

Transcript of Sonia Sotomayor, “How Federal Judges Look to International and Foreign Law Under Article VI of the U.S. Constitution,” Speech Before the American Civil Liberties Union of Puerto Rico (Apr. 28, 2009).

I always find it strange when people ask me, “How do American courts use foreign and international law in making their decisions?” And I pause and say, “We don't *use* foreign or international law. We *consider the ideas* that are *suggested* by international and foreign law.” That's a very different concept. And it's a concept that is misunderstood by many. And it's what creates the controversy that surrounds, 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's 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, *si te convence* [Spanish for “if it convinces you”], 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 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. Hang on, do you want to try to translate what I just said? [Aside to translator]. All right.

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 the law that a private citizen can rely upon. Now, foreign law, that's international law, treaties. Foreign law is 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 use, 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 contacts with. Is this a contract that really belongs in Puerto Rico or in Spain or in England,

or is it a contract that really is American and 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. policy, 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 of how to decide a case. So you end up with treaties. Most of the time, even though under Article Four [sic, referring to Article VI] 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 become law. And there is 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, 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'm 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 *Medellín* case<sup>1</sup>. 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 *Medellín*, 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 ground 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. It sort of 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 on. 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 court, 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 ICU [sic] said, 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

---

<sup>1</sup> Referring to *Medellín v. Texas*, 552 U.S. 491 (2008)

an aside because when I said what I said, there's a limit to even how much even Congress could tell us to accept a foreign decision. Medellín 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 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 foreign law to decide how to interpret the contract rights under the uniform, under the treaty for contracts. Similarly, California has used it in other contexts, so have 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 somebody to approve or 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 is validly taken, but I think I share more the ideas of Justice Ginsburg in thinking or in 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 US courts, but they can add to the store 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 Eighth 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, referring to *Lawrence v. Texas*, 539 U.S. 558], 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 where 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 and 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 better 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 of this,

I am trying to cut my presentation short. I had 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. Ideas no tienen fronteras. [Spanish for "ideas don't have borders."] 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 other, anyone has said to see if it has persuasive value. I'm going to stop now and let [him] speak. I don't know what his comments are going to be, but my suspicion is that in Puerto Rico, the use of international and foreign law is more extensive than in the U.S. courts, but I may be wrong.