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Senator Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Bldg
United States Senate
Washington, DC 20510

June 18, 2009

Re: Confirmation of Judge Sotomayor

Dear Senator Leahy,

I am pleased to supplement my letter of June 3, 2009 in support of Judge Sotomayor's confimation to the Supreme Court of the United States of America with the following review of the Judge's methods of legal reasoning in the areas of 4th Amendment and Section 1983 Civil Rights Law. This letter reviews three representative examples of Judge Sotomayor's opinions at the intersection of civil rights and 4th Amendment jurisprudence. These cases in chronological order are *Anthony v. City of New York*, 339 F.3d 129 (2d Cir. 2003) in which Sotomayor wrote the court's unanimous opinion; *N.G. v. State of Connecticut*, 382 F.3d 225 (2d Cir. 2004) in which the Judge concurred in part and dissented in part; and *Walczyk v. Rio*, 496 F.3d 139 (2d Cir. 2007) where she concurred in the outcome, but wrote separately to address issues arising from the court's qualified immunity analysis. Each of these three cases dealt with Section 1983 civil rights actions predicated upon claims that the government action at issue violated the plaintiff's constitutional rights under the 4th Amendment. As such, they provide particularly useful vehicles for understanding Judge Sotomayor's approach to legal reasoning, generally, and the 4th Amendment in particular. This is because Section 1983 provides an alternative to the exclusionary rule as a means of enforcing substantive 4th Amendment rights.

The exclusionary rule has been a controversial mechanism for remedying constitutional violations because it fails to vindicate constitutional rights that produce no evidence of crime and the remedy it *does* provide is limited to the exclusion of evidence relevant to the truth-finding function of the criminal trial. As a result, concerns about the evidentiary impact of the exclusionary rule can have a restrictive impact on judicial interpretation of substantive 4th Amendment rights. By contrast, Section 1983 offers a remedial vehicle that relies on monetary damages and injunctive relief rather than the exclusion of evidence. It is thus available to a broader class of persons, including those who are injured by police or government misconduct that produces no evidence of criminal activity. In Section 1983 cases, the individual's interest in obtaining legal enforcement of her constitutional rights at times raises countervailing concerns about the distributive impact of awarding large monetary damages against municipalities, as well as concerns about fairness to individual police officers and government actors who cannot be expected to "keep abreast of every development in the case law or to recognize every implication of legal precedent for police conduct that courts have not previously considered." Walczyk, 496 F. 3d at 167 (Sotomayor concurring).

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Because of the compelling interests at stake in the enforcement of fundamental 4th Amendment rights to freedom from unreasonable searches and seizures and the fact that real life cases present an infinite and often unpredictable arrangement of particular circumstances, government practices, and evolving policies, this area of law often enough challenges judges to decide cases not governed by the four corners of established precedent. Judicious interpretation is critically important, and the excellence of a judge's interpretative efforts depends on producing a just outcome in the particular case through the articulation of generally applicable rules that successfully balance the competing interests in a fair and reasonable manner for a sustainable future set of similar cases within a framework that reconciles pre-existing precedential authorities. In this way, judicial excellence produces justice in the particular case and contributes to the intelligibility of law through the extension and reconciliation of prior precedents in new situations.

Measured against this standard of judicial excellence, a careful analysis of Judge Sotomayor's opinions in these cases provides ample evidence of a fair and reasonable legal mind, whose judicial philosophy cannot in any way be characterized as being either "pro-police" or "pro-claimant/defendant." Her decisions reflect a very close reading of, and fidelity to, pre-existing precedents informed by rigorous attention to the factual circumstances and evidentiary record against which she evaluates the applicability of invoked precedents to the particular case at hand. Her opinions reflect judicial empathy for the suffering of claimants injured by government misconduct, moderated by concern for the interests of other parties likely to be affected by a finding or denial of liability, both in the particular case and over the range of cases that forseeably might be governed by the constitutional rule articulated in the case.

Anthony v. City of New York is a 2003 decision in which Judge Sotomayor wrote the opinion for a unanimous decision by a three judge panel of the Second Circuit. The case involved a Section 1983 civil rights action by a disabled woman with Down Syndrome, who was seized and involuntarily hospitalized in a psychiatric ward by officers responding to a 911 call from the apartment the woman shared with her sister. The lawsuit alleged four different violations of the 4th Amendment, challenging the constitutionality of the officers' warrantless entry into her apartment, the warrantless seizure of her person without probable cause to believe she was a danger to herself or to others, as well as the constitutionality of the hospital's involuntary detention and forced urine analysis.

