Testimony of

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Re: Nomination of Judge Sonia Sotomayor to be an
Associate Justice of the Supreme Court

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Thank you, Chairman Leahy and Ranking Member Sessions, for the opportunity to address you at the hearing on the nomination of Sonia Sotomayor to be a justice of the Supreme Court. My subject is the use of foreign and international law in constitutional interpretation and Judge Sotomayor's approach to this issue. I believe the use of international and foreign and international law is a subject of contemporary importance, because the ease of access to foreign and international law may tempt justices to use such sources in constitutional interpretation. Such reliance distorts the meaning of our constitution, undermines domestic democracy, and alienates Americans from a document that is our common bond. Sadly, I see the decision by some, including certain Supreme Court justices, to give weight to foreign and international law as the latest in long line of attempts by those who do not like our constitutional principles or the results of the democratic process to substitute principles and results more to their liking.

At the outset, I want to make clear that I am taking no position on Judge Sotomayor's nomination. What is important in the constitutional conversation offered by this hearing is to identify correct constitutional principles and to measure a nominee's adherence to those principles. It is not to engage in any kind of partisan or personal attack on an Article III judge who has my respect and good wishes. Thus, I will first set out the constitutional principles that should govern in this area: contemporary international or foreign law should generally be given no weight in constitutional analysis. I will then briefly turn to a speech that Judge Sotomayor gave to the ACLU which may suggest she does believe that foreign and international law may have some weight in constitutional analysis.

To be sure, however, this speech is not pellucid and perhaps Judge Sotomayor will have articulated what I believe to be the correct principles in her testimony to you. In particular, I would be most interested to know whether Justice Sotomayor, as she indicated in her speech, continues to agree more with Justice Ruth Bader Ginsburg rather than Justice Antonin Scalia and Clarence Thomas on this subject, because, as I will note, Justice Ginsburg is perhaps the foremost proponent of using foreign and international law on the Supreme Court. I would also be interested in learning whether she still agrees with the Supreme Court's use of a decision by the European Court of Human Rights in Lawrence v. Texas, because, as I also discuss, that use is a prime example of giving weight to foreign law in constitutional interpretation. Most importantly,

I would want to know if she thinks there is any distinction between being bound by international law and foreign law and giving it any weight in her decisionmaking, because that appears to me the false distinction that some use to justify importing foreign and international law into our jurisprudence.

I turn now to a general discussion of the proper constitutional principles relating to international and foreign law as a source of authority in constitutional interpretation. First, I will discuss what it means to use foreign or international law as authority in the interpretation of the U.S. Constitution. Second, I will assume the truth of originalism as a theory of constitutional interpretation and show why the use of contemporary foreign or international law is incompatible with that theory. I will then show that the use of foreign and international law is also objectionable under even theories of constitutional interpretation that purport to be more pragmatic than originalism.

1. Giving Weight to Foreign and International Law

First, what does it mean to use international law or foreign law as an authority in helping to construe the Constitution? This question has itself been a source of confusion. A court uses foreign or international law as authority whenever it gives any weight in American constitutional law to propositions because they are part of international or foreign law

It is sometimes said by the apologists for the use of international and foreign law that, of course, such propositions have no authority so long as a court is not treating them as binding. But that defense misunderstands the nature of legal decisionmaking. Even Supreme Court precedent does not bind the Supreme Court. Such precedent may be overruled and yet few would deny that precedent has authority in constitutional law. The real question is whether propositions of international or foreign law are going to be given any weight (i.e. whether their existence or absence could make any difference to the way the Court comes out). If propositions of international and foreign law are not going to be given any weight, I do not believe it is a deep error for a court to cite them.

I still think, however, the better practice is not to cite such materials. Multiplying citations to legal propositions that do not make a difference to the outcome makes it harder to figure out what are the authorities that are doing the work in reaching the result. Certainly if a judge is not giving foreign or international materials weight, the judge should make clear that foreign and international legal material is being included for some reason other than its weight. It is otherwise natural for the reader to believe that citation to legal material means that material might have made a difference to the outcome.

