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Testimony :: Dr. Kim Lane Scheppele

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TESTIMONY

U.S. COMMISSION ON SECURITY AND COOPERATION IN EUROPE

HEARING ON "THE TRAJECTORY OF DEMOCRACY – WHY HUNGARY MATTERS"

Capitol Visitor Center, Room SVC 210 (Senate Side)

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I am honored to testify before you today. My name is Kim Lane Scheppele, and I am the Rockefeller Professor of Sociology and International Affairs, as well as the Director of the Program in Law and Public Affairs, at Princeton University. I am also a Faculty Fellow at the University of Pennsylvania Law School.

Nearly twenty years ago, the US National Science Foundation gave me a grant to move to Hungary to study the Hungarian Constitutional Court, then the most impressive of the new courts in Eastern Europe. I planned to go for one year but stayed for four, working as a researcher at the Constitutional Court and serving as an expert advisor to the constitutional drafting committee of the Hungarian Parliament in 1995-1996, a position I occupied with the assistance of a second NSF grant. I am grateful to the NSF for having funded my research on Hungary, which documented how the new Hungarian constitution of 1989 put down roots and grew to support a vibrant Hungarian constitutional democracy. I have followed Hungarian constitutional developments closely ever since.

I am here today because the current Hungarian government has felled the tree of democratic constitutionalism that Hungary planted in 1989.

Since its election in 2010, the Fidesz government has created a constitutional frenzy. It won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the constitution. Twelve times in its first year in office, it amended the constitution it inherited. Those amendments removed most of the institutional checks that could have stopped what the government did next – which was to install a new constitution. The new Fidesz constitution was drafted in secret, presented to the Parliament with only one month for debate, passed by the votes of only the Fidesz parliamentary bloc, and signed by a President that Fidesz had named. Neither the opposition parties nor civil society organizations nor the general public had any influence in the constitutional process. There was no popular ratification. The Fidesz constitution went into effect on January 1, 2012.

While the government claims it was given a mandate to make major changes, the general Hungarian public thinks otherwise. During the election campaign in 2010, Fidesz never said it would change the whole constitutional system. Once the Fidesz governing program became clear after the party came to power, the popularity of Fidesz has plummeted, even more so after the government undertook to replace the constitution.

Figure 1: Political Party Popularity in Hungary 2008-2013

Source: Ipsos/Portfolio.hu.

After the April 2010 election, Fidesz's popularity has steadily dropped. But none of the other parties – the MSzP (Socialists), Jobbik (far-right party), LMP (Politics Can be Different, a liberal/green/youth party) or the new liberal electoral coalition Együtt 2014 (Together 2014) – is any more popular. Surveys show that 50% or more of Hungarian voters say that there is no political party that they support.

Even though the government pushed through a one-party constitution without support from any other political fraction, except its own party-list partner the Christian Democrats, this didn't stop the constitutional juggernaut. The government has amended its new constitution four times in 15 months. Each time, the government has done so with the votes of only its own political bloc, rejecting all proposals from the political opposition or from civil society groups. The current Hungarian constitution remains a one-party constitution.

Just last week, the Fidesz government passed a 15-page amendment to the new 45-page constitution. László Sólyom, the conservative former president of both the Constitutional Court and the Republic of Hungary, said in a public statement last week that the "Fourth Amendment" removes the last traces of separation of powers from the Hungarian constitutional system. Under the constitution as amended, no institution has the legal right to check many of the key powers of the one-party government.

The Fourth Amendment nullifies more than 20 years of rights-protecting case law of the Hungarian Constitutional Court that had been developed before the new constitution went into effect. This leaves a giant gap where firm legal protection of basic rights once stood. The Fourth Amendment specifically overturns nearly all of the decisions that the Constitutional Court made in the last year striking down controversial new laws the Fidesz government had passed. The Fourth Amendment removes the Court's power to evaluate on substantive grounds any new constitutional amendments, a move which allows the government to escape review by inserting any controversial new proposal directly into the constitution. The Fourth Amendment entrenches political control of the judiciary and gives the government new tools to prevent the opposition from coming to power. The Fourth Amendment reverses many of the concessions Hungary made last year when the European Union, the Council of Europe and the US State Department criticized fundamental aspects of that constitution.