The Judge affirmed the lower court's holding that the officers' warrantless entry into the woman's home was supported by exigent circumstances insofar as the police were responding to "a plea for help from a terrified woman who claimed to be under attack." Exigent circumstances are a well settled exception to the 4th Amendment's requirement that entry and search of a person's home must be supported by a warrant based on probable cause. In affirming the lower court's dismissal of her search and seizure claims against the hospital for the forcibly administered blood and urine analyses and her involuntary confinement, the Judge also applied well settled precedents upholding the constitutionality of warrantless blood and urine tests as reasonable searches when justified by "special needs" beyond generalized law enforcement purposes. In this case, the district court had found that the tests were not conducted for the general law enforcement purpose of obtaining evidence of crime, but rather because the delusional and paranoid behavior the woman exhibited to the hospital staff required testing to enable the staff to diagnosis and treat her condition. Her behavior also justified her involuntary confinement because it provided reasonable grounds for the hospital staff to believe she was a danger to herself or to others. Id. at 142.

Turning to the issues arising from the officers' warrantless seizure, the Judge noted that a warrantless seizure for purposes of involuntary hospitalization "may only be made upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is dangerous to herself or to others." In this case, there was conflicting evidence as to the woman's behavior prior to the officers' seizure. Read in the light most favorable to the plaintiff, the evidence credited by the Judge indicated that the woman was sitting calmly and quietly in the apartment while the police conducted the search and attempted to contact her legal guardian. In light of this evidence, there was certainly justification from which a lower court could have found that the officers' decision - to nevertheless handcuff and transport this disabled woman to involuntary confinement in a psychiatric ward - violated her clearly established right to be free from unreasonable seizure.

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The Judge declined to reach this issue. Instead the Judge turned to the doctrine of qualified immunity and held that even if the seizure may have violated the woman's 4th Amendment rights for lack of the requisite probable cause, the police officers who executed the seizure were shielded from liability in their individual capacities under the doctrine of qualified immunity which prevents liability where the police officer's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

The Judge's reasoning in this case relies on a previously articulated framework for qualified immunity which established a two-pronged analysis in which the "clearly established" nature of the right, in this case, the right not to be seized absent probable cause to believe one is a danger to self or others, is insufficient to defeat the defense of qualified immunity. Officers confronting liability in their individual capacities are entitled to immunity from liability if (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights. *Anthony* at 138.

In this case, absent a procedurally inappropriate crediting of testimony unfavorable to the plaintiff, it might reasonably have been decided that the seizure violated the woman's clearly established right. Certainly, mentally disabled persons have a clearly established right not be seized and involuntarily hospitalized by officers responding to their 911 calls for assistance if there is no probable cause to believe that they are a danger to themselves or others. Thus the qualified immunity defense succeeded in this case not because the woman's rights were not clearly established, but because of the Judge's determination that it was objectively reasonable for the officers to execute the seizure in compliance with an order of a superior officer to seize the woman and remove her to the hospital. "Plausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists." *Id.*

N.G. v. State of Connecticut is a Section 1983 case decided the year after Anthony. In this case, the parents of two minor girls brought a Section 1983 class action lawsuit challenging the constitutionality of the juvenile strip search policies in use at Connecticut's juvenile detention centers as violations of the minors' 4th Amendment rights. The lawsuit sought damages on behalf of juvenile status offenders such as runaways and truants, juveniles arrested for non-criminal offenses, and juveniles charged with minor offenses. The case reviewed the constitutionality of three categories of juvenile strip searches pursuant to which detained children were strip searched under the detention center's policy: (1) strip searches conducted after transfer from one detention center to another – which the court declared unconstitutional; (2) strip searches based upon reasonable suspicion – which the court upheld; and (3) suspicionless strip searches upon "initial intake" regardless of the reason for the child's detention – which the court also upheld. Judge Sotomayor concurred with the court's opinion in all but the last.

The two children whose parents brought the class action were juvenile status offenders detained under a provision of Connecticut law authorizing detention of juveniles adjudicated to be members of "families with service needs." Plaintiff S.C. was fourteen years old at the time of her "initial intake." She had a history of mental illness, suicide attempts, self-mutilation, sexual activity with older men, drug and alcohol abuse, and drug peddling. She was subject to detention for failure to comply with a court order to stay at home or at institutions where she had been placed. From her initial intake in July 2000 to January 2001, she was strip searched pursuant to each of the three categories for a total of eight strip searches in a six month period. Plaintiff T.W. was thirteen years old at the time of her initial intake. She had a history of truancy, and possible mental health issues. She was strip searched twice, the first time when the superior court ordered her detention for failure comply with a court order to attend the seventh grade and the second time when she was transferred from the first detention center to another.

