



## GEORGETOWN LAW

Nicholas Quinn Rosenkranz  
Associate Professor of Law

July 27, 2009

The Honorable Patrick Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
433 Russell Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you again for the opportunity to testify at the Sotomayor confirmation hearing before the Judiciary Committee on July 16, 2009. I write to respond to the written follow-up questions of Ranking Member Sessions and Senator Hatch, and to answer a question that Senator Klobuchar asked during the hearing. I have reproduced the Senators' questions below in italics, and after each question I have written my answer.

**RANKING MEMBER SESSIONS' QUESTIONS**

***RANKING MEMBER SESSIONS QUESTION #1:** Judge Sotomayor, in her hearing testimony, depicted the use of foreign law as akin to using a dictionary because both are texts that are extrinsic to the Constitution. What harms arise from the use of foreign law that distinguish this use from the use of dictionaries? What about using foreign law versus using law review articles?*

**ANSWER:** There is nothing wrong with consulting extrinsic sources as aids to interpretation of the Constitution. But it is essential to understand the fundamental project of constitutional interpretation before evaluating precisely *which* extrinsic sources will be useful to that project. And conversely, the extrinsic sources chosen by a judge can tell one a great deal about that judge's theory of constitutional interpretation.

If one is trying to determine the meaning of a 220-year-old text, it is easy to see how it might be useful to consult with, for example, an equally old dictionary, to understand how words were used at the time.<sup>1</sup> Likewise, if a scholar has written a careful law review

<sup>1</sup> See, e.g., *District of Columbia v. Heller*, 128 S.Ct. 2783, 2828 (2008) (citing S. JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1773)); *United States v. Lopez*, 514 U.S. 549, 585-87 (1995) (Thomas, J., concurring) (citing S. JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1773); N. BALEY, *AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* (26th ed. 1789); T. SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (6th ed. 1796)); *Morrison v. Olson*, 487 U.S. 654, 719

article about the original public meaning of a particular constitutional provision,<sup>2</sup> it might well be useful to consult such an article. (Far be it from me to suggest that judges should not consult law review articles!) But foreign law is an entirely different matter. As I explained in my written statement, if one is trying to discern the meaning of a particular 220-year-old text, “it is mysterious why one would need to study other legal documents, written in other languages, for other purposes, in other political circumstances, hundreds of years later and thousands of miles away.”<sup>3</sup> In short, the distinction is one of relevance. Old dictionaries and careful scholarship may well be useful in determining the original public meaning of the United States Constitution. But contemporary foreign law will almost never be relevant to that project.

And so, if a judge appears to rely on contemporary foreign law in a constitutional case, the suspicion arises that the judge is engaged in an entirely different project. Since, as a matter of logic, contemporary foreign law cannot help discern the original public meaning of the U.S. Constitution, it would seem that such a judge is not trying to *discern* the meaning at all; it may seem, rather, that the judge is engaged in the quite different project of *updating* the meaning of the Constitution, to bring it in line with (the judge’s perception of) world opinion. And that is not the proper role of a federal judge.

**RANKING MEMBER SESSIONS QUESTION #2:** *Is Judge Sotomayor’s attempt to distinguish between “using” foreign law, which she says is forbidden, and “considering” the ideas from foreign law, which she says is permitted, and even “commanded” by our legal system an “unintelligible distinction” as one commentator has said?*

**ANSWER:** The distinction is intelligible only if one posits an idiosyncratically narrow definition of “using” foreign law, which is what Judge Sotomayor seems to have in mind. Her premise seems to be that a court “uses” foreign law only if the court treats the foreign law as binding or outcome-determinative.<sup>4</sup> Thus, when Judge Sotomayor flatly testified

(1988) (Scalia, J., dissenting) (citing S. JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (6th ed. 1785)); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113–14 (2001).

<sup>2</sup> See, e.g., Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 HARV. L. REV. 1867 (2005).

<sup>3</sup> *Hearing Before the Sen. Judiciary Comm. on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (2009), available at *Sen. Patrick J. Leahy Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court* (July 16, 2009) (CQ Transcriptions) [hereinafter *July 16 Hearings*] (testimony of Nicholas Quinn Rosenkranz, Associate Professor, Georgetown University Law Center).

