GERALD WALPIN
875 Park Avenue
New York, NY 10075

212-288-5324

Honorable Patrick J. Leahy
United States Senator
Chairman, Senate Committee on the Judiciary

Honorable Jeff Sessions
United States Senator
Ranking Member, Senate Committee on the Judiciary

224 Dirksen Senate Office Building
Washington, DC 20510

By Courier and Fax

Dear Senators Leahy and Sessions:

Re: Confirmation Hearings On Judge Sotomayor

I am forwarding to each of you, with this letter, a submission to the members of the Senate Judiciary Committee, explaining my reasons in favor of the confirmation of Judge Sotomayor to be a Supreme Court Justice.

If there is anything else that I need to do in order for this to be considered by the members of the Senate Judiciary Committee, please ask one of your staff to inform me.

Thank you for your consideration.

Very truly yours,

Gerald Walpin

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SUBMISSION TO THE SENATE JUDICIARY COMMITTEE
From Gerald Walpin

INTRODUCTION

I submit this memorandum to the Senate Judiciary Committee as it considers the nomination of Judge Sonia Sotomayor to be a Justice of the Supreme Court, so that the Committee has the views of one, whom the New York Times described as a "staunch conservative," in favor of her confirmation.

Some of the Senators on the Judiciary Committee may recognize my name as the Inspector General of the Corporation For National and Community Service whom the President, in June, ordered removed from that position. Not too long before that happened, I had been contacted by White House staff and, based on several communications, I stated that I would be pleased to make a submission in support of her confirmation. While I believe that the White House erred in the decision to remove me, I do not believe that decision should in any way detract from what I believe are the merits of the President's nomination of Judge Sotomayor.

The New York Times comment, referred to above, was made in connection with my submission in favor of her nomination to the Court of Appeals For the Second Circuit.

REASONS SHE SHOULD BE CONFIRMED

I would be less than honest if I did not, at the outset, state that I would prefer that the next Supreme Court nominee be someone more like Justices Scalia, Thomas, Roberts and Alito. But Senator McCain lost the election. The Constitution gives the winner, President Obama, the right to choose who will be the nominee to the Supreme Court.

I strongly believe that any President's nominee should be confirmed as long as the nominee meets five requirements: intelligence, integrity, experience, judicial temperament, and belief that the rule of law trumps any personal tendencies.

From personal knowledge and from my review of many of her decisions, both as a District Judge and then on the Court of Appeals, I have no doubt that Judge Sotomayor meets each of these qualifications. I have known her for about 15 years in my capacity as President of the Federal Bar Council – the bar association for the Federal Courts in the Second Circuit in which she sits – and as a New York litigator.

Her academic achievements at Princeton and Yale Law School, and now the plaudits of her judicial colleagues, both conservative and liberal, establish her intelligence. Few, if any, other appointees to the Supreme Court have equaled her seventeen years of prior experience in service on both the trial and appellate benches. I do not believe that, in all her years as a prosecutor, in private practice, and as a judge, any one has questioned her integrity.

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Since the nomination was announced, I have heard criticism of her judicial demeanor, based on the assertions that she interrupts lawyers too much and too quickly to ask them questions, and she too often has made up her mind before the oral argument. I find these assertions frivolous. I speak from my experience as a litigator who has argued many appeals before different judges. The objection to Judge Sotomayor's practice during oral argument simply describes a "hot" bench, composed of judges who have studied the briefs and ask questions quickly and frequently to test their views and the litigants' views – a bench that most good litigators prefer. As to her having often indicated during oral argument that she may have made up her mind before the argument, it must be assumed that a good judge, who has performed his/her responsibility to read the briefs in advance of oral argument, has reached a tentative conclusion; a judge with a totally "open" mind, not tending towards one side or the other, likely has not in fact studied the briefs.

Finally is the element on which Judge Sotomayor has been so far most criticized: does she really believe in the rule of law to submerge any personal predilections? The answer is yes.

I start with what she informed the Senate Judiciary Committee in connection with her Second Circuit nomination: "because judicial power is limited by Article III of the Constitution, judges should" base their decisions on "the law as written and interpreted in precedents." Further, she emphatically rejected reading new rights into the Constitution: "The Constitution is what it is. We cannot read rights into" it.

I will now cite and summarize some of her judicial opinions that, I believe, demonstrate that she has lived by that rule and does not base her judicial decisions on any liberal ideology.

The abortion issue has been a flash point of ideological differences. Yet – and without regard to her personal views on that subject – she sided with the anti-abortion position because she considered herself bound by *stare decisis* (precedents), which required that decision, in *Center For Reproduction Law and Policy v. George W. Bush*, 304 F.3d 183 (2d Cir. 2002). The plaintiff organization there challenged the Government policy which required foreign organizations, as a condition of receiving U.S. Government funding, to agree not to perform abortions and not even to promote abortions generally, even with other funds. Judge Sotomayor's opinion reflected her view that a judge must respect precedent: "The Supreme Court has made clear that the Government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds."

Much objection to so-called liberal judges has addressed decisions providing unreasonably large recoveries to the plaintiffs' bar. In *In re Air Crash Off Long Island*, 209 F.3d 200 (2d Cir. 2000), the issue was whether the air crash about eight miles off the coast of the United States was governed by the Death On The High Seas Act, which, if it controlled, would bar the plaintiffs from recovery of substantial non-pecuniary damages. The majority (two able judges known for their liberal tendencies) of the Court of Appeals panel on which Judge Sotomayor was the third judge, held in favor of the plaintiffs'

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ability to recover substantially greater damages. Judge Sotomayor dissented to reject a "more generous recovery" for the air crash victims in reasoning that demonstrates her recognition of the limits on judges' power:

> "In an understandable desire to provide the relatives and estate representatives of the 213 victims of the TWA Flight with a 'more generous recovery,' the majority fails to give proper effect to the [statute's language].
>
> "Congress and the President have the opportunity to amend [the statute] to incorporate a more generous remedial scheme .... I have no desire to pre-empt the legislative process .... The appropriate remedial scheme ... is clearly a legislative policy choice, which should not be made by the courts."