At issue was the scope of an exception to the 4th Amendment's requirement of a warrant and probable cause. The "special needs" exception is a judicially crafted exception to the requirement that searches be conducted pursuant to judicially authorized warrants based on probable cause. It has previously been recognized in situations when the government asserts "special needs" independent of the generalized law enforcement interest in discovering evidence of criminal activity. Because this exception is based on the

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reasonableness of dispensing with the warrant and/or probable cause requirement in the particular situation under review, determining the limits and scope of the exception requires careful balancing of the compelling interests at stake.

In affirming the constitutionality of suspicionless strip searches conducted upon "initial intake" into the State's detention centers, the majority acknowledged the admittedly compelling interest in protecting psychologically vulnerable children from the foreseeable harm caused by searches uniformly understood to be particularly intrusive, humiliating and traumatic. They nevertheless concluded that this interest was outweighed by the state's interest in protecting children from the harm they could inflict upon themselves or each other by undiscovered contraband concealed on their person upon intake into a juvenile detention center. The majority further reasoned that the state's interest in detecting child abuse and deterring future attempts to smuggle concealed contraband provided additional justifications outweighing the interest in protecting children from the concededly more severely adverse psychological effect such strip searches were likely to have on children, than adults, who under established precedents could not constitutionally be strip searched absent individualized suspicion.

Judge Sotomayor's dissent is exemplary in its reasoned assessment of the competing interests, factual record, and prior precedents. First, the Judge concedes that the government's special needs are more compelling in the context of juvenile detention centers, than other contexts where the "special needs" doctrine has not authorized strip searches absent individualized suspicion. Indeed, her holding is a narrow one that does not establish a blanket prohibition against strip searching juveniles on initial intake into a detention center, but would restrict such searches to instances in which there is individualized reasonable suspicion. Her holding is animated, on the one hand, by the intense intrusion reflected in the particular facts of the case, which only the Judge found sufficiently compelling to recount:

> The case before us presents facts that provoke all of our typical concerns about strip searches. The detention facility officers on numerous occasions ordered appellants - troubled adolescent girls facing no criminal charges-to remove all of their clothes and underwear. The officials inspected the girls' naked bodies front and back, and had them lift their breasts and spread out folds of fat. The young girls described the process as embarrassing and humiliating. Indeed, T.W. cried throughout one of her searches. During one of S.C.'s searches, two other detainees were present. The juvenile detention facilities perform similar searches on every girl who enters, notwithstanding the fact that many of them - indeed, most of them - have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age. *N.G.* at 239

This attention to the record evidence of the girls' particular experiences reflects an appropriate degree of judicial empathy, not evident in the more abstract concessions through which the majority acknowledges – only to discount – the particular vulnerabilities of minor girls to the extreme humiliation strip searches are known to impose on anyone subjected to them. The Judge's objection to the state's policy of conducting suspicionless strip searches of all juveniles admitted to the juvenile detention centers in favor of a narrower authority to conduct such searches based on individualized reasonable suspicion reflects a careful balancing in which the Judge's obvious empathy for the girls' suffering is balanced against her assessment of the government's special needs to ensure the safety of all of the children admitted to the state's detention center.

Turning to the interests the state asserts, and the majority accepts, as a basis for its "special need" to conduct the suspicionless strip searches at issue, Judge Sotomayor examines the weight of the state's asserted interests through a careful review of the evidence and concludes after rigorous examination of the factual record that there is *simply no evidence* to suggest that the government's interest in detecting contraband, deterrence or detecting child abuse is sufficient to justify "a highly degrading, intrusive strip search absent any individualized suspicion that the particular individual ordered to disrobe possesses contraband." *N.G.* at 244. This conclusion is **not based** on a personally subjective value determination that the juvenile's dignity and privacy interests outweigh the state's detection and deterrence interests, but rather on the unremarkable grounds that the state's own record evidence provides no factual basis for believing that suspicionless strip searches will advance these interests, and plenty of reason to believe they

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have not and will not, notwithstanding the adverse psychological effects they have and will most certainly produce in the children subjected to them. Given the lack of evidentiary support that suspicionless strip searches *actually* advance the state's asserted interests in detection and deterrence, the Judge was surely correct to conclude that these interests cannot reasonably outweigh the dignity and privacy interests such searches concededly infringe.