Second, my objections are limited to propositions that are given weight by virtue of their presence in foreign or international law. Depending on their theory of constitutional interpretation, Justices may have other reasons to use a proposition that happens to occur in foreign or international law as a source of authority in constitutional interpretation. For instance, Justices may consider moral principles relevant to constitutional interpretation and may believe the proposition that happens to be contained in international and foreign law is a morally good one. But in that case the methodological question is what weight morality should have in constitutional construction, not the relevance of foreign or international law.

Let me make some clarifying analogies. Justices generally give our own domestic precedent weight, regardless of whether precedent is itself soundly reasoned. Justices could simply look at precedent to determine whether it contains reasoning that they judge to be good by some metric

provided by the correct theory of constitutional interpretation. That would just be using precedent for informational value. But Justices generally do use a precedent as authority as well, i.e. for its disposition value. Whatever its informational value, a precedent will make subsequent court opinions more likely to come out in its direction simply because it is precedent.
Or take another example. A justice trying to discern the meaning of word that appears ambiguous at the time of the Framing might consult dictionaries at the time to ascertain the better interpretation. If most dictionaries pointed to one meaning rather than the other and the Justice therefore chose that meaning as the proper legal construction, he would be giving weight to those dictionaries in his reasoning. If most dictionaries had favored the other meaning, he would presumably have chosen that other one. It is giving such weight to foreign or international law that is objectionable.
I think the prime example where the Supreme Court has given dispositional value to foreign or international law came in Lawrence v. Texas. There the Court cited a case from the European Court of Human Rights, which constitutionally protected homosexual conduct and stated: "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." In that case the Court used the decision in the European Union to support the view that our Constitution should also protect homosexual conduct. Ironically, the Court's reliance on European precedent came in a case when it overruled its own precedent. It also ignored the precedent from many other nations whose Constitutions permitted the regulation of sexual conduct.

2. Originalist Objections to Giving Weight to Foreign or International Law
Having defined what it is to deploy foreign and international law, the next question is what is wrong with giving any weight to these materials? If one is an originalist, as I am, the objections to this use of contemporary international or foreign law are straightforward. Originalists believe that the meaning of the Constitution is established at the time a provision is ratified. From the perspective of originalism, the problem thus with contemporary international or foreign law is the fact that it is contemporary, not the fact that it is foreign or international. Originalists would be pleased to consider Blackstone, or other foreign and international sources from the time of framing that shed light on what a reasonable person at that time would have thought the Constitution meant.

Now, there may be some exceptions to this general rule, but they are exceptions that prove the rule. It may be, for instance, that the intent of the Framers was to have a word in a constitutional provision, like "treaty," be defined by whatever international law of the current day meant it to be. In that case originalism would use international law to construe the meaning of treaty. But in general originalists do not believe as a matter of fact that the Framers meant to define words according to some future meaning. Thus, contemporary foreign or international law is simply not relevant to construing the vast majority of constitutional provisions.

3. Pragmatic Objections to Giving Weight to Foreign or International Law
But one should also object to the use of foreign or international law in constitutional interpretation, even if one is a self-styled pragmatist about constitutional theory. Pragmatists believe that the Constitution should invalidate our laws, only if our laws have bad consequences. But does a conflict between our law and international or foreign law give us substantial reason to

believe the consequences of our law are bad consequences? That is the central question for a pragmatic view of the relevance of foreign or international law, because we begin with some presumption that our democratically made legislation is beneficent and thus has good consequences for Americans. I do not have time to go into why we have that presumption about democratic legislation, but it is a default rule of our system.

A. The Case of Foreign Law A rule of foreign law is not appropriately used to create doubt about the beneficence of our own law, because it is not formulated to be good with respect to the United States. Even assuming that the foreign nation has a flourishing political system, foreign law is formulated to be good for that foreign nation. There may be many differences between that foreign land and the United States that make its law appropriate for that nation and our law appropriate for ours. Indeed, foreign law viewed in isolation may seem contrary to our own, but that difference may be itself delusive. A proposition of foreign law represents the tip of an iceberg of some complex set of social norms in that nation. There may well be other norms within their system that make the legal proposition in question good for those nations. But since the United States does not share in those other norms, importing this single legal proposition may have bad consequences for the United States.