<sup>4</sup> See *Hearing Before the Sen. Judiciary Comm. on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (2009), available at *Responses of Judge Sonia Sotomayor to the Written Questions of Senator Jeff Sessions*,

<http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/QFRsSessions.pdf> [hereinafter *Sessions Written Questions*] (“Reading the decisions of foreign courts for ideas, however, does not constitute ‘using’ those decisions to decide cases.”); Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit, *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), available at *NEW YORK TIMES*, *Speech to the A.C.L.U. of Puerto Rico*, <http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html> (last visited Jul. 8, 2009) [hereinafter *ACLU Speech*] (“[W]e don’t use foreign or international law. We consider the ideas that are suggested by international and foreign law. That’s a very different

that foreign law should not be “used” in constitutional interpretation,<sup>5</sup> she apparently meant to affirm only that foreign law is not binding and authoritative precedent in United States courts—an utterly uncontroversial proposition.

At the same time, Judge Sotomayor seems to say that judges can and should consider the ideas suggested by foreign law.<sup>6</sup> This is an intelligible distinction but not a reassuring one. Considering foreign ideas may sound innocuous: why shouldn’t one consider any and all good ideas, regardless of their source? But, again, the question is one of relevance. If one is genuinely engaged in the project of discerning the meaning of a 220-year-old American text like the U.S. Constitution, there are almost certainly no ideas of any relevance to be found in foreign legal texts written centuries later for entirely different purposes. Good ideas indeed know no borders,<sup>7</sup> and they may be found in a vast array of sources, foreign and domestic. But good ideas *of relevance to constitutional interpretation* are much harder to find—and they are exceedingly unlikely to be found in contemporary foreign law.

**RANKING MEMBER SESSIONS QUESTION #3:** *Judge Sotomayor spoke favorably of French judicial decision making in a speech, Judicial Independence: What It Takes to Maintain It, stating: “In terms of actual decision-making, judicial panels in France issue only one decision. Unlike courts in the United States, dissenting opinions are very rare. With a single decision, there is less pressure on individual judges and less fear of reprisal for unpopular decisions.” Judge Sonia Sotomayor & Jennifer Peng, Judicial Independence: What It Takes to Maintain It, Speech Given at the Colegio de Abogados de Puerto Rico Asamblea Annual 1999, 12–13 (Sept. 11, 1999) (“Bar Association of Puerto Rico Annual Assembly”), available at <http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Question-12-d-No-33-9-11-99-Colegio-de-Abogados-de-Puerto.pdf>. What does Judge Sotomayor’s favorable reference to this French practice say about her understanding of the role of the judge in the American legal system?*

**ANSWER:** This brief observation about French judicial practice reveals little about Judge Sotomayor’s view of the American judicial role. In the speech, Judge Sotomayor was careful to note: “[N]ot every method is easily transplanted, nor will every method

---

concept . . .”); see also *infra* text accompanying notes 12–17.

<sup>5</sup> See *Hearing Before the Sen. Judiciary Comm. on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (2009), available at *Sen. Patrick J. Leahy Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court* (July 14, 2009) (CQ Transcriptions) [hereinafter *July 14 Hearings*] (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit) (“American law does not permit the use of foreign law or international law to interpret the Constitution. That’s a given.”).

<sup>6</sup> See Sotomayor, *ACLU Speech*, *supra* note 4 (“[I]deas 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 . . . then you are going to adopt its reasoning.”).

<sup>7</sup> See *id.* (“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.”).

necessarily work in a different judicial system. Thus, we must always keep in mind the underlying structure and needs of each culture and the differences among them.”<sup>8</sup> She then proceeded to highlight several structural features of the French system, which distinguish it from the American system.<sup>9</sup> And only then did she make the observation quoted in the Question above. Under these circumstances, the observation can tell us little about her view of the American judicial role.

More generally, there is nothing inherently objectionable about comparative law as a scholarly inquiry, or about a descriptive survey of judicial independence around the globe. The objection arises when one brings such an inquiry to bear on the project of interpreting the U.S. Constitution. For *that* project, it is exceedingly difficult to see the relevance of contemporary foreign law.

