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BEFORE: Senate Committee on the Judiciary, Hearings on the Nomination of Judge  
Sonia Sotomayor to be Associate Justice of the United States Supreme Court

Members of the Committee:

I thank you for the opportunity to comment on the nomination of Judge Sonia Sotomayor, whom I have known professionally since she became a judge in 1992.

I am a professor at Yale Law School, where I teach and write primarily in the area of criminal law. Before I joined the Yale faculty in 1985, I was an Assistant U.S. Attorney in the Southern District of New York and a special assistant at the Department of Justice in Washington.

In my judgment, this is an exceptionally strong nomination. My judgment has nothing to do with Judge Sotomayor's sex, ethnicity, or "personal story." I am judging her on the same criteria I used when I was asked by the Yale Daily News whether Samuel Alito was a strong nomination to the Court. I answered "yes" then, and I answer "yes" now. Specifically, I am confident that Judge Sotomayor would serve this nation with powerful intelligence, vigor, rectitude, and an abiding commitment to our Constitution. Moreover, her service as a state prosecutor and district judge would make her unique on the Court to which she will ascend.

My judgment about Judge Sotomayor is informed by many sources.

First, I have been unusually involved, at least for a professor, with members of the Bar and the bench, as well as the academy, within the Second Circuit. Among these lawyers who know her best, she is held in high repute across the board.

My judgment is also based on my many conversations with Judge Sotomayor. The most important of these have been our conversations about Yale students who have applied to clerk with her after graduation. From her questions over the course of more than fifteen years, I believe that I have gained insight into her understanding of the role of a judge.

And the bottom line is this: What she wants in her law clerks is what we all want in a judge.

She wants to make sure, first, that they are serious about the law – not about public affairs, or professional opportunities after the clerkship, or about pursuing a political or other agenda as a law clerk.

And they must be serious about *all* areas of the law. Thus, if a student has primarily taken courses in, say, criminal law, she asks me – But will he care equally about

commercial law, and administrative law, and immigration law? For *Judge Sotomayor* there are no favorite areas of the law.

Which brings me to a third quality that she wants in her law clerks: The prospective clerk must be willing to work his or her fingers to the bone if necessary to make sure that Judge Sotomayor's opinions and the opinions she joins don't miss an arguably relevant precedent, and don't get a fact wrong.

And there is an overriding fourth quality that the Judge holds critical: Is the prospective clerk willing to take criticism, to think harder, and (where appropriate) to rethink his or her initial assessment of the issues?

Over the years, the Judge's former clerks have told me time and again that they greatly appreciate the Judge's demanding devotion to the law, as a result of which they were held to higher standards and learned more than at any other time of their lives.

Her conception of the role of a judge is borne out by her judicial opinions in the area of criminal law.

Other witnesses have or will comment on her criminal procedure decisions. Let me just note that the left-right scale is not very helpful in this area of law. My conclusion about these opinions is that they often reflect a greater pragmatism than, say, Justice Souter's opinions. Sometimes this cuts for the government, and sometimes against it.

I do want to mention in particular one *substantive* criminal law case, United States v. George, decided in 2004. [386 F.3d 383, 2d Cir., 2004.] Judge Sotomayor's sixteen-page, unanimous opinion concerns the meaning of the mens rea term "willfully" in the federal statute that makes it a crime to "willfully" falsify a passport application. [18 U.S.C. 1542.] Her opinion makes clear that the role of the courts is not to decide what level of mens rea *they* think should be imposed, but what level *Congress* intended when it used the word "willfully." The opinion then embarks on a heroic effort to figure out what Congress meant in this particular statute, or – to be more precise, since she was a lower court judge – she set out to determine, on the basis of Supreme Court precedent, what that Court would say Congress intended in this statute. The opinion is so clarifying and insightful that my co-authors and I decided to include a long excerpt from it in our forthcoming Federal Criminal Law casebook.

The significance of the case isn't only that it is an excellent opinion, but that Judge Sotomayor and her two colleagues changed their minds. In their initial decision, they said the trial judge instructed the jury incorrectly on the meaning of "willfully," and they therefore vacated the conviction. But then the government filed a petition for rehearing. And after the prodigious amount of effort that is reflected in the final opinion, Judge Sotomayor vacated her own first opinion. As the Judge summarized: "Having reviewed the arguments of both parties pursuant to the government's petition for rehearing, we now [affirm the conviction]."

I submit that the *George* case reveals the judicial qualities that Judge Sotomayor clearly possesses. *First*, she cared deeply about the issue at hand, no matter how minor or word-parsing it may seem even to lawyers. *Second*, she was willing to reassess her initial judgment and to keep digging. *Third*, her legal analysis was exceptionally clear and exceptionally astute. And, *fourth*, she had no agenda other than trying to get the law right – and in a society committed to the rule of law, “getting the law right” is what it *means* to be “fair and impartial.”

This is a great judge. I urge you to vote in favor of Judge Sotomayor’s confirmation.