Under cover of constitutional reform, the Fidesz government has given itself absolute power. It now has discretion to do

virtually anything it wants, even if civil society, the general public, and all other political parties are opposed.

How could Hungary have fallen so far so fast from the family of stable constitutional democracies? The answer lies in the Achilles' heel of the old constitutional system: a disproportionate election law combined with an easy constitutional amendment rule.

Hungary's 1990 election law gave disproportionate numbers of seats to the winner of an election, a feature that was designed to help plurality parties form stable governments. When Fidesz got 53% of the vote in the 2010 election, the election law converted this victory into 68% of the seats in the Parliament. While Fidesz won this vote in a joint party list with the Christian Democrats (the KDNP), the Christian Democrats barely have an independent existence apart from Fidesz and its members vote in a bloc with Fidesz on every issue.

Figure 2: Composition of the Hungarian Parliament 2010

Source: Hungarian National Election Commission

Translation:

The Fidesz/KDNP joint party list (orange) received 52.7% of the vote, 263 of the seats and 68.1% of the Parliament. MSzP (Socialists) (red) received 19.3% of the vote, 59 of the seats and 15.3% of the Parliament. Jobbik (far-right party) (dark green) received 16.6% of the vote, 47 of the seats and 12.2% of the Parliament and LMP (Politics Can be Different) (light green) received 7.7% of the vote, 16 of the seats and 4.1% of the Parliament. There was one independent MP.

Armed with its two-thirds supermajority, the Fidesz government has been able to make use of the old constitution's amendment rule, dating to the communist constitution of 1949, which permitted the constitution to be changed with a single two-thirds vote of the Parliament. This "magic two-thirds" has enabled Fidesz to make all of its constitutional changes in a formally legal manner. Only one barrier remained: In 1995, under a prior two-thirds government, the old constitution was amended to require a four-fifths vote of the Parliament before any new constitutional drafting process could begin. One month into its term, Fidesz used its two-thirds vote to amend the constitution to remove the four-fifths requirement.

Many of the laws, including the constitution itself, many of the constitutional amendments and most of the cardinal laws, were introduced through the parliamentary procedure of a "private member's bill," which bypasses the stage of public consultation required of all government bills. That, combined with the fact that the Parliament instituted a new rule through which a two-thirds vote could cut off parliamentary debate on any topic, has meant that most of these new laws have received very little public discussion. It has not been uncommon for a constitutional amendment go from first proposal to final enactment in just a few weeks.

Taken over three years, the constitutional changes are complicated, detailed, and spread out across a new constitution, four major constitutional amendments, dozens of "cardinal" (super-majority) laws, and thousands of pages of ordinary laws that were all passed in a giant legislative blur, sometimes in the middle of the night. I strongly suspect that most Hungarians do not understand the details of this new constitutional system. Even Hungarian lawyers are not able to keep up with the total revolution in the law. In what follows, I will try to explain how the new system of Hungarian government is structured, current as of March 15, 2013, taking all of this new law into account.

The primary source for my testimony is the Magyar Közlöny, the official gazette of the Hungarian government that publishes all of the laws. From my perch in the United States, I cannot say how the laws are being carried out. But I can say how the laws are structured and what they do and do not permit. I will call this whole new legal structure the “Fidesz constitution” even though not everything is in the single constitutional text or its amendments. Many elements of the system I describe are in two-thirds “cardinal” laws that are almost as entrenched as the constitution itself, which is why I don’t make the fine distinctions here except where they are crucial for understanding how the system works. I am happy to provide detailed legal citations for all of the claims I make below if you are interested in checking more precisely what I say or precisely where in the law each of these statements can find support.

Others who are providing testimony for this hearing will address other crucial issues raised by the current Hungarian government’s actions over the last three years. They will address the fate of civil liberties, the difficult situation for many churches in Hungary and the growing and increasingly virulent strains of anti-Semitism and anti-Roma agitation that have occurred alongside this constitutional revolution.

My remit at this hearing today is to talk about something altogether more boring, but no less important: the system of divided and checked powers necessary for a government to remain both constitutional and democratic. History tells us that a government that has no limits on what it can do and that concentrates all powers in a single party will soon cease to be either constitutional or democratic.