Judge Sotomayor's highly reasonable dissent from the majority's factually unsupported assertion that suspicionless strip searches advance the state's interest in detection and deterrence is further buttressed by her analysis of the relevant precedents. This analysis illustrates a method of legal reasoning that is relentlessly faithful to the integrity of judicial precedential analysis even as it is attentive to doctrinal gaps in pre-existing precedents and faithful to the policy objectives and constitutional values that should inform the legal analysis through which existing precedents are extended to cover these gaps. For example, the Judge takes issue with the fact that the majority's opinion neglects to discuss closely analogous precedents that cut against its holding even as it asserts the special "pertinence" of a case the Judge persuasively argues is not "pertinent at all."

The cases neglected by the majority include three cases in which the Second Circuit refused to allow suspicionless strip searches of students by teachers, prison correction officers pursuant to a random strip search policy designed to advance the government's compelling interest in maintaining prison security, internal order and discipline, and people entering our national borders. *Id.* at 240-41. In none of these cases did the government's special needs justify eliminating the requirement of individualized suspicion, and while the precedents were not directly on point, being strip search cases, the three cases are at least arguably more analogous to the girls' case, than the majority's "especially pertinent" precedent, which had nothing to do with the constitutionality of strip searches, but instead involved "blood tests of convicted adult sex offenders held in prison." *Id.* at 241, criticizing the majority's reliance on *Roe v. Marchotte,* discussed at 231. Indeed, the Judge notes that the Second Circuit has never before found that a strip search in the absence of any individualized suspicion was reasonable, *Id.* at 239, and her dissent in this case provides a reasoned basis for refusing to extend the "special needs" doctrine to allow such searches against particularly vulnerable children based on no factual evidence that such searches actually advance the state's asserted interests.

Precedential analysis proceeds through a process of analogical reasoning, which requires judges to fairly identify the factors that warrant the application of a particular precedent to a factual situation that is similar in some ways and different in others. This process of culling through similarities and differences is an analytical challenge that cannot be effectively performed without a fair and careful assessment of the objectives and values that link the doctrinal ruling to the specific facts of the case. The notion that the constitutionality of a strip search is more fairly assessed through an examination of prior precedents dealing with strip searches, rather than those dealing with drug tests, is eminently reasonable and fair.

Similarly, it is undeniably superior to ground constitutional rulings on the empirical reality revealed by an evidentiary record than to ground such rulings on unsubstantiated assumptions that the strip search of a child is the kind of "search a reasonable guardian ... might undertake." *Id.* at 236. As a method of legal reasoning, judicial attention to record evidence and empirical reality ensures that constitutional doctrine is informed by a reality-based assessment of its impact on real interests and practices, rather than those assumed for the purposes of justifying a doctrinal outcome. Without this reality check, judges are freed from the constraints of fact and can justify any doctrinal outcome on the basis of unverified assumptions about the benefits it will confer or the harms it will prevent. Judge Sotomayor's method of legal reasoning demonstrates a willingness to be checked by reality and governed by precedent -- in a way that the majority's opinion, from which she dissents in this case, unfortunately does not.

Walczyk v. Rio is a 2007 decision in which a panel of the Second Circuit took up a Section 1983 civil rights action in which a suspect raised various constitutional challenges, the most pertinent to this analysis being his allegation that the police officers' failure to disclose that the suspect had not lived in his mother's home for over seven years deprived the warrant issued to search her residence of probable cause. Judge Sotomayor concurred in the court's resolution of all of the 4th Amendment issues in the case, but wrote separately to express her disagreement with the qualified immunity analysis the court applied to determine

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whether the failure to disclose this and other facts constituted material omissions in violation of the suspect's clearly established right to be free of searches not based on probable cause.