Moreover, the United States and many other nations are differently situated in a variety of ways. For instance, the United States is more entrepreneurial and far more religious than most European nations and it would be hardly surprising if a different set of rules is optimal for its people. Finally, it is very hard to see how one could draw any conclusion from looking at the foreign law of selected nations, because selective attention would ignore many nations that have norms that accord with ours. Perhaps as a matter of theory we could look at the law of all foreign nations on a constitutional issue and try to come up with kind of a weighted average of all that law as a standard of comparison for our own, but the courts are not institutionally competent to do that. That would be the work for the entire lifetime of a scholar.

B. The Case of International Law International law is different from foreign law, because international law at least purports to claim some kind of universality, which foreign law does not. Here I address giving weight to any international law that has not been ratified by our political process to create actual domestic obligations. Such "raw" international law includes the use of treaties the United States has not signed, customary international law, and the decisions of the International Court of Justice. In my view, any discrepancy between international law and our law should not cast doubt on the beneficence of our own law. The basic reason is that international law does not purport to be democratic and thus its results do not impeach the product of our own democratic processes. International law reflects the consent of nation states, not the peoples of the world or global demos.

The democratic deficit of international law is not a mere theoretical problem. Take, for instance, the many human rights treaties that are basis of modern human rights law, but that have not been ratified by the United States. These treaties, including treaties on civil rights and human rights, were fabricated during the time when the Soviet Union and its allies were important actors on the international stage. The provisions of treaties that required the give and take of negotiations with totalitarian nations cannot be presumed beneficial by virtue of the process that generated them. These provisions may be beneficial for some other reason, but are not good simply because they are a part of international law.

Customary international law in fact faces democratic deficits beyond the fact that nondemocratic nations are involved at many points in influencing its fabrication. Customary international law is not written down, and thus its principles depend on inferences about the propositions to which

nation states have consented. Those responsible for inferring these principles from the confusing welter of state practices and declarations are not democratically chosen. These fabricators include publicists and international courts. International law professors are publicists. But we have strong evidence that international law professors are not very representative of their fellow citizens, at least in the United States, because they contribute to one of our political parties over the other by a ratio of more than five to one. International courts are not representative either, both because some members are appointed by authoritarian nations and because even those appointed by democratic government are appointed through processes that are unlikely to elicit the consensus of their societies. If we have such ideologically skewed groups choosing norms, we will get ideologically skewed norms.

C. Other Pragmatic Objections These concerns about the democratic bona fides of foreign and international law that should give us pause before permitting these sources to be used as a factor in overturning our own domestic law. But additional pragmatic reasons militate against the systematic use of international or foreign law as a factor in constitutional construction. While I generally focus on the problematic consequences for Americans of using foreign or international law to construe our Constitution, another pragmatic concern focuses on the welfare of foreign nationals as well. The systematic use of foreign and international law to interpret our Constitution will move United States' law, at the margin, to converge to the law of the rest of the world. It is at all not clear that such convergence through constitutional fiat is good. Competition among different laws in different jurisdictions often has advantages. The differences generate information about the effects of laws, and as a result democratic branches are better positioned to choose better laws for themselves. Particularly, if one believes in American exceptionalism, one will think it a loss to entire world to have our distinctive norms prematurely extinguished through the operation of a constitutional law constructed along the lines of international and foreign law.

Indeed, I cannot resist responding to those like, Justice Ruth Bader Ginsburg, who use the "decent respect for the opinions of mankind language" in the Declaration of Independence as an argument for construing our Constitution in light of foreign laws. If Thomas Jefferson had looked to the law of Louis XVI France or any republic on the European continent at the time he would have found support for a regime antithetical to the principles of the Declaration, but none for the self-evident truths which he proclaimed and which eventually diffused throughout the world.

