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Questions for Judge Sotomayor on the Use of Foreign and International Law

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Judge Sonia Sotomayor has not yet had occasion to cite to or rely upon foreign or international law to interpret the United States Constitution. She will have a lifetime to do so, however, if confirmed to replace Justice David Souter as the next associate justice to the U.S. Supreme Court.

Based upon a recent speech given by Sotomayor, it appears that she will continue in the tradition of sitting members of the Court—such as Justices Ruth Bader Ginsberg, John Paul Stevens, and Anthony Kennedy—in polling "the world community" and citing as persuasive authority the rulings of foreign and international courts.

She should therefore be questioned at length during her confirmation hearing before the Senate Committee on the Judiciary regarding the role that foreign law and world opinion will play in her decision-making process.

Sotomayor Supports the Citation of Foreign and International Law to Interpret the U.S. Constitution. In the foreword to a 2007 book, *The International Judge*, Judge Sotomayor wrote that "the question of how much we have to learn from foreign law and the international community when interpreting our Constitution is…worth posing."[1] Sotomayor did not, however, indicate her position on the issue. To date, no opinion written or joined by Sotomayor while at the Second Circuit Court of Appeals or the District Court for the Southern District of New York has been uncovered where she relied upon foreign or international law to interpret the meaning of the U.S. Constitution.[2] There is, therefore, scant material from which to draw upon to determine Sotomayor's position on the use of foreign and international law.

In April 2009, however, Sotomayor made extensive comments on the issue in a speech she delivered to the Puerto Rican chapter of the American Civil Liberties Union (ACLU).[3] In that speech, Sotomayor made it clear that the Court's citation to foreign and international law was proper and indeed laudable since "international law and foreign law will be very important in the discussion of how to think about the unsettled issues in our own legal system."

At the outset of her speech, Judge Sotomayor attempted to draw a distinction between the "use" and "consideration" of foreign and international law in interpreting the Constitution:

> I always find it strange when people ask me, "How do American courts use foreign and international law in making their decision?" And I pause and say, "We don't *use* foreign or international law; we *consider* the ideas that are suggested by an international court of law." … I, for one, believe that if you look at the ideas of everyone, consider

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> them, and test them, test the force of their persuasiveness, look at them carefully, examine where they're coming from and why, that your own decision will be more informed.[4]

Sotomayor's statements may be fairly read to mean that it is improper for a judge to use foreign law as controlling precedent, but merely considering foreign law in reaching a judicial decision is appropriate. This is, however, a distinction without a difference. Of course foreign and international law has no binding, precedential value in U.S. courts. Even the current justices of the Supreme Court who have cited to foreign law and "world opinion" take pains to make that point clear in their written opinions.[5]

Yet to "consider" foreign law while analyzing the provisions of the U.S. Constitution is to "use" foreign law. It defies logic to say that, in reaching a judicial decision, a judge may review and "consider" the opinions of foreign tribunals without ultimately "using" those opinions. In other words, even if Sotomayor suggests that she does not advocate "using" foreign law as binding or controlling authority, her own statements concede that she endorses its "use" as persuasive authority. This "use" is dangerous, because American law is unique—the constitutional protection of free speech, for example, is far more robust than in most other nations—and so relying on persuasive foreign authority could serve to undermine these key, and uniquely American, constitutional protections.

A Judicial Popularity Contest? Sotomayor went on to inform the ACLU of Puerto Rico that she aligned herself with Justice Ruth Bader Ginsberg "in thinking or believing that unless American courts are more open to discussing the ideas raised by foreign cases, by international cases, that we are going to lose influence in the world."[6] This is apparently an allusion to a speech that Justice Ginsberg had recently delivered at a symposium at Ohio State University, where she lamented that the influence of the U.S. Supreme Court was diminishing since it had not regularly used foreign law in reaching its decisions.[7] Ginsberg admonished: "You will not be listened to if you don't listen to others."

