

Answers of John O. McGinnis to questions from Senator Hatch

1. *Do you think Justice Sotomayor's testimony on foreign and international law is consistent with her speech to the ACLU?*

I find it difficult to square Judge Sotomayor's denial that foreign or international law should have any influence on constitutional law with her speech to the ACLU. First, it is well known that there is a debate among the Justices on this subject. Justices Ginsburg and Breyer are strong proponents of its use. Justices Scalia and Thomas are strong detractors. Judge Sotomayor expressly endorsed Justice Ginsburg's view over that of Justices Scalia and Thomas. She conceded that Justices Scalia and Thomas had one good point—the danger of selective use. But this is objection not to the use of foreign and international law in Supreme Court opinions, only to selective use. Second, Judge Sotomayor seems to endorse the use of foreign law in *Lawrence v. Texas*, the paradigm case for relying on foreign law. As I suggested at greater length in my testimony, the best interpretation of her speech is that she thinks that foreign law may have some influence, but that it cannot dictate results. That is the position of Justices Breyer and Ginsburg, in my view.

It is possible, of course, that Judge Sotomayor was not very familiar with this debate and did not recognize that she was agreeing with those who held the opposite position from what she believed.

2. *What is the difference between the approach to foreign law that Justices Thomas and Scalia take and the approach that Justice Ginsburg takes? Which view is more consistent with Founding principles? Which view best preserves American sovereignty?*

I believe Justice Scalia and Thomas have the far better view. Justices Scalia and Thomas believe that the meaning of the Constitution is fixed at the time it was ratified. It follows directly that contemporary foreign and international law has no relevance.

I am not sure how to characterize Justice Ginsburg's jurisprudential methods and that is part of the problem with them. She appears to sometimes consider consequences and the need for social change in construing the Constitution. Looking at foreign or international law may seem consistent with her view, because she believes that international law and foreign law may encapsulate social changes that are going on and thus help American constitutional law reach results with better consequences. The difficulty with relying on foreign and international law, however, is that there is no reason to believe it is likely to have better consequences for the United States than our own democratic system or be better than that system at capturing social change. (I discuss this point at some

length in my testimony). Even on the premises of her own jurisprudence, it is thus a mistake to rely on foreign or international law in constitutional interpretation.

The views of Justices Scalia and Thomas far better preserve the sovereignty of the United States, because under their view foreign and international cannot influence the interpretation of our founding document. In contrast, the views of Justice Ginsburg would permit citizens in other nations to encroach on our sovereignty, at least at the margin, because their law and legal decisions might influence the interpretation of our own Constitution.

*3. Judge Sotomayor says that her judicial philosophy is "fidelity to the law." What, if anything, does that tell us about her judicial philosophy and what kind of Justice she would be?*

I am not sure the phrase fidelity to law means a great deal unless one makes clear how one goes about legal analysis. After all, no nominee to the Court would say that she was going to be unfaithful to law! As I suggested in answer to question 2, Justices Scalia and Justice Thomas, on the one hand, and Justice Ginsburg on the other have entirely different approaches to law. Unless a judge is willing to tell us the nature of his or her jurisprudential methods, it is difficult to give a lot of meaning to the term "fidelity to law."

Indeed, what disturbs me a little about Judge Sotomayor's speech on foreign and international law is its apparent premise that foreign and international law may become a source to aid judicial decisionmaking, although she correctly concludes that our jurisprudence does not endow this material with formal authority. In my view, fidelity to law means at minimum that only material that is formally endowed with authority should have any weight whatsoever in a judge's decisions.