

judges may be ruled by pragmatism or personal values, such as empathy.

Even with a sincere purpose of following the law, judges use very different methods for finding what the law requires. For example, some judges are far more likely to determine that the law is ambiguous and, therefore, requires the judge to fill in the gaps.

If the judge finds the law indeterminate, he or she may look to outside sources, such as international law, or to personal values about what is fair or rational. Pragmatic, flexible interpretation of the law allows significant room for individual assessments of what the law requires, as each judge will have his or her own conceptions about what is best.

If the law is really a series of perspectives, this suggests a very thin conception of law. Fidelity to law as a series of perspectives is something very different from fidelity to law as binding written commands of the legislature and Constitution. If law is simply one's own perspective, then fidelity to law is little more than fidelity to one's own views.

The Supreme Court gets a final word with regard to constitutional interpretation. A nominee's judicial philosophy is important, because on the Supreme Court, the only real restraint is self-restraint.

Our constitutional structure does not give judges political power. It gives them the judicial power to decide particular cases through an evenhanded application of the law; to fairly interpret statutes and the Constitution for all that they contain, not more, not less.

In our courts, the rule of law should prevail over the rule of what the judge thinks is best. Thank you for giving me the chance to testify today.

[The prepared testimony of Ms. Rao appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, Ms. Rao, for your testimony. Next, we have John McGinnis. John McGinnis is a professor of law at Northwestern University. Previously, he was a deputy assistant attorney general in the Department of Justice's Office of Legal Policy; a graduate of Harvard Law School, where he was the editor of the Harvard Law Review, something he has in common with President Obama. That is not true?

Mr. *McGinnis*. He was president of the Harvard Law Review.

Senator KLOBUCHAR. You were editor. Well, we could just pretend for today. Professor McGinnis also clerked on the U.S. Court of Appeals for the District of Columbia.

Thank you for being here, Professor McGinnis. We look forward to your testimony.

**STATEMENT OF JOHN MCGINNIS, PROFESSOR,
NORTHWESTERN UNIVERSITY SCHOOL OF LAW**

Mr. MCGINNIS. Thank you so much, Chairman Klobuchar, Ranking Member Sessions, for the opportunity to address you. At the outset, I want to make clear that, like my colleague, I am not taking any position on Judge Sotomayor's nomination, although I will say she has my respect and good wishes.

What this hearing affords is one of the rare opportunities for a constitutional conversation with the American people and where the correct constitutional principles can be identified.

Ultimately, the Constitution rests on the people's confidence in the Constitution and their fidelity to the principles. Only once the correct constitutional principles are identified can the Nation measure a nominee's adherence to those principles and so determine whether he or she should be confirmed.

My subject, the use of international and foreign law, is an issue of substantial importance, not least because the Supreme Court has come to rely on such material. For instance, in *Lawrence v. Texas*, the Supreme Court recently relied on the European Court of Human Rights as part of its decision to strike down a statute of one of our states.

In my view, such reliance distorts the meaning of our Constitution. It undermines domestic democracy and it threatens to alienate Americans from a document that is their common bond.

So what are the correct principles? I think they can be simply stated. They are that judges should avoid giving any weight to contemporary foreign or international law unless the language of the Constitution calls for it, and the language of the Constitution generally does not.

If the Constitution, as I believe, should be interpreted according to the meaning it had at the time it was ratified, it follows directly that the use of contemporary foreign or international law is not proper.

The problem with this use, in fact, is that it's contemporary, not simply the fact that it's foreign or international, because the meaning of the Constitution was fixed at the time it was ratified.

But even if one is a self-styled pragmatist about constitutional theory, the use of contemporary foreign or international law in constitutional jurisprudence is still objectionable.

Pragmatists believe the Constitution should only invalidate our laws if they have bad consequences. But a conflict between our law and foreign law is not appropriately used to create any doubt about the beneficence of our own law.

Foreign law is formulated to be good for that foreign nation, not for ours. Indeed, a proposition of foreign law is really only the tip of an iceberg of some complex set of social norms in other nations.

But since the United Nations doesn't share all those norms, importing that single legal proposition into our nation can have very bad consequences for us. International law differs from foreign law, because international at least purports to have some kind of universality, which foreign law does not.

But raw international law also lacks any democratic pedigree and can cast doubt on our democratically made law. Indeed, international law has multiple democratic defects. Totalitarian nations have participated in its fabrication. Very unrepresentative groups, like law professors, still shape its form.

It's also hardly transparent. American citizens have enough trouble trying to figure out what goes on in hearings like this one, let alone in diplomatic meetings in Geneva.

As I read Judge Sotomayor's speech on this issue, her position depends on propositions that seem, to me, in some tension. Judge

Sotomayor stated that justices should not use foreign or international law, but they should consider the ideas they find in such materials in their decision-making.

I understand, at this hearing, Judge Sotomayor disavowed the use of such materials to have any influence on jurisprudence, and I welcome that disavowal. What she left unexplained, to my satisfaction at least, however, is her view in the speech that such materials can help us decide our issues; her praise for the use of such law in *Lawrence v. Texas*, which expressly relied on that European human rights decision; and, perhaps most puzzling of all, her endorsement and her praise for Justice Ginsberg's view when it's well known that Justice Ginsberg, in contrast with, say, Justice Scalia, believes that such materials are relevant to decision-making.

Indeed, Justice Ginsberg says that they're nothing less than the basic denominators of fairness between the Governors and the governed.

Foreign and international law may well contain good ideas, as Justice Sotomayor suggested, but so many other sources that have no weight and should not, I think, routinely be cited as authority.

To put the question in perspective, undoubtedly, the Bible and the Quran have many legal ideas that many people think are good, but we would be rightly concerned if judges used them as guidance for interpreting the Constitution or even routinely cited them.

Depending on what text the judge cited and what she omitted, we might think she was biased in favor of one tradition at the expense of others.

In my view, the rule of law itself ultimately is founded on the proposition that only material that is formally relevant should have weight in a judge's decision, and the way a judge can demonstrate adherence to the rule of law in this context is extremely simple—simply refrain from appealing to the authority of foreign or international law in her opinion.

Thank you very much.

[The prepared testimony of Mr. McGinnis appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, Professor McGinnis. Last, but not least, we have Professor Rosenkranz. Nicholas Quinn Rosenkranz is an associate professor at Georgetown University Law Center. After graduating from Yale Law School, he clerked for Judge Frank Easterbrook on the U.S. court of appeals for the seventh circuit and for Justice Anthony Kennedy on the U.S. Supreme Court. He then served as an attorney advisor at the Office of Legal Counsel in the United States Department of Justice.

You should know, Mr. Rosenkranz, that Judge Easterbrook was my professor at law school and I know that must have been kind of a tough clerkship. I am sure you had to work very hard. So we look forward to hearing your testimony. Thank you.

**STATEMENT OF NICHOLAS QUINN ROSENKRANZ, PROFESSOR,
GEORGETOWN UNIVERSITY LAW CENTER**

Mr. ROSENKRANZ. Madam Chair, thank you. Ranking Member Sessions, members of the Committee, I thank you all for the opportunity to testify at this momentous hearing.