The importance of checked and limited powers was an insight very familiar to the American constitutional framers. The Philadelphia Convention did not even include a bill of rights in the US Constitution because the framers believed that the most effective protection for rights was a government that was limited by law. While American history has taught us that a bill of rights matters – and the ratification process of the US Constitution insisted on including one – we have also learned much from Princeton graduate James Madison, who wrote in Federalist #47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

By James Madison’s definition, Hungary is on the verge of tyranny.

In what follows, I will show that the Fidesz political party has gathered all of the powers of the Hungarian government into its own hands, without checks from any other political quarter and without any limits on what it can do.

We should start with the basics: Hungary has a unicameral parliamentary system of government. A unicameral Parliament has no upper house to check what the lower house does, no “Senate” to complicate life for the “House of Representatives” and vice versa. A parliamentary system means that the most powerful executive, the prime minister, is elected by the Parliament rather than directly by the people. As a result, the prime minister in Hungary is virtually guaranteed a majority for all of his legislative initiatives because that legislative majority put him into his job. Not surprisingly, the legislative-executive cooperation guaranteed in Hungary’s unicameral parliamentary system dates back to the communist constitution of 1949. (From the mid-19th to the mid-20th centuries, Hungary had a bicameral parliament.)

In 1989, however, major constitutional changes in Hungary added a number of checks to this basic framework. A Constitutional Court was created as the primary watchdog on the majoritarian dangers of a unicameral parliamentary system. Unlike a Supreme Court which is the highest court of appeal in the legal system (something we are familiar with in the United States), a Constitutional Court is the only court that is allowed to hear and decide constitutional questions – and it does nothing else besides rule on constitutional matters. Because the Hungarian Constitutional Court conducts the primary oversight in a system that has little formal separation of legislative and executive power, it is even more important than the Supreme Court in

the American separation-of-powers system.

Given such weighty responsibility in the 1989 constitutional design, the Constitutional Court was made highly accessible to the new democratic public in Hungary. Literally, anyone could ask the Constitutional Court to review a law for constitutionality using a so-called *actio popularis* petition. As a result, virtually every law was challenged. From the time it opened in January 1990, the active Constitutional Court kept each new government under constitutional constraint regardless of the political leanings of the government. Opinion polls showed that the Constitutional Court was consistently the most highly respected political institution in Hungary.

The procedure for electing judges to the Constitutional Court before 2010 prevented the Court from being captured by any one political fraction. Because each judicial nominee to the Constitutional Court had to first be approved by a majority of parliamentary parties before then being elected to the Court by a two-thirds vote of the Parliament, the Court always had a balance of different political views represented on the bench.

Other changes that were made to the constitutional system in 1989 provided more checks on Hungary's unicameral parliamentary government. Revamped parliamentary procedure required extensive consultation with both civil society and opposition parties before government bills could be put to a vote. Important issues of constitutional concern required a two-thirds vote of the Parliament. As we have seen, however, the private member's bill procedure allowed the consultation stage for legislation to be bypassed and the two-thirds laws could cease to be a real check on power when the government had two-thirds of the parliamentary seats, something the disproportionate election law made quite likely.

Four ombudsmen added after 1989 to the system of rights protection. Other independent institutions – the central bank, state audit office, prosecutor general's office, national election commission and media board – provided both expertise and additional checkpoints. For example, both the national election commission and the media board were structured to ensure representation from across the political spectrum. An independent self-governing judiciary ensured that the laws were fairly applied.

There were so many different checks instituted after 1989 on the power of the prime minister and his parliamentary majority that the post-1989 constitutional system worked reliably to ensure that the operation of majoritarian political power didn't ride roughshod over democratic guarantees and constitutional limitations.

By contrast with this robust system of complementary powers, the new "Fidesz constitution" removes virtually all of the checks added to the prior communist constitution after 1989. I will detail the major reversals here.

Under the Fidesz constitution, the Constitutional Court's power and independence have been compromised in multiple ways. The system for electing constitutional judges was changed so that now a single two-thirds vote of the Parliament is sufficient to put a judge on the Court, abolishing the multiparty agreement that was once necessary for nomination. The Fidesz constitution also expanded the number of judges on the Court from 11 to 15, giving the governing party four more judges to name immediately.