That is, perhaps, the weakest justification for using foreign and international law for constitutional interpretation. It is argument by ego—and reminiscent of Justice Sandra Day O'Connor's speech shortly before her retirement in 2006 when she stated that relying on foreign law "may not only enrich our own country's decisions; it will create that all-important good impression."[8] In fact, Jus-

1. Daniel Terris, Cesare P. R. Romano, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Boston: Brandeis University Press, 2007).
2. Sotomayor cited to foreign law in at least one case that involved an international custody dispute where the substance of child custody laws in Hong Kong were at issue and thus arguably relevant. *See Croll v. Croll*, 229 F.3d 133 (Sotomayor, J., dissenting).
3. Judge Sonia Sotomayor, speech to ACLU of Puerto Rico, April 2009, at *http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html* (July 6, 2009). A full transcript of the speech is appended hereto.
4. *Ibid.* (emphasis as spoken).
5. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005), where Justice Anthony Kennedy writes, "The opinion of the world community [regarding the juvenile death penalty], *while not controlling our outcome*, does provide respected and significant confirmation for our own conclusions" (emphasis added); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002), where Justice John Paul Stevens writes, "Although these factors [the disapproval of the world community, non-government organizations, and polling data regarding the death penalty for mentally retarded defendants] *are by no means dispositive*, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue" (emphasis added).
6. Sotomayor, speech to ACLU of Puerto Rico.
7. Adam Liptak, "Ginsberg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa," *The New York Times*, April 12, 2009, at *http://www.nytimes.com/2009/04/12/us/12ginsburg.html* (July 6, 2009).
8. Adam Liptak, "U.S. Court Is Now Guiding Fewer Nations," *The New York Times*, September 18, 2008, at *http://www.nytimes.com/2008/09/18/us/18legal.html* (July 6, 2009).

tice Ginsberg bemoaned that the Canadian Supreme Court is "probably cited more widely abroad than the U.S. Supreme Court."[9]

But influencing foreign courts and creating a "good impression" is neither the duty nor obligation of a Supreme Court justice. International politics and public diplomacy are by their nature functions of the political branches of the U.S. government, particularly the executive branch. Nowhere in the Constitution does it state that the Supreme Court should function in such a manner so that its jurisprudence influences foreign tribunals. Nor is such a duty reflected in the oath of office to the Supreme Court, which requires members to "faithfully and impartially discharge and perform all the duties incumbent upon me…under the Constitution and laws of the United States. So help me God."

Being popular among one's international peers at law school symposia and overseas conferences should not enter the calculus of Supreme Court justices when deciding on cases of crucial constitutional importance.

Questions for Judge Sotomayor. In the years ahead, anti–death penalty activists will continue their quest to incrementally erode and ultimately ban capital punishment in the United States. Other activists will likely call for the Court to outlaw the practice of sentencing juvenile killers to life without the possibility of parole.[10] If Sotomayor is confirmed to the Court, she will enjoy life tenure and will have many opportunities to interpret the Constitution regarding these issues and other social issues where—in the recent past—the citation of foreign law has sparked controversy.[11]

In the last two Supreme Court confirmation hearings, both Chief Justice John Roberts and Justice Samuel Alito were questioned on the matter of citing foreign and international law. In light of her speech to the ACLU of Puerto Rico, Sotomayor should also be questioned regarding her views on the subject. Such questions could include the following:

