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**United States Senate Judiciary Committee Hearing:**

**The Nomination of Sonia Sotomayor  
to be an Associate Justice of the Supreme Court of the United States**

**July 15, 2009**

**Hart Senate Office Building  
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**Prepared Statement  
of**

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Mr. Chairman, Ranking Member Sessions, Members of the Committee: I thank you for the opportunity to testify at this momentous Hearing. I have been asked to comment on the use of contemporary foreign and international legal materials in the interpretation of the United States Constitution. In a recent speech, Judge Sotomayor seemed to embrace and defend this approach.<sup>1</sup> I believe that, in this, she may be misguided. I have written about this issue in the *Stanford Law Review*<sup>2</sup> and the *Harvard Journal of Law & Public Policy*,<sup>3</sup> and I will be drawing substantially on those articles in my remarks today. I also had the honor of testifying on this issue before the House Judiciary Subcommittee on the Constitution, and I commend the record of that Hearing to the Committee as well.<sup>4</sup>

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<sup>1</sup> See Sonia Sotomayor, Judge, United States 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 *Sotomayor Speech*]. Oddly, Judge Sotomayor seemed to say exactly the opposite in testimony on Tuesday. See M. Edward Whelan III, *Sotomayor's Confusion on Use of Foreign Law*, BENCH MEMOS ON NATIONAL REVIEW ONLINE, Jul. 14, 2009, <http://bench.nationalreview.com/post/?q=NmU3NzQ3N2UzZmJmM2NGFjNDkzYWU5MGY1YzYxODBhNkYyWY=WHELAN>. I shall address my testimony to the position set forth in her April 28 speech and leave it to the Committee to reconcile her more recent statements.

<sup>2</sup> See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281 (2007).

<sup>3</sup> See Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J. L. & PUB. POL'Y 475, 475-79 (2009).

<sup>4</sup> See *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30 (2005) (statement of Nicholas Quinn Rosenkranz, Associate Professor, Georgetown University Law Center).

This issue has come to recent prominence because in two of the most high-profile and hot-button cases of the past decade, the Supreme Court relied on contemporary foreign law to help determine the meaning of the United States Constitution.<sup>5</sup> These sorts of foreign citations are quite controversial, and four current Supreme Court Justices have expressly objected to them. Justice Scalia<sup>6</sup> and Justice Thomas<sup>7</sup> have repeatedly explained why it is inappropriate to rely on foreign law when interpreting the U.S. Constitution. And, in hearings before this Committee, the two most recently confirmed Justices, Justice Alito<sup>8</sup> and Chief Justice Roberts,<sup>9</sup> also expressly repudiated such

<sup>5</sup> See *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *Lawrence v. Texas*, 539 U.S. 558, 568-74 (2003).

<sup>6</sup> See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989); Stephen Breyer & Antonin Scalia, Assoc. Justices, U.S. Supreme Court, Debate at American University: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (Jan. 13, 2005) (transcript available at <http://www.freerepublic.com/focus/f-news/1352357/posts>).

<sup>7</sup> See, e.g., *Foster 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.”).

<sup>8</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>9</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—

citations. Indeed, Congress itself reacted quite strongly to these citations, holding several hearings on this topic<sup>10</sup>—and even going so far as to consider legislation disapproving such reliance on foreign law.<sup>11</sup> Dozens of Representatives and several Senators have endorsed such legislation.

Judge Sotomayor, however, has said that the position of these Justices is based on a “misunderstanding.”<sup>12</sup> And likewise, according to Judge Sotomayor, those like the many Senators and Congressmen who would forbid this sort of reliance also labor under a “fundamental misunderstanding.”<sup>13</sup> Most tellingly, in the same speech, Judge Sotomayor cited with approval the two most controversial instances in which the Supreme Court used foreign law to interpret the U.S. Constitution.<sup>14</sup>

I believe that contemporary foreign law generally has no place in the interpretation of the United States Constitution. Rather than reiterate the trenchant, pragmatic arguments of Professor McGinnis, I will explain why reliance on foreign law

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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.*

<sup>10</sup> See, e.g., *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. Res. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005); *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004).