#### **SENATOR HATCH'S QUESTIONS**

**SENATOR HATCH QUESTION #1:** *Was what Judge Sotomayor said at the confirmation hearing about foreign law consistent with her speech to the ACLU of Puerto Rico?*

**ANSWER:** There does seem to be some tension between Judge Sotomayor’s April 28 speech and her testimony last week. In the speech, Judge Sotomayor seemed to endorse the idea that foreign law could be relevant and helpful in the interpretation of the United States Constitution.<sup>10</sup> In her testimony, by contrast, she seemed to disavow this sort of use of foreign law.<sup>11</sup>

The speech and the testimony can be reconciled only if one adopts an idiosyncratically narrow definition of what it means to “use” foreign law, which is what Judge Sotomayor seems to have in mind. As she put it, “we don’t *use* foreign or international law,”<sup>12</sup> but “[w]e consider the ideas that are suggested by international and foreign law.”<sup>13</sup> Likewise,

<sup>8</sup> Judge Sonia Sotomayor & Jennifer Peng, *Judicial Independence: What It Takes to Maintain It*, Speech Before the Colegio de Abogados de Puerto Rico Asamblea Annual 1999, 11 (Sept. 11, 1999) (“Bar Association of Puerto Rico Annual Assembly”), available at <http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Question-12-d-No-33-9-11-99-Colegio-de-Abogados-de-Puerto.pdf>

<sup>9</sup> See *id.* at 11–13.

<sup>10</sup> Sotomayor, ACLU Speech, *supra* note 4 (“In both those cases [*Roper v. Simmons* and *Lawrence v. Texas*], 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.”)

<sup>11</sup> See *July 11 Hearings*, *supra* note 5 (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit) (“American law does not permit the use of foreign law or international law to interpret the Constitution. That’s a given.”).

<sup>12</sup> Sotomayor, ACLU Speech, *supra* note 4 (emphasis added)

<sup>13</sup> *Id.*

later in the speech, she discussed the citation of foreign law in two recent and controversial Supreme Court cases, saying: “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.”<sup>14</sup> Likewise, in her testimony, Judge Sotomayor said: “[T]here’s a public misunderstanding of the word ‘use.’ And what I was talking about, one doesn’t use those things in the sense of coming to a legal conclusion in a case.”<sup>15</sup> And: “people misunderstand what the word ‘use’ means. And I noted that use appears to be—to people to mean if you cite a foreign decision, that’s means it’s controlling an outcome or that you are using it to control an outcome. And I said, no.”<sup>16</sup> Finally, in her written answers to the Committee’s follow-up questions, Judge Sotomayor wrote: “In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute ‘using’ those decisions to decide cases.”<sup>17</sup>

Judge Sotomayor’s premise seems to be that a court only “uses” foreign law if the court treats the foreign law as binding or outcome-determinative. Thus, when she testified that she would not “use” foreign law to interpret the U.S. Constitution,<sup>18</sup> she may have meant to affirm only that she would not treat it as binding or outcome-determinative—but that she might still use it to inform her analysis, as she seemed to suggest in her speech. If that is what she means, then the speech and the testimony may be reconciled, but the reconciled position would still be troubling, for reasons discussed in the Answers to Ranking Member Sessions’ Questions #1 and #2, above.

***SENATOR HATCH QUESTION #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?*

***ANSWER:*** Justice Scalia and Justice Thomas take the position that foreign law is generally irrelevant to the interpretation of the United States Constitution.<sup>19</sup> Justice

<sup>14</sup> *Id.*

<sup>15</sup> *Hearing Before the Sen. Judiciary Comm. on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (2009), available at *Sen. Patrick J. Leahy Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court* (July 15, 2009) (CQ Transcriptions) [hereinafter *July 15 Hearings*] (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit).

<sup>16</sup> *July 16 Hearings*, *supra* note 3 (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit).

<sup>17</sup> *Sessions Written Questions*, *supra* note 4.

<sup>18</sup> *See July 14 Hearings*, *supra* note 5 (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit) (“American law does not permit the use of foreign law or international law to interpret the Constitution. That’s a given.”).

<sup>19</sup> *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989) (“We emphasize that it is *American* conceptions of decency that are dispositive [to the Eighth Amendment inquiry], rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant.”); Foster

Ginsburg, by contrast, takes the position that foreign law may be relevant to the interpretation of the United States Constitution.<sup>20</sup> As I expressed in my written testimony,<sup>21</sup> I believe that the position of Justice Scalia and Justice Thomas (and Justice Alito<sup>22</sup> and Chief Justice Roberts<sup>23</sup>) is more consistent with Founding principles and better preserves American sovereignty. My arguments are set forth in greater detail in

---

v. Florida, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari) (“While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”); Stephen Breyer & Antonin Scalia, Assoc. Justices, U.S. Supreme Court, Debate at American University: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at <http://www.freerepublic.com/focus/f-news/1352357/posts>).