Another pragmatic objection is rooted in the protection of our own sovereign democratic processes. If one takes the use of foreign or international in constitutional interpretation seriously, international or foreign law will have, at the margin, authority to change our law. It suddenly gives people in other nations some ability to affect the shape of our polity. It seems problematic to allow people in other nations to be able to consciously think about how they are changing their law to change our own law. Perhaps, even worse, our own domestic interests groups will have another way of getting a second bite at the apple, because they will be more effective than ordinary citizens in working in foreign and international forums to make law that will have a blowback effect on the United States. Once again I would cite the Declaration of Independence in support of this position. One of the Declaration's charges was as follows: "King George the III has conspired with others to subject us to a jurisdiction foreign to our Constitution." I do not want to suggest that a judge relying on foreign law is exactly like King George the III! But a practice of giving weight to foreign law does permit people who are foreign to our jurisdiction to have some conscious influence over the content of our law.

My final kind of pragmatic concern goes back to Alexis de Tocqueville. Tocqueville was very impressed by how much the Americans paid attention to their laws, and in particular, to their Constitution--how much reverence they felt to their system. He came, of course, from the country that had recently been under the ancien regime, under a much more top down structure of social ordering, where people were indifferent or contemptuous of the laws that oppressed them. Tocqueville thought that one of the reasons that Americans were so psychologically invested in their law was because it was their own. Americans' creation of their own Constitution remains an important reason for people's enthusiasm for their founding documents.

Thus, a systematic reliance on the authority of foreign or international may have the effect of alienating Americans from the fundamental law that is the source of our stability and prosperity. I certainly fear that politicians in the long run will exploit that alienation to discredit the Court. Reliance on foreign and international authorities may seem chic, but that high style comes with a high price.

Thus, for a wide variety of powerful reasons, the use of foreign or international law is of doubtful benefit even under pragmatic theories of constitutional interpretation. Regardless of whether a judge is an originalist or a pragmatist, he or she should keep contemporary foreign and international law, as interesting as those laws may be and useful as they may be in other contexts, separate from the construction of the Constitution that we Americans have made.

4. Judge Sotomayor's Thoughts on the Subject

Judge Sotomayor's most comprehensive statement on the use of international and foreign law came in speech to the American Civil Liberties Union in Puerto Rico. I confess that I found the speech not entirely clear and thus I would be interested in any clarification that Judge Sotomayor might have offered in her testimony to this committee or otherwise. I am also at a disadvantage in that I have not found an authorized transcript of that speech and thus I am basing my remarks on having listened to it. As I understand the speech, her position depends on propositions that seem to me in some tension. Jude Sotomayor stated that Justices should not use "foreign or international law" but they should "consider the ideas" they find in foreign and international law in their decisionmaking.

What I find confusing about this general position is that foreign and international law may well contain good ideas, but so do many novels, books of philosophical speculation, and the speeches of members of this committee. Despite the good ideas contained in such disparate sources, judges in my view should not rely on such material as a guide to legal interpretation. To put the question in perspective, undoubtedly the Bible, the Koran, and other religious texts have many good ideas, but we would be rightly concerned if judges used them as guidance for interpreting the Constitution, even if they stated they did not find such guidance binding.

I think many would even be uncomfortable if judges routinely cited religious texts for their good ideas. Such a practice would lessen our confidence that the judges were actually making decisions based on the legally relevant material. Depending on what text a judge cited and what she omitted, we might think she was biased in favor of one tradition at the expense of others. The first problem is present in the citation of international law and both problems are present in the citation of foreign law.

