



What is the proper role of foreign and international law in interpreting the United States Constitution?

Issue

In today's hearing, Senators Kyl, Cornyn, Sessions and other right-leaning critics tried to make the case that Judge Sotomayor is a proponent of using foreign and international law to decide cases, particularly constitutional cases, in U.S. courts. In general, they disapprove of the idea that foreign law or international norms might influence our jurisprudence. Senator Cornyn points with disapproval to Justice Kennedy's majority opinion in *Roper v. Simmons*, 543 U.S. 551 (2005), that held that the death penalty is unconstitutional for those under the age of 18. Cornyn objects to Kennedy's discussion of international norms (including the UN Convention on the Rights of the Child) even though the opinion clearly states that it "does not become controlling, for the task of interpreting the Eight Amendment remains our responsibility." *Id.* at 575.

Sotomayor Involvement

Judge Sotomayor has never used foreign law to interpret the US Constitution. In a speech criticized and misconstrued by Senator Cornyn, she said that "American analytical principles do not permit us to use [international or foreign] law to decide our cases," and that "It is American law that supplies the rules of how to decide a case." [Speech to ACLU Puerto Rico](#).

Judge Sotomayor has considered international law where required – for example: (1) In *In re Bd. of Dirs. of Telecom Argentina*, 528 F.3d 162 (2d Cir. 2008), Judge Sotomayor applied a provision of the US Bankruptcy Code that authorizes US courts to recognize and enforce foreign insolvency proceedings if certain factors are satisfied, including international comity and whether the foreign law imposes rules of priority substantially similar to those in the US law. And, (2) Judge Sotomayor applied Spanish law to a calculation of damages in a breach of contract case where both parties agreed that Spanish law should govern their dispute. *Carlisle Ventures v. Banco Espanol De Credito*, 1998 U.S. Dist. LEXIS 7489 (S.D.N.Y. May 20, 1998).

Judge Sotomayor has also discussed international case law in the context of international conventions to which the United States is a party, but has made clear that the determination of foreign courts is not binding. In *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), Judge Sotomayor was on a panel considering whether a custody decree that required the father to consent to any removal of the child from Hong Kong conferred a right of custody under the Hague Convention on the Civil Aspects of International Child Abduction. Judge Sotomayor, in dissent, determined that the father had a right of custody based on the text, object and purpose of the Hague Convention and then went on to consider international case law, writing that "[w]hile not essential to my conclusion . . . I note that my analysis is consistent with the decisions of most foreign courts to consider the issue." *Id.* at 150

Notably, Judge Sotomayor rejected the notion that Congress adopted international law concepts in the Death on the High Seas Act and wrote, in dissent: "When interpreting a domestic statute like DOHSA, therefore, we should not incorporate international concepts of territorial and high seas unless Congress specifically intended to import those concepts into the statute." *In re Air Crash off Long Island*, 209 F.3d 200, 219 (2d Cir. N.Y. 2000)