of powers, the Bill of Rights, the vital role of Congress as the font of all legislation, the President's position as chief executive, the role of the judiciary, and federal laws ranging from antitrust and patents to criminal procedure and environmental laws. The Court decides seventy-five cases every year involving an awesome range of complex subjects, demanding from each Justice an extraordinary breadth and depth of understanding, experience, erudition, judgment and insight.

2. Respect for precedent and judicial tradition. The Justices before whom I have appeared have uniformly manifested abiding respect for the role of the judiciary and past decisions of the Court. Not every precedent is inviolate, of course. As Justice Breyer explained in his book, "Making our Democracy Work," the Court has occasionally been mistaken or wrong, but its errors have generally been corrected over time. The Justices are mindful of the importance of *stare decisis* and the public's reliance on its past decisions, but within the context of an

overarching fealty to the meaning and intent of the Constitution and the rule of law.

3. Open-mindedness and independence. Justices, of course, bring to their decision-making their individual histories, predilections, and past writings. But each must examine every case on the merits, carefully review precedents, briefs and oral argument, and the views of their colleagues, and only then come to a decision. Any other approach would, as Justice Ginsburg has explained, “display disdain for the entire judicial process.”

4. Integrity. The Justices of our Supreme Court, like our judiciary in general, reflect rock-solid integrity. We may strongly disagree with the Court’s decisions from time to time, but no credible critic would suggest that the Court’s decisions are corrupt or dishonest. Our citizens respect and obey even very unpopular decisions, because they believe in the integrity of the judicial process and the honesty of our Justices.

5. Temperament. Nearly every Justice has said that he or she has changed their views from time to time about legal issues after reading the briefs and listening to the arguments of the advocates and their colleagues on the Court. An open mind and a respectful temperament and collegiality among the Justices are vital to the Supreme Court's process. And the Justices before whom I have appeared uniformly listened to and probed—often intensely—the arguments presented to them. But, however strongly they have disagreed in a particular case, they have remained respectful, warm and gracious to their colleagues.

I have known Judge Kavanaugh for two decades and argued before him, and I know from personal observations and experience that he possesses and has consistently manifested the qualities I have described. He received an outstanding education in one of the nation's finest law schools, clerked for extraordinary jurists including the Justice he is being nominated to replace, taught Constitutional Law at Harvard Law School, served in the Executive Branch and in private practice, and for twelve

years at the highest level of the federal appellate judiciary short of the Supreme Court. He is thoughtful, respectful, open-minded, respected by his peers and widely praised by lawyers who have appeared before him.

Our system contemplates that Justices will be appointed from Presidents of either party. As lawyers who appear before the Court—and as Americans who must live with the Court’s decisions—we cannot expect that our cases will be decided by jurists who always agree with the positions we might prefer.

But, we can aspire to a judiciary that will be prepared, perceptive, competent, open-minded, honest and respectful. That is the jurist that is Brett Kavanaugh. He is the kind of person and judge that we expect and deserve on the Supreme Court. I hope that you confirm his appointment to this position.