Between changing the process for electing judges and expanding the number of judges to be elected, Fidesz government has been able to select nine of the 15 judges on the Court in its first three years in office. The Fidesz parliamentary bloc, voting in unison as it always does, put these judges onto the Court without multiparty support, though a few of the new judges were able to garner some votes from the far-right Jobbik party. The new constitutional judges have almost always voted for the Fidesz government position in each case. Some of the new judges have just voted for the government's position without even giving

reasons.

Even if the Court is in Fidesz-friendly hands, however, a powerful Court might still be dangerous to a government that shuns checks on its freedom of action. This may explain why the jurisdiction of the Court has been cut. The Court no longer has the power to review laws based on “*actio popularis*” petitions, which are petitions that anyone can file. Now, the only individuals who can challenge laws must show that they have been concretely injured by the application of a potentially unconstitutional law and that they have exhausted their remedies in the ordinary courts. If the Constitutional Court can only hear cases that have concrete victims, it is hard for the Court to rule on matters pertaining to separation of powers and the structure of democratic institutions. Individuals rarely get “standing” to challenge a law that creates a new system for judicial appointments or a law that gives a government agency the power to issue decrees without parliamentary oversight, both laws that have been passed since Fidesz came to power. Some elements of “abstract review” remain with the Constitutional Court, but these, too, have been restricted.

Abstract review allows the Court to hear challenges to laws without a concrete dispute before it. With the exception of the Parliamentary Commissioner for Human Rights (who will himself be replaced by Fidesz parliamentary majority later this year), the constitution gives the power to challenge laws abstractly only to particular offices that are currently occupied by people affiliated with Fidesz. One might guess that Fidesz appointees do not have a strong incentive to limit the power of their own government. While one-quarter of the Parliament is also given the power to challenge a law at the Constitutional Court, the one-third of the seats in the current Parliament that are not held by the governing party are divided between parties of the center-left and a party of the far right, who would have to agree on a challenge, something that is not very likely. As a result, many laws have been effectively insulated from constitutional challenge by the way that abstract review power has been designed.

Even with the limitations on access to the Constitutional Court that were built into the Fidesz constitution, the system of judicial review in Hungary may seem broader than the system we have in the United States. Therefore, the dangers of the new system in Hungary may not be apparent to an American eye. Limiting the power to initiate judicial review only to those who have been directly injured and only to officials who owe their jobs to this government limits the ability of the Court to reach constitutional violations that it used to be able to reach. The US Supreme Court cannot reach all constitutional violations either, but the United States has a bicameral Congress, a separately elected president, a vigilant and active civil society, and federalism, which adds state governments and state courts as additional checks on the power of temporary majorities. Hungary has none of those checking institutions and so relies on the Constitutional Court to carry more weight in the constitutional system. Making it difficult for this Court to reach all constitutional violations creates blind spots in which unconstrained political discretion can override constitutional values.

In addition to limiting access to the Court, the Fidesz constitution restricts the jurisdiction of the Court in other ways as well. The Court may no longer review any law that deals with taxes or budgets when those laws are passed at a time when the national debt is more than 50% of GDP. Under the Fourth Amendment passed last week, the Court will never have the power to review budget and tax laws that were passed under these circumstances. As a result, if a tax law passed this year infringes an individual’s constitutionally guaranteed property rights or if such a tax is applied selectively to particular minority groups, there is nothing that the Constitutional Court can do – in perpetuity. This opens up a space for the government to violate many personal rights without any constitutional oversight.

The Fourth Amendment has also banned the Court from reviewing constitutional amendments for substantive conflicts with constitutional principles. As a result, if the constitution promises freedom of religion but a constitutional amendment requires a two-thirds parliamentary vote before a church is officially recognized (a provision that was added to the constitution with the Fourth Amendment), the Court can do nothing about this. Or if the constitution says anyone may freely express her opinion but an amendment says that no one may defame the Hungarian nation (a provision that was also added to the constitution with the Fourth Amendment), there is nothing the Court can do. These examples show that the government can now directly amend the constitution any time it thinks the Constitutional Court might strike down some policy that the government wants to enact regardless of how much these new amendments violate principles that have been guaranteed elsewhere in the constitution. In fact, the Fourth Amendment already puts back into the constitution laws that the Constitutional Court has already struck down

as unconstitutional once before under the new constitution.