- In your speech to the ACLU of Puerto Rico, you expressed your fear that the U.S. Supreme Court may "lose influence in the world" if it was not more open to discussing the ideas raised by foreign and international courts. *Do you believe that it is the proper role of a justice of the Supreme Court to decide cases based on whether the decision will influence the jurisprudence of foreign courts? If so, how great a factor should the desire to influence foreign courts play in interpreting the Constitution?*
- Recent Supreme Court cases such as *Roper v. Simmons* (regarding the juvenile death penalty) and *Lawrence v. Texas* (regarding the criminalization of homosexual acts) have caused controversy since the majority opinion in those cases cited foreign law, international law, and the "opinion of the world community" in reaching a decision. You spoke favorably as to both of those opinions in your recent speech to the ACLU of Puerto Rico. *By what criteria should foreign decisions be cited? Should the Court really be looking to adopt norms outside of the American tradition when deciding cases regarding controversial "values" issues such as the death penalty and homosexuality?*
- In your speech to the ACLU of Puerto Rico, you stated that citing to foreign and international law in cases such as *Roper v. Simmons* and *Lawrence v. Texas* was proper since it would "help us understand whether our understanding of our own constitutional rights fell into the mainstream of human thinking." *What exactly constitutes the "mainstream of human thinking"? Since much of American constitutional jurisprudence falls outside of the mainstream—i.e., the U.S. Constitution has been interpreted to provide broader protection for free speech and abortion than in most (if not all) of the world—how is it that America's more illiberal neighbors within "the world community" should influence the Court's decisions?*

An Obligation to Explain. The United States may very well have something to learn by studying

9. *Ibid.*
10. See, i.e., "The Rest of Their Lives; Life without Parole for Child Offenders in the United States," Amnesty International and Human Rights Watch, 2005, at *http://www.amnestyusa.org/us/clwop/report.pdf* (July 6, 2009).
11. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile death penalty), *Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty for mentally retarded), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (criminalization of homosexual conduct).

the legal opinions of foreign nations and polling the practices of the international community. Where the ideas and norms that hold sway in foreign lands are compelling, they may be incorporated into the American system—but this is properly done through democratic means, in particular through elected legislators at the state and federal level.

Imposing foreign norms and practices through judicial fiat is another matter. And while such an imposition may create a "good impression" among the international judiciary and legal professoriate, it has little to do with sound constitutional interpretation. If Judge Sotomayor intends to join her colleagues already on the Court in relying upon something other than U.S. legal precedent and American norms in interpreting the Constitution, then she has an obligation to explain and defend her position at the forthcoming confirmation hearing.

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APPENDIX

Transcript of Judge Sotomayor's April 2009 Speech to the American Civil Liberties Union of Puerto Rico[12]

I always find it strange when people ask me, "How do American courts use foreign and international law in making their decision?" And I pause and say "We don't *use* foreign or international law; we *consider* the ideas that are suggested by an international court of law." That's a very different concept and it's a concept that's misunderstood by many. And it's what creates the controversy, in America especially, that surrounds the question of whether American judges should listen to foreign or international law. And I always stop and say, "How can you ask a person to close their ears?"

Ideas have no boundaries. Ideas are what set our creative juices flowing. They permit us to think. And to suggest to anyone that you can *outlaw* the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding. What you would be asking American judges to do is to close their minds to good ideas, to *some* good ideas. There are some ideas we may disagree with, for any number of reasons. But ideas are ideas. And whatever their source, whether they come from foreign law, or international law, or a trial judge in Alabama, or a circuit court in California, or any other place, if the idea has validity, if it persuades you, [speaks in Spanish], then you're going to adopt its reasoning. If it doesn't fit, then you won't use it. And that's really the message that I want you to leave with here with today.

I'm going to try first to understand the way that American law is structured against the use of foreign and international law, because American analytical principles do not permit us to use that law to decide our cases. But nothing in the American legal system stops us from considering the ideas that that law can give us. So let me start by explaining what the limits are under American law in using foreign or international law.

Even treaties are not law in the United States unless the treaty, when it is signed by the President, explicitly says that it becomes law in the United States, or Congress can later not merely ratify the convention, but it has to implement it, it has to pass a law that says, "This treaty is now the law of the United States." So think about it. The President of the United States has signed dozens and dozens of treaties. Some of the most important treaties of human rights law: the convention against torture, the convention against racial discrimination. Many of the human rights treaties that the United States has passed are not laws in the U.S. They are *moral* obligations by the United States, but they are not *enforceable* in a United States court.