In performing its analysis of the qualified immunity defense, the majority in *Walczyk* concluded that the officers might still be entitled to qualified immunity notwithstanding the court's determination that the search warrant issued to search the mother's residence was not supported by probable cause. This is because under the majority's analysis, the violation of a clearly established constitutional right, such as the right to be free of searches not supported by probable cause, will not deprive an officer of qualified immunity "if he can establish that there was arguable probable cause." *Id.* at 163. "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Id.*

In her concurring opinion Sotomayor takes issue with the majority's qualified immunity analysis:

> The portion of the majority's qualified immunity discussion that I find objectionable reads as follows: "If the right at issue was not clearly established by then existing precedent, then qualified immunity shields the defendant. Even if the right at issue was clearly established in certain respects, however, an officer is still entitled to qualified immunity if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context." Maj. Op. at 154 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). These two sentences and the citation to *Malley* reveal the two flaws I see in this circuit's approach to qualified immunity. First, our approach splits the single question of whether a right is "clearly established" into two distinct steps, contrary to Supreme Court precedent. Second, we demand a consensus among all hypothetical reasonable officers that the challenged conduct was unconstitutional, rather than positing an objective standard of reasonableness to which defendant officers should be held, as the Supreme Court has repeatedly instructed us to do. *Id.* at 165-66

The remarkable thing about this concurrence is that it appears to repudiate the framework the Judge herself applied in *Anthony v. City of New York*, when she dismissed the 4th Amendment claim of the mentally disabled woman who was involuntarily hospitalized in a psychiatric ward by the officers responding to her 911 emergency call. In that case, the facts most favorable to the plaintiff provided grounds for concluding that the officers violated her clearly established right to be free of warrantless seizure from her home in the absence of probable cause to believe she was a danger to herself or to others. In that case, the Judge concluded that the officers were nevertheless entitled to qualified immunity under the two prong test attributed to *Malley v. Briggs*. *See Anthony*, 339 F.3d at 138.

To be sure, the Judge is certainly right to conclude, as she did in her *Walczyk* concurrence, that "by splitting the 'relevant dispositive inquiry' in two, [the majority's approach] erect[s] an additional hurdle to civil rights claims against public officials that has no basis in Supreme Court precedents." *Walczyck*, 496 F.3d at 166. It is also a fair reading of the Supreme Court's precedents up to then to conclude that "the Supreme Court does not follow this "clearly established" inquiry with a second ad hoc inquiry into the reasonableness of the officer's conduct. Once we determine whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity inquiry is complete." *Id.* at 166-7. This apparent change in the Judge's approach to the qualified immunity doctrine cannot by any stretch be attributed to a pro-defendant/client bias insofar as she agrees with the majority that "questions of disputed fact preclude judicial resolution of whether the officers are entitled to qualified immunity for their search of [the mother's] house", and the Judge herself recognizes that the distinction she is drawing is "a fine one." *Id.* at 168.

She is correct, however, to say that it has real consequences, if not in the case at bar, then in future cases such as *Anthony v. City of New York*, where the officers' treatment of the plaintiff not only violated a clearly established right, but the officers' failure to reflect the standards of treatment taught in the City's training programs for handling non-violent disabled persons might arguably be found to be objectively unreasonable. As such, the Judge's concurrence in *Walczyk* reflects perhaps an evolution in the Judge's

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understanding of the restrictive consequences the qualified immunity doctrine may have if it operates to shield misconduct that unduly undermines the enforcement of clearly established constitutional rights.

Based on the foregoing analysis, Judge Sotomayor's judicial philosophy in the area of 4th Amendment jurisprudence cannot fairly be categorized in simplistic pro-state or pro-individual terms. This is because its primary focus is a reasoned application of existing precedent, informed by rigorous analogical reasoning, evidentiary scrutiny and ever more profound reflection on the policy objectives and constitutional values at stake in the articulation of constitutional doctrine. This rich and complex analysis likewise cannot be reduced to simplistic classifications based on whether the outcome allows liability or denies it. In *N.G.*, this is evidenced by the fact that the Judge's determination that the state's policy of performing suspicionless strip searches upon initial intake into the juvenile detention centers did not mean that the state might not justify strip searches, including the searches of the girls in the case, based on individualized suspicion. It is similarly evidenced by the fact that the Judge's objections to the qualified immunity analysis performed in *Walczyk* do not lead her to an outcome different from the majority's in that case, though the approach she articulates in her *Walczyk* concurrence might perhaps have produced a different, and arguably fairer, outcome had she used that approach in *Anthony v. City of New York.*

In sum, based on a careful analysis of these and other constitutional law decisions Judge Sotomayor has delivered over the years, I am pleased to submit this case review as a supplement my letter of June 3 in support of her nomination and confirmation to the Supreme Court of the United States of America. As I indicated in that letter, and reaffirm through this supplemental review of her appellate work product, there is no doubt that President Obama has nominated a candidate whose intellectual integrity, professional competence and manifest record of judicious temperament will make her a very fine Associate Justice. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Elizabeth M. Iglesias
Professor of Law & Director

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