She again demonstrated her respect for the limitation on judicial power by her dissent in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), in which a 70-year old clergyman sued his Methodist Church, alleging that his forced retirement violated the Age Discrimination In Employment Act. The majority held that the age discrimination statute applied despite the religious context. In dissent, Judge Sotomayor stated that courts should not get involved "in matters as fundamental as a religious institution's selection of its spiritual leaders." For courts to interfere, she said, "risks an unconstitutional trespass on the most spiritually intimate grounds of a religious community's existence."

She again showed her respect for the limitation on judicial power is *Aguinda "B" "C" "D" v. Texaco Inc.*, 303 F.3d 470 (2d Cir 2002), in which she joined in the Court's opinion dismissing two class actions, on behalf of "indigenous citizens of the Ecuadorian Amazon" and of the adjoining area in Peru, which sought damages for environmental and personal injuries arising out of Texaco's oil exploration and extraction operations in that region over almost a 30 year period. Clearly, if Judge Sotomayor were to base her decisions on "liberal doctrine," this would have been a prime case for the court to jump in to protect the underdogs and the environment, against a large corporation. Instead, however, she rejected and dismissed those claims as inappropriate for a U.S. Court determination.

A final example of her willingness to limit the over-usage of our federal courts has been some of her decisions in securities stock fraud class actions – an area dear to the hearts of the plaintiffs' bar and the bane of existence of the business world. Her decisions have placed meaningful limits on the availability of the courts for such lawsuits. In *Rombach v. Chang*, 355 F.3d 164 (2d Cir. 2004), she joined an opinion dismissing such a class action, due to the failure of that complaint to meet heightened standards which the Court imposed, before a class action for fraud would be allowed. In an opinion that she wrote, in *Moore v. Painewebber*, 306 F.3d 1247 (2d Cir. 2002), she dismissed a class action based on alleged oral fraudulent representations, holding that, absent unique proof, a class action is not appropriate for oral misrepresentation claims.

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I am aware that Judge Sotomayor has been criticized for some speeches she has made, particularly those that declare her empathy for the downtrodden and minorities. I too disagree with some of her comments in some of her speeches, which go beyond recognition of past wrongs to suggestions that a person's race or ethnicity somehow might result in better judgment than someone of a different birth. As I do not believe such views are really held by the Judge Sotomayor whom I know and with whom I have had many conversations on many subjects, I attribute those remarks to the speech context, and not what she applies in ruling on cases. Thus, she had no problem in writing the opinion, in *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123 (2d Cir. 2004), in which she dismissed a race and gender discrimination law suit brought by an African-American woman because the evidence showed that she did not have the qualifications for the promotion that she sought – demonstrating that her rulings are based on the law and the evidence, not the color of the plaintiff.

The criminal law area is one on which conservatives have frequently criticized some judges for ignoring the reality of protecting innocent people from criminals in favor of a hyper-technical application of Constitutional protections. Judge Sotomayor hardly fits into that category. One media review of her criminal law decisions revealed that she sided with the Government in more than two-thirds of the cases that came before her. A good example of her realistic thinking in the criminal law area is *United States v. Howard*, Docket No. 06-0457 (2d Cir. June 5, 2007), in which the Government had appealed the lower court's suppression of evidence that established the defendants' sale and possession of cocaine, because the police had used ruses to obtain access to the defendants' cars, the police should have, but didn't obtain a warrant for the searches, and the police did not properly notify the defendants that the searches had occurred – all technical grounds and obviously irrelevant to the defendants' actual guilt. Judge Sotomayor reversed the lower court's decision and held that the seized evidence was admissible.

Similarly, in *United States v. Falso*, 544 F.2d 110 (2d Cir. 2008), she upheld the admissibility of evidence obtained with an invalid search warrant, relying on the good-faith of the law enforcement officers in believing that the search warrant was valid, even though it was not. A judge who is motivated by empathy for a defendant might well have used the invalid search warrant as a reason to reverse the conviction, for which the trial judge had imposed a 30 year sentence on the conviction relating to child pornography and engaging in illicit sexual conduct with minors (particularly as the defendant's only prior conviction was for a misdemeanor eighteen years before). In a companion decision in the same case [2008 WL 4376828 (C.A. 2 (N.Y.)], Judge Sotomayor also rejected that defendant's appeal in which he sought to suppress statements that he made, on the ground that he had not been given any Miranda warnings.

I could cite some of her decisions with which I strongly disagree, including the New Haven Firefighters case. It is, of course, proper for the members of the Senate, in considering her confirmation, to question her on those opinions, as well as on her speeches to which I referred above. But, if the handicap for confirmation of a sitting

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judge to appointment to a higher court is being correct 100% of the time, no sitting judge could ever be confirmed.

I must add one further comment on the ongoing discussion of her confirmation. I know that some of my conservative colleagues ask why she should be treated differently from the unacceptable manner in which some liberals treated Judges Thomas, Alito and Bork when they were nominated to the Supreme Court. My answer is that two wrongs do not make a right. Just as we expect Justice Sotomayor to live by the law when she is confirmed, we must show by our example that we do as we say. The President has nominated someone who has the necessary qualifications. I believe that the Constitution requires confirmation.

Respectfully submitted

Gerald Walpin

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