To make matters worse, the Fourth Amendment also nullifies all decisions made by the Constitutional Court before the new constitution took effect. At one level, this makes sense: old constitution, old decisions/new constitution, new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights. With those decisions gone, no one can say for certain whether Hungarian law protects free speech, freedom of religion, equality of all Hungarians before the law, property rights, and virtually every other right in precisely the way that everyone in Hungary had come to take for granted.

What other checks on Fidesz's untrammled power have now been removed in the Fidesz constitution? The independence of the ordinary judicial system has taken a big hit. In 2011, the Fidesz government suddenly lowered the judicial retirement age from 70 to 62, thus removing the most senior 10% of the judiciary, including 20% of the Supreme Court judges and more than half of the appeals court presidents. Both the Hungarian Constitutional Court and the European Court of Justice found that the sudden change in the judicial retirement age was illegal.

The government's first reaction was to defy both courts' judgments, before finally agreeing at the end of 2012 to reinstate fired judges who wanted to return to their jobs. In the meantime, however, all of the court leadership positions were filled with new judges, so the old judges who wanted to be reinstated were returned to much less important positions. Through this move, the government was able to replace much of the top leadership of the judiciary in a single year. One court leader who could not have been replaced in this manner (because he was too young) was the then-President of the Supreme Court, András Baka. He was removed from office when the new constitution went into effect because of a new requirement, effectively immediately, that judges must have five years of judicial experience in Hungary before being named to the Supreme Court (newly renamed the Curia). President Baka's 16 years of experience as a judge on the European Court of Human Rights did not count.

How were the new judges named? The new president of the Supreme Court/Curia was elected by a two-thirds vote of the Fidesz Parliament. Beyond that, a new institution was created to oversee the appointment of all other judges as well as the administration of the judiciary: the National Judicial Office. This office replaced a system of judicial self-government. The president of the NJO, elected by two-thirds of the Parliament, has the power to hire, fire, promote, demote and discipline all judges in the system without any substantive oversight from any other institution. The national President has to countersign in cases where a judge is appointed for the first time in the system, but it is not clear he could refuse to do so. The new leadership of the ordinary courts has thus been replaced by judges who owe their careers to an official elected by the "magic two-thirds" of the Fidesz Parliament.

The Council of Europe's Commission on Democracy through Law (the Venice Commission) sharply criticized the extraordinary powers of and general lack of legal standards governing the president of the National Judicial Office. The US State Department has also raised questions about the independence of the judiciary under this system. In a concession to criticism, the Fidesz government agreed to limit the powers of the president of the NJO in legislation passed in summer 2012. But with the Fourth Amendment to the Constitution, those concessions are clawed back. The constitution now entrenches the National Judicial Office (NJO), whose president has the constitutional power to "manage the central administrative affairs of the courts," a set of responsibilities in which the judges merely "participate." None of the constraints that the Fidesz government agreed to under international pressure – requiring a significant role for the judges in their own self-government, establishing legal standards for the president of the NJO to use in managing the judiciary, and no longer allowing the president of the NJO to stay in office until her successor is elected – are in the constitution itself. In fact, the concessions that the Fidesz government made to Hungary's international critics may be unconstitutional now that the Fourth Amendment gives the sole power to manage the courts without these constraints to the president of the National Judicial Office.

In another move that has attracted universal criticism, the Fidesz government gave the president of the National Judicial Office the power to take any case in the entire court system and move it to a court different from the one to which normal procedure would assign it. So, for example, if a political corruption case against members of the main opposition party would normally be assigned to the trial-level court in Pest, the president of the National Judicial Office can move the case to Kecskemét. In fact, this is not a hypothetical; that very example has already happened. The rationale given for this extraordinary power to move cases is that the courts are overcrowded and case resolution can be speeded up by moving cases to less crowded courts.