Of course, it may be that the good ideas contained in foreign or international law have an independent bearing on constitutional law, but, if so, one needs some formal justification for their relevance other than their presence in foreign and international law. Indeed, what disturbs me a little about Judge Sotomayor's speech is not only some of its reflections on the use of foreign and

international law, but its premise that this material may became a source to aid judicial decisionmaking, even although she correctly concludes that our jurisprudence does not endow this material with formal authority. The rule of law itself in my view is founded on the proposition that only material that is formally relevant should have weight in a judge's decisions. I recognize that some might think that Judge Sotomayor is not saying that foreign law and international law should have any weight, but simply suggesting that judges should be aware of it. There is some possible support for this unexceptionable view. Judge Sotomayor spends a good deal of the speech showing that international law and foreign law are generally not binding. In particular, she rightly praises the result in the Medellin v. Texas, which clearly holds the only the political branches can make international decisions binding on our land. I think this part of the speech is well done, and in particular, I appreciate her praise for the Supreme Court's excellent decision in Medellin, a decision which has been criticized by those who would like to permit judges to converge our own law to international decisions.

But in my view, the better interpretation of this speech rests on a distinction between her rejection of the proposition that international or foreign law can dictate the result or bind a court and her acceptance of the proposition that consideration of such law may have some weight in judicial decisionmaking, including interpreting the constitution.

I have several reasons for this construction of Judge Sotomayor's remarks. At one point she appears to suggest that such materials can "help us decide our issues." She also cites Justices Ginsburg's views on this matter favorably, and Justice Ginsburg has suggested that we should view foreign decisions as "basic denominators of common fairness between the governors and the governed." Finally and most importantly, she favorably mentions the Supreme Court's reliance on foreign law in Lawrence v. Texas--the case that in my view is the prime example of one in which the Court improperly gives weight to foreign law. Thus, I think the better interpretation of Judge Sotomayor's speech is that she would give weight to ideas of foreign and international law in at least some circumstances even while disclaiming that such material could formally bind the Court.

For reasons I have described I believe this approach misguided, because contemporary foreign and international legal material deserves no weight in American jurisprudence, unless the Constitution itself calls for such material to be given weight. If the material has no proper weight even citing it can lead to confusion, because such a citation make Supreme Court opinions less transparent. Indeed, citation to foreign or international law in this context is worse than citation to a novel, because law of any kind intrinsically seems to carry with it a patina of authority. Citizens then are left in doubt as what is actually doing the analytic work justifying the decision. Some have suggested that citing foreign or international law is like citing to a law review article. But there are differences. No one thinks that a law review article could have any intrinsic weight because it purports on its face to be just an opinion of an author without authority. Second, at least in most circumstances, a law review article cited offers reasoning directly about the provision in the United States Constitution at issue. It is thus natural to understand the citation as an acknowledgement of the author's work on the issue. That is not the case with a foreign or international legal opinion, because it is not addressed to a provision of the American constitution.

At one point, Judge Sotomayor justifies looking to foreign law on the theory that such consideration will encourage other nations to look at our law in making their own decisions. This justification may be called the "you scratch my back and I will scratch yours" justification for considering foreign law. I believe that this justification is plainly invalid. First, I am unaware of

any evidence that foreign nations are more likely to rely on our law if we rely on theirs. I am skeptical that such evidence will be forthcoming: other nations are likely to make their decisions about what materials to rely on in their national interest, not ours. Second, the President may want to signal his displeasure with another nation's regime and isolate it. Our highest Court's favorable invocation of the legal system of that regime may send the opposite signal, thus undermining the President's ability to speak with one voice on behalf of the nation. Finally, and most fundamentally, the Supreme Court simply has no authority to decide cases in a way that maximizes its influence overseas. The Supreme Court is many things, but not an organ of our foreign policy. The Court should confine itself to umpire our disputes and not act like a secretary state authorized to shade decisions or even formulate opinions to burnish the Court's reputation in foreign lands.

I want to close these written remarks by emphasizing that Judge Sotomayor may well have clarified her views in her testimony. I do not believe we should necessarily hold mistaken comments in speeches against a judicial nominee, particularly if he or she corrects them. Constitutional law is a complex enterprise in which men and women of good will are often mistaken. I know I have been on more than one occasion.

Once again many thanks for the opportunity to participate and I look forward to your questions.