<sup>20</sup> See Justice Ruth Bader Ginsburg, U.S. Supreme Court, The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the Constitutional Court of South Africa (Feb. 7, 2006), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_02-07b-06.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html).

<sup>21</sup> July 16 Hearings, *supra* note 3 (testimony of Nicholas Quinn Rosenkranz, Associate Professor, Georgetown University Law Center).

<sup>22</sup> See *Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006).

I don’t think that we should look to foreign law to interpret our own Constitution .... I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world .... The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time. The framers did not want Americans to have the rights of people in France or the rights of people in Russia or any of the other countries on the continent of Europe at the time .... They wanted them to have the rights of Americans. And I think we should interpret our Constitution—we should interpret our Constitution. And I don’t think it’s appropriate to look to foreign law. I think that it presents a host of practical problems that have been pointed out. You have to decide which countries you are going to survey. And then it’s often difficult to understand exactly what you are to make of foreign court decisions. All countries don’t set up their court systems the same way. Foreign courts may have greater authority than the courts of the United States. They may be given a policy-making role. And, therefore, it would be more appropriate for them to weigh in on policy issues. When our Constitution was being debated, there was a serious proposal to have members of the judiciary sit on a council of revision, where they would have a policy-making role before legislation was passed. And other countries can set up their judiciary in that way. So you’d have to understand the jurisdiction and the authority of the foreign courts. And then sometimes it’s misleading to look to just one narrow provision of foreign law without considering the larger body of law in which it’s located. If you focus too narrowly on that, you may distort the big picture. So for all those reasons, I just don’t think that’s a useful thing to do.

*Id.*

<sup>23</sup> See *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005).

If we’re relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he’s playing a role in shaping the law that binds the people in this country .... The other part of it that would concern me is that, relying on foreign precedent doesn’t confine judges .... Foreign law, you can find anything you want. If you don’t find it in the decisions of France or Italy, it’s in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They’re there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent—because they’re finding precedent in foreign law—and use that to determine the meaning of the Constitution. And I think that’s a misuse of precedent, not a correct use of precedent.

*Id.*

two recent law review articles,<sup>24</sup> which are enclosed for your convenience and for the Congressional Record.

**SENATOR HATCH QUESTION #3:** *Judge Sotomayor has said that foreign law does not bind the courts, but it is possible to look to foreign law for ideas. Does any judge believe that they are bound by foreign law when deciding a case? Why is it wrong to look to foreign law for ideas?*

**ANSWER:** Judge Sotomayor rightly affirms that foreign law is not binding and authoritative precedent in United States courts,<sup>25</sup> a proposition that, to my knowledge, all United States judges accept. However, Judge Sotomayor seems to embrace the idea that foreign law may be a useful source of “good ideas” when interpreting the U.S. Constitution.<sup>26</sup> It may sound innocuous to consult foreign law for “good ideas”—as Judge Sotomayor says, “ideas have no boundaries,”<sup>27</sup> and good ideas may be found in any number of sources, foreign and domestic. The issue, though, is one of relevance. As explained above, in the Answers to Ranking Member Sessions’ Questions #1 and #2, it is very difficult to understand how the ideas reflected in contemporary foreign law—however good or bad—could ever be *relevant* to the interpretation of our distinctly American Constitution.

**SENATOR KLOBUCHAR’S QUESTION**

At the end of the hearing of my panel, Senator Klobuchar stated that Judge Sotomayor had never used foreign law to interpret the U.S. Constitution or U.S. statutes. I contradicted her on the latter point, saying that I thought Judge Sotomayor had used foreign law to interpret a U.S. statute. Senator Klobuchar asked that I follow up on this exchange and to clarify this factual question. Upon further research, I conclude that we were both, in a sense, correct.

The case that I had in mind was *Croll v. Croll*.<sup>28</sup> This case is a somewhat complicated example, however, because it concerned a treaty<sup>29</sup> as well as implementing legislation.<sup>30</sup>

<sup>24</sup> See Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J. L. & PUB. POL’Y 475, 475–79 (2009); Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281 (2007).