<sup>11</sup> See H.R. Res. 97, 109th Cong. (2005); Constitution Restoration Act of 2004, S. 2323, 108th Cong.; H.R. Res. 568, 108th Cong. (2004); Constitution Restoration Act of 2004, S. 2082, 108th Cong.; Constitution Restoration Act of 2004, H.R. 3799, 108th Cong.

<sup>12</sup> See *Sotomayor Speech*, *supra* note 1 (“But this use [of foreign law] 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 Supreme Court justices. Both Justice Scalia and Justice Thomas have written extensively criticizing the use of foreign and international law to [sic] in Supreme Court decisions.”).

<sup>13</sup> See *id.* (“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.”).

<sup>14</sup> See *id.*

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 into 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] 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 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.

*Id.*

to interpret the U.S. Constitution is in tension with our constitutional text and structure, and with fundamental notions of democratic self-governance. I should emphasize that I take no position on the ultimate question of whether Judge Sotomayor should be confirmed, and I offer my comments with the greatest respect. But I am concerned that her recent speech on this issue may betray a misconception of the judicial role. For the balance of my testimony, I shall explain why.

In this room, and at the Supreme Court, and in law schools, and throughout the nation, we speak of our Constitution in almost metaphysical terms. In the United States, we revere our Constitution. And well we should; it is the single greatest charter of government in history. But it is worth remembering exactly what the Constitution is. *The Constitution is a text.* It is comprised of words on parchment. A copy fits comfortably in an inside pocket, but copies don't quite do it justice. The original is just down the street at the National Archives, and it is something to see. It is sealed in a titanium case filled with argon gas, and at night it is kept in an underground vault.<sup>15</sup> But during the day, anyone can go see it, and read it. The parchment is in shockingly good condition. And the words are still clearly visible.

The most important job of a Supreme Court justice is to discern what the words on that parchment mean. The Constitution includes words that some people wish it did not, like "the right of the people to keep and bear arms."<sup>16</sup> And it omits words that some people wish it included, like "privacy." But this is not the proper concern of a Justice. The job of the Court is not to *instill* the text with meaning. It is not to declare what the text *should* mean. It is not to excise some words. It is not to add others. It is to *discern*, using standard tools of legal interpretation, the meaning of the words on that piece of parchment.

Now language evolves, of course, but that evolution does not alter the interpretive project. A word in the Constitution may have taken on a new meaning in the centuries since the Constitution was ratified, but evolution in language does not effect amendment of law. This is why when the Court looks to dictionaries to interpret the Constitution, it looks not to contemporary dictionaries but to dictionaries from the Founding era.<sup>17</sup> And this is why, for example, no one contends that the constitutional phrase "domestic Violence"<sup>18</sup> should be understood in its modern sense, when that sense was entirely

<sup>15</sup> See NICHOLAS A. BASBANES, A SPLENDOR OF LETTERS: THE PERMANENCE OF BOOKS IN AN IMPERMANENT WORLD 6 (2003).

<sup>16</sup> U.S. CONST. amend. II.

<sup>17</sup> See *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. Bailey, *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 (1988) (Scalia, J., dissenting) (citing S. Johnson, *Dictionary of the English Language* (6th ed. 1785)). See also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113-14 (2001).

<sup>18</sup> U.S. CONST. art. IV § 4.

unknown at the Framing.<sup>19</sup> The project of constitutional law is to discern what the text of the U.S. Constitution—those words on that parchment down the street—meant to the American people at the time of ratification.<sup>20</sup>

In many cases, the text is clear. For many questions, you don't need a lawyer, let alone a constitutional scholar. All you need to do is walk down the street and read the words. But sometimes the meaning of those words is not perfectly clear. Merely reading the parchment may not suffice. One might need to turn to other sources to help understand the meaning of the words. One might, for example, turn to a dictionary from the founding era. One might turn to the Federalist Papers, or to early Supreme Court cases, to see what early and authoritative interpreters thought that those words meant. One might even turn to British legal sources, like the Magna Carta, or Blackstone, or Coke, because those sources were perhaps in the minds of the ratifiers at the time.