So no private litigant can come to a U.S. court for those conventions that have not been executed or implemented, can come to a U.S. court and rely on those conventions to establish a claim. That's a concept that most people don't appreciate. But it informs all of American jurisprudence. Which is, unless a treaty is what we call self-executing, unless the treaty says, "It becomes law," then it's only a moral obligation, number one. Number two: Unless Congress passes another law that says, "Private citizens have a right to enforce this treaty in an American court," then the treaty is not law that a private citizen can rely upon.

That's international law, treaties. Foreign law's something else. Foreign law is the law of a foreign nation. Foreign law is *sometimes* used by American courts in that very word that they used, but it's a very limited circumstance. It's when a private dispute invokes foreign law for its own decision making. And what that means is if you have an American company and a foreign company signing a contract, American conflicts of law will say, "Let's look at the contract and let's look at what nation that contract has the most context with. Is this a contract

12. Transcribed by The Heritage Foundation from a video of Judge Sotomayor's speech to the ACLU of Puerto Rico in April 2009, available at *http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html (July 6, 2009)*. The italicized portions of the transcript reflect the words emphasized by Judge Sotomayor.

that really belongs in Puerto Rico, or in Spain, or in England? Or is it a contract that really is American, where one party happens to be foreign? If the American court decides that the contract is *really* a Puerto Rican contract, a Spanish contract, an English contract, then it will actually use the law of that country to decide the legal claim, *unless* the law of that country violates public policy of the United States. And I can tell you that there's a whole host of cases in U.S. law about "What is U.S. public policy?" because as you can imagine there's a lot of difference of opinion on what's really an important public policy. But that's a very, very limited circumstance in which an American court applies foreign law. In almost all situations it is *American* law that supplies the rules on how to decide a case.

So you end up with treaties, most of the time, even though under article four of the Constitution it says that "Treaties are the supreme law of the land," in most instances, they're not even law. In others, they've become law and there's an American judicial principle that says "Even if a treaty is self-executing, even if Congress gave you a right under the treaty, the Congress the next year can take that right away." And if a later Congress says, "We don't like that treaty," and they change the law, the treaty is dead law.

And so, as I hope you're understanding, the use of foreign and international law in the American judicial system holds *very limited* formal force. The force comes *only* when there is goodwill on the part of the president and on Congress in respecting the obligations under those treaties and commitments. In saying all of this, by the way, I am not suggesting that America is tremendously different than a lot of other foreign nations. Our way of interpreting the force of foreign and international law does differ, however, from many of our more important neighbors. Many of our neighbors simply don't understand when America signs a treaty and we don't respect the obligations established by that treaty.

That happened most recently in the Medellin case. I'm sure that all of the civil rights organizations here know that case. It's a very, very recent case decided by our Supreme Court. In Medellin, it was a case last year, the International Court of Justice had heard a complaint filed by Mexican citizens who were on death row in America challenging their sentences on the grounds that Texas authorities had violated the Vienna Convention by failing to consult with the consulate of Mexico. The convention requires that every time a signatory to the convention is arrested, that the arresting country will tell the consulate of that arrest and let the prisoner talk to the consulate so they can get some help and understand their legal rights.

So it makes sense to most people. If you get arrested in another country you want someone from your own country to help you understand what's going. The International Court of Justice, an international court, had declared that the United States had violated that convention, and had ordered the United States to re-sentence the defendants. Now it didn't tell the courts *how* to do it, but it did tell the U.S. court, "You have to re-sentence these defendants. You violated that convention." The Supreme Court was asked to determine what the effect of that ICU [sic] decision would be, and what the Supreme Court said was, "It has no effect. It has no effect because that treaty is not self-executing. It is not the law of the land. And we in American courts are not bound by the determination of any international court unless there is a law passed by Congress that directs us to do that."