<sup>25</sup> See Sotomayor, ACLU Speech, *supra* note 4 (“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 can add to the story [sic] of knowledge relevant to the solution of a question. And she’s right.”); *July 15 Hearings*, *supra* note 15 (“[My Speech] repeatedly underscored that foreign law could not be used as a holding, as precedent, or to interpret the Constitution or the statutes.”).

<sup>26</sup> See Sotomayor, ACLU Speech, *supra* note 4 (“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 . . .”).

<sup>27</sup> *Id.*

<sup>28</sup> 229 F.3d 133 (2d Cir. 2000).

<sup>29</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1345 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (1986).

Judge Sotomayor used foreign law to help interpret the treaty. But, at least arguably, the implementing legislation, and not the treaty, constituted the underlying source of law in the case. Some treaties are non-self-executing, and so do not create domestic rules of law of their own force;<sup>31</sup> these treaties require implementing legislation to create domestic law—and, in such cases, it is the legislation, rather than the treaty, that is the true source of the domestic law.<sup>32</sup> The treaty at issue in *Croll* is probably non-self-executing,<sup>33</sup> or at least the Second Circuit appeared to view it that way, carefully citing not just the treaty but also the implementing legislation.<sup>34</sup> And, if so, it was really the implementing legislation, rather than the treaty itself, that was the source of domestic law in the case. On this reading of the case, Judge Sotomayor used foreign law to interpret the treaty—and, implicitly, used the treaty to interpret the statute. Thus, in this sense, my statement at the hearing was correct: Judge Sotomayor did use foreign law to interpret a U.S. statute—even if only *indirectly*, via a treaty.

Admittedly, though, this characterization of *Croll* is debatable. (Moreover, of course, there is nothing inherently objectionable about using foreign law to interpret a treaty and then using the treaty to interpret its implementing legislation; my testimony concerned the use of foreign law to interpret the U.S. Constitution.) In any event, I know of no case in which Judge Sotomayor used foreign law *directly* to interpret a U.S. statute or the U.S.

<sup>30</sup> International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 *et seq.* (1995).

<sup>31</sup> See *Medellin v. Texas*, 128 S.Ct. 1346, 1356 (2008); *Foster v. Neilson*, 27 U.S. 253, 254 (1829); Restatement (Third) of Foreign Relations § 111 (1987); Rosenkranz, *supra* note 2, at 1877-79 (2005); Sotomayor, ACLU Speech, *supra* note 4.

<sup>32</sup> See Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 157 (1972) (“[I]f a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively ‘law of the land.’”);

<sup>33</sup> *Cantor v. Cohen*, 442 F.3d 196, 207 n.1 (4th Cir. 2006) (Traxler, J., dissenting) (“[The language in Art. 2 of the Hague Convention] does not evidence an intent that the agreement be self-executing; congressional action was thus necessary.”); Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3339-40 (2009) (“[T]he United States did not officially make the Child Abduction Convention effective as a matter of domestic law until Congress enacted ICARA on April 29, 1988. Implementing legislation was required because the Child Abduction Convention was not self-executing in the United States. With its passage, ICARA incorporated by reference the Child Abduction Convention and detailed procedures for how the Convention would be implemented in the United States.”) (internal citations omitted); Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of The Special Commission to Review the Operation of the Hague Convention on The Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 253 (“[T]he [Hague] Convention [on the Civil Aspects of International Child Abduction] is not self-executing in the United States . . . .”); see Petition for Certiorari, Brief for United States as Amicus Curiae at 4, *Abbott v. Abbott*, No. 08-327 (May 27, 2009) (“In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, which establishes procedures for requesting return of a child abducted to the United States.”); cf. *Medellin*, 128 S.Ct. at 1369 (“If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented ‘in mak[ing]’ the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote consistent with all other constitutional restraints. Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that ‘[t]he power to make the necessary laws is in Congress; the power to execute in the President.’”) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006)) (internal citations omitted).

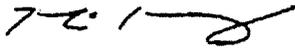
<sup>34</sup> See *Croll*, 229 F.3d at 134 (majority); *id.* at 144 (Sotomayor, J., dissenting).

623

Constitution, and so, with that possible qualification, Senator Klobuchar was correct on this point.

I hope that these answers are responsive and useful. Please let me know if the Committee has any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "N. Rosenkranz", written in a cursive style.

Nicholas Quinn Rosenkranz