But this rationale is belied by the facts: From public sources, I have been keeping track of the movement of these cases in the first year that the president of the NJO has had this power. She has moved only a few dozen cases away from courts that have thousands of backlogged cases. And she has moved the cases not to the least crowded courts in the countryside but to other courts that also have backlogs. She has moved some of the most high-profile political cases in which the political opposition has a stake, leading the opposition to charge the government with picking the judges particularly in cases that have strong political overtones. While my statistics cannot reveal the motivation of the government, they can show that the government is not moving a substantial enough number of cases to make a difference in waiting times and it is not moving cases from the most to the least crowded courts. I am happy to make the data available upon request.

With the Fourth Amendment passed last week, the power of the president of the NJO to move any case to any court in the country is entrenched in the constitution itself. And the constitution does not include the legal constraints that Hungary agreed to under pressure. Giving power to the president of the NJO to select which court handles individual cases outside the rules of ordinary legal procedure is for many – myself included – the end of the rule of law in Hungary.

The Constitutional Court and the ordinary judiciary have suffered a severe blow under the Fidesz constitution. Other independent institutions have fared no better.

The ombudsman system, which once comprised four independent ombudsmen with independent jurisdictions, has now been folded into one office with a much smaller staff. The former data protection ombudsman was fired and the office has been absorbed directly into the government, something that has generated an infringement action launched by the European Commission against Hungary at the European Court of Justice because EU law requires an independent data privacy officer.

As of two weeks ago, the central bank has a new governor, who moved to that job from being minister of the economy. He used his ministerial power to unilaterally change the rules for the central bank. Without the need for parliamentary approval or Court review, then, György Matolcsy, as the Fidesz economics minister, gave the office of György Matolcsy, the new central bank governor, dramatically increased powers just before he moved from one job to the next. The charter of the central bank, as it turns out, is not even a statute passed by Parliament but a document that either the bank itself or the minister of the economy can change at will.

The new media council has a chair appointed directly by the prime minister and a membership that consists exclusively of members elected by the Fidesz parliamentary two-thirds, both for nine-year terms. The media council has draconian powers to levy bankrupting fines based on a review of the content of both public and private media, including broadcast, print and internet media. A Constitutional Court decision freed the print media from some of these constraints, but the Fidesz government could now easily amend the constitution to bring the print media back under control and the Constitutional Court could say nothing further about it.

The election commission has been revamped and now consists exclusively of members who have been elected by the Fidesz parliamentary two-thirds majority, all for terms of nine years. While each party with a national list in the next election

(scheduled for April 2014) will have a temporary member on the commission during the campaign, opposition parties will be easily outvoted by the Fidesz majority.

The legal framework for the 2014 election is still in flux. The Fidesz parliamentary two-thirds has already enacted two election laws over vociferous protest from opposition parties, creating an even more disproportionate system than the one it replaced. One law gerrymanders the districts for the next election in such a way that it will be very difficult for the opposition to win. The law even fixes the exact boundaries of election districts in a cardinal law that requires a two-thirds vote of the Parliament to change. This law also eliminates the second round of voting for single-member districts so that someone without majority support in a district can enter Parliament, which was not previously the case.

The government passed a second cardinal law on elections that instituted a system of voter registration, even though the country has conducted more than 20 years of elections with an excellent “civil list” that has never produced any complaints of irregularity. The Constitutional Court struck down voter registration as unconstitutional, and for now the governing party seems to have given up on this idea. But with its parliamentary two-thirds vote, the government has the power to override the Constitutional Court by simply adding voter registration to the constitution. The government may also change other important features of the election system right up until the election takes place. In fact, at the moment, the election framework is presently incomplete. Among other things, no rules have yet been devised for making and verifying voter lists for ethnic Hungarians in the neighboring states who have recently become eligible for citizenship as the result of constitutional changes.

The Fourth Amendment added new electoral rules just last week. The amendment created a constitutional ban on political advertising during the election campaign in any venue other than in the public broadcast media, which is controlled by the all-Fidesz media board. Moreover, only parties with national party lists can advertise at all in the national media, which might exclude smaller and newer parties. These restrictions had been previously declared unconstitutional by the Constitutional Court, so the government amended the constitution to override that decision. And since these provisions are now in the constitution itself, the Constitutional Court cannot review them again.