But what the Supreme Court has done in two controversial cases is to rely on *contemporary* foreign law in determining the meaning of the United States Constitution. This is the practice that Judge Sotomayor seemed to endorse in her recent speech.<sup>21</sup> And it is this practice that is of great concern, because the relevance of these sources is questionable at best. When one is trying to figure out the meaning of the document down the street at the Archives, 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. To put the point most simply, as a general matter, *it is simply unfathomable how the law of, say, France in 2009 could help one discern the public meaning of the United States Constitution in 1789.*

So far, all this must seem like common sense. But it may come as a surprise to the American people to learn that not everyone accepts these premises. Some judges, and many law professors, do not believe that the Court should try to discern the original public meaning of the words on the parchment down the street. They seem to believe,

<sup>19</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-14, at 52-53 (3d ed. 2000); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?* 877 (U of St. Thomas Legal Studies Research Paper No. 08-36, 2009), available at <http://ssrn.com/abstract=1301706>.

<sup>20</sup> See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 621 (1999) ("In constitutional interpretation, the shift is from the original intentions or will of the lawmakers, to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."); Frank H. Easterbook, *Abstraction and Authority*, 59 *U. CHI. L. REV.* 349, 359 (1992) ("Thus the question becomes the level of generality the ratifiers and other sophisticated political actors at the time would have imputed to the text."); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *GEO. WASH. L. REV.* 1127, 1136 (1998) ("Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.") See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* ch. 4 (2004); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law and Legal Theory Research Papers, Series No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

<sup>21</sup> See *Sotomayor Speech*, *supra* note 1.

instead, that the Court should *infuse* those words with meaning.<sup>22</sup> They reject the quest for original meaning and embrace the notion of an “evolving” Constitution. And the current predilection for using *contemporary* foreign law to interpret the United States Constitution necessarily implies an embrace of this “evolving Constitution” theory. These citations must entail a rejection of the quest for the *original* meaning of the Constitution, because, as a matter of logic, they cannot possibly shed light on that original meaning.

And so, to put the point most starkly, this sort of reliance on contemporary foreign law must be, in essence, *a mechanism of constitutional change*. Foreign law changes all the time, and it has changed continuously since the Founding. If modern foreign law is relevant to constitutional interpretation, it follows that a change in foreign law can alter the meaning of the United States Constitution.

And that is why this issue is so important. The notion of the Court “updating” the Constitution to reflect its own evolving view of good government is troubling enough. But the notion that this evolution may be brought about by changes in foreign law violates basic premises of democratic self-governance.<sup>23</sup> When American judges conceive of their job as ensuring, on an ongoing basis, that “our understanding of our own constitutional rights [falls] into the mainstream of human thinking,”<sup>24</sup> then changes in that supposed “mainstream” can expand or contract those constitutional rights. When the Supreme Court declares that the Constitution evolves—and that foreign law may effect its evolution<sup>25</sup>—it is declaring nothing less than *the power of foreign governments to change the meaning of the United States Constitution*.

And even if the Court purports to seek a foreign “consensus,”<sup>26</sup> *a single foreign country* might make the difference at the margin.<sup>27</sup> Indeed, foreign countries might even

<sup>22</sup> See STEVEN BREYER, *ACTIVE LIBERTY* 115-32 (2005); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 12-15 (1996); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); Address by William J. Brennan, Jr., at Hyde Park, New York, 8 Recorder, Nov. 8, 1989 (“I frankly concede that I approach my responsibility as a Justice, as a 20<sup>th</sup> century American not confined to [the] framers’ vision in 1787. The ultimate question must be, I think, what do the words of the Constitution and Bill of Rights mean to us in our time.”).

<sup>23</sup> See Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL’Y 223, 228 (2006) (“Foreign law post-dating the Constitution’s adoption is relevant only to those who suppose that judges can change the Constitution or make new political decisions in its name, which I think just knocks out the basis of judicial review.”).

<sup>24</sup> See *Sotomayor Speech*, *supra* note 1.

<sup>25</sup> If the Court cites foreign sources, presumably it is relying upon them at least in part. The Court has no business spending government money to print its thoughts in the United States Reports unless those thoughts are in service of an exercise of the judicial power. See *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) (“‘Acknowledgment’ of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.”).