Now, I put a small aside here. Some have asked me whether if Congress had passed a law that said, "You have to, United States courts, give effects to the decisions of foreign countries." There is an argument that's been raised by many people, that that might be an unconstitutional law, because no foreign country can tell an American court how to determine an American constitutional right. I put that only as an aside because when I said what I said there is a limit to even how much even Congress can tell us to accept a foreign decision.

Medellin sent, I think it's fair to say, was a surprise to many human rights groups and civil rights groups. But it was premised on very traditional American law principles about the use or non-use of international and foreign law in deciding our cases.

All of this said, it is not to suggest, however, that we don't use the ideas of foreign courts in some of our decision making. Very recently in New York, for example, the Court of Appeals of New York

looked to the foreign law to decide how to interpret the contract rights under the treaty for contracts. Similarly, California has used it in other contexts, so have other American courts. But this use does have a great deal of criticism. The nature of the criticism comes from, as I explained, the misunderstanding of the American use of that concept of using foreign law.

And that misunderstanding is unfortunately endorsed by some of our own Supreme Court justices. Both Justice Scalia and Justice Thomas have written extensively criticizing the use of foreign and international law in Supreme Court decisions. They have a somewhat valid point. They argue that because there are so many international and foreign laws and so many of them vary, that a judge can look to the law of any country to support his or her own conclusion, because they'll find someone who will agree with them. So it's easy to say, "This is a good idea because England likes it," forgetting to mention that Russia doesn't, that Russian law doesn't, or vice versa.

It is a point that's validly taken, but I think I share more the ideas of Justice Ginsburg in thinking or believing that unless American courts are more open to discussing the ideas raised by foreign cases, by international cases, that we are going to lose influence in the world. Justice Ginsburg has explained very recently in an address to the South African Constitutional Court that foreign opinions are not authoritative. They set no binding precedent for U.S. courts. But they give add to the story of knowledge relevant to the solution of a question. And she's right.

We have looked, in some Supreme Court decisions, to foreign law to help us decide our issues. So, for example, in Roper v. Simmons, Justice Kennedy noted that for almost a half-century, the Supreme Court has referenced the law of other countries and to international authorities as instructive for its interpretation of the 8th Amendment prohibition of cruel and unusual punishment. And in that case, the Supreme Court outlawed the death penalty of juveniles in the United States. Similarly, in a recent case, Lawrence v. Tribe [sic], the Supreme Court overturned a Texas state law making it a crime for two people of the same sex to engage in certain intimate, sexual acts. And the justice referred to the repeal of such laws in many, many states and in many countries of the world.

In both those cases, the courts were very, very careful to note that they weren't using that law to decide the American question. They were just using that law to help us understand what the concepts meant to other countries, and to help us understand whether our understanding of our own constitutional rights, fell into the mainstream of human thinking. There may well be times when we disagree with the mainstream of international law, but there is much ambiguity in law, and I, for one, believe that if you look at the ideas of everyone, consider them, and test them, test the force of their persuasiveness, look at them carefully, examine where they're coming from and why, that your own decision will be more informed.

Having said all of this, I do remind you that there are ways in which judges do make decisions that are not grounded in careful enough analysis of what's persuading them. And there are decisions that will say, "I'm adopting X or Y," instead of explaining why X or Y is persuasive, and I think that that's why some of the confusion about the use of foreign law has arisen in the United States.

Having said all this, I'm trying to cut my presentation short, I have 45 minutes and I'm trying not to bore you. So I think I'm now well within my time to finish.

So, I will end with what I started with [speaks in Spanish]. To the extent that we as a country remain committed to the concept that we have freedom of speech, we must have freedom of ideas. And to the extent that we have freedom of ideas, international law and foreign law will be very important in the discussion of how to think about the unsettled issues in our own legal system. It is my hope that judges everywhere will continue to do this, because I personally believe that it is part of our obligation to think about things not outside of the American legal system, but that within the American legal system we're commanded to interpret our law in the best way we can, and that means looking to what anyone has said to see if it has persuasive value.

[non-substantive closing remarks]