<sup>26</sup> See *id.* at 577 (majority opinion) (“In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”); *id.* at 604 (O’Connor, J., dissenting) (criticizing the Court’s search for an “international consensus”).

<sup>27</sup> See, e.g., *id.* at 577 (“The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”). *But see id.* at

attempt this deliberately.<sup>28</sup> The Court has already held that the Constitution—as interpreted by reference to foreign law—forbids the execution of murderers, no matter how heinous their crimes, if they committed their murders before turning eighteen.<sup>29</sup> But some foreign countries would have us go even further; France, for example, has declared that one of its priorities is the *abolition of capital punishment in the United States*.<sup>30</sup> Yet surely the American people would rebel at the thought of the French Parliament deciding whether to abolish the death penalty—not just in France, but also, thereby, in America.<sup>31</sup>

After all, foreign control over American law was a primary grievance of the Declaration of Independence. The Declaration, too, may be found at the National Archives, and its most resonant protest was that King George III had “subject[ed] us to a jurisdiction foreign to our constitution.”<sup>32</sup> This is exactly what is at stake here: foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with our basic founding principles of democracy and self-governance.<sup>33</sup>

Indeed, the Constitution itself has something to say about constitutional change. “We the People *of the United States* . . . ordain[ed] and establish[ed] th[e] Constitution”<sup>34</sup> and included mechanisms by which *we* could change it if necessary. Article V sets forth a complex, carefully wrought mechanism—really four such mechanisms—for

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626-27 (Scalia, J., dissenting) (“The Court has . . . long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation’s *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War . . . a legal, political, and social culture quite different from our own.”).

<sup>28</sup> See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281, 1305 (2007) (explaining how the United States Supreme Court’s reliance on foreign law could skew the policy incentives of foreign governments in a suboptimal way).

<sup>29</sup> See *Roper*, 543 U.S. at 568.

<sup>30</sup> See Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4-5.

<sup>31</sup> See Easterbrook, *supra* note 23, at 228 (“When other nations abolish the death penalty . . . they can do this by voting and can reverse the result by voting. How, then, can these deliberations and results possibly eliminate the role of the people of the United States in making decisions?”).

<sup>32</sup> THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776). The Declaration also protests:

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary to the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation until his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

*Id.* para 2-4.

<sup>33</sup> See Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1911 (2005) (“Surely the Founders would have been surprised to learn that a United States statute—duly enacted by Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England.”).

<sup>34</sup> U.S. CONST. pmbl. (emphasis added).

constitutional change.<sup>35</sup> These mechanisms require the concurrence of many different collective bodies, each with a different—and exclusively American—geographic perspective.<sup>36</sup> There is simply no reason to believe that, in addition to the four express mechanisms of constitutional change in Article V, there is also a fifth mechanism, unmentioned in the text, by which foreign governments may change the meaning of the United States Constitution.

As I mentioned at the outset, in a recent speech, Judge Sotomayor seemed to endorse reliance on foreign law when interpreting the United States Constitution<sup>37</sup> (though her testimony seems to be to the contrary<sup>38</sup>). Again, I take no position on the ultimate question of whether Judge Sotomayor should be confirmed. But I do hope that the Committee will continue to explore her views on this important issue. Judge Sotomayor has affirmed that the U.S. Constitution has not been changed and cannot be changed other than by Article V amendment.<sup>39</sup> But, as I have explained, if contemporary foreign law were relevant to the interpretation of the United States Constitution, it would seem to follow that a change in foreign law could effect a change in the meaning of the United States Constitution. I hope the Committee will ask Judge Sotomayor whether foreign governments can, indeed, amend the United States Constitution in this way.

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<sup>35</sup> The amendment process has two phases, proposal and ratification, and each phase has two options. At the proposal phase, Congress may propose amendments “whenever two thirds of both Houses shall deem it necessary.” U.S. CONST. art. V. Or alternately, “on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments.” *Id.* Likewise, at the ratification stage, there are two options: an amendment may be “ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.” *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See Sotomayor Speech, supra* note 1.

<sup>38</sup> *See Whelan, supra* note 1.

<sup>39</sup> *See Sen. Lindsey Graham Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, WASHINGTON POST, July 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071412782.html>.