But suppose that, despite all of the obstacles that the current governing party has put in the way of the political opposition, an opposition coalition manages to win the next election. The Fidesz constitution has created a trap that can be snapped in just such a case. The constitution creates a national budget council with the power to veto any future budget that adds to the national debt, which any foreseeable budget will do. The members of the budget council have been chosen by the Fidesz two-thirds majority for terms of 6 or 12 years and can be replaced only if two-thirds of the parliament can agree on their successors when their terms are over. Not only does this mean that, for three elections cycles out, any future government must follow a budgetary course agreed on by a council where all of the members were elected by the Fidesz government, but this budget council has even more power than that.

The constitution requires the Parliament to pass a budget by March 31 of each year. If the Parliament fails to do so, the president of the country can dissolve the Parliament and call new elections. When this provision is put together with the powers of the budgetary council, the constraints on any future government are clear. If a new non-Fidesz government passes a budget that adds to the debt, that budget can be vetoed by the all-Fidesz budgetary council at any time, including on the eve of the budget deadline given in the constitution. The parliament would then miss the deadline and the president (also named by Fidesz and serving through 2017) could call new elections. And this process can be repeated until an acceptable government is voted back into power.

The Fidesz government may have created this unfortunate interaction of constitutional provisions inadvertently in an earnest attempt to create a binding mechanism to achieve budget discipline. But it would be easy for the Fidesz government to achieve fiscal discipline without creating this anti-democratic trap. The Fidesz government could amend the constitution to require that the budget council veto the budget by a deadline that would give the Parliament time to pass a new budget before the president gains the power to dissolve it. I have personally suggested this to high-level members of Fidesz, but an amendment to this effect has so far not appeared.

There is more that could be said about the new Fidesz constitution. I have only mentioned what I take to be the biggest obstacles posed to constitutionalism and democracy by this new constitutional framework.

What can be done about the Fidesz consolidation of power by the United States, the US Helsinki Commission, and by the Organization for Security and Cooperation in Europe?

First, of course, Hungarian democracy must be created and maintained by Hungarians themselves. But a democratic public must be an educated public and Hungarians themselves need to learn what has happened to their own constitution over the last three years. Most have no idea, and not because they couldn't or wouldn't understand.

The government celebrated its new constitution with great fanfare. They set up "constitutional tables" at every town hall where people could sign up to receive their very own copy of the constitution. Last June, the government presented to every secondary school graduate a coffee-table book with the words of the new constitution illustrated with historic and specially commissioned paintings. But much of what I have mentioned above is not contained in the text that government has distributed. Many of the most worrisome provisions that I have highlighted here are in the constitutional amendments made since that time or in the cardinal laws that can only be accessed through reading the immensely difficult legalese of the Magyar Közlöny. These laws are posted online only in PDF form, not searchable unless one goes through each individual daily issue separately.

Hungary's friends, including the United States, could assist financially with a program to educate citizens, lawyers and judges in Hungary about the new constitutional framework in Hungary. A public education campaign about the new constitutional structure – conducted by Hungarian constitutional experts from the government, from the opposition and from academia – may assist in giving Hungarians better information about their new constitutional system. Such a campaign would be especially effective if it could be conducted through the broadcast media in Hungary, though since the government functionally controls the broadcast media through its Media Council, some monitoring system would have to be put in place to ensure that both the government and opposition voices are heard. Having read thousands of petitions that ordinary Hungarians sent to the Constitutional Court in the 1990s, I am confident that Hungarians themselves will rise to the defense of both democracy and constitutionalism once they see the dangers of a flawed constitutional design.

Second, the Hungarian government vociferously claims that it is still a democracy because political parties may freely organize for the parliamentary elections next year. But its critics are concerned that the government presently controls the media landscape, has enacted a number of legal provisions that disadvantage opposition parties, and continues to change the electoral rules. In fact, nothing prohibits the government from changing important elements of the electoral framework at the last minute. With the election only one year away, it is important to get the rules of the game fixed – fairly – as soon as possible.

The OSCE has expertise in monitoring elections to ensure that they are free and fair. The OSCE should insist that the electoral rules be settled far enough ahead of the election so that all who want to contest the election have a reasonable amount of time to organize themselves accordingly.

Enough questions have been raised about the willingness of the current Hungarian government to recognize the political opposition that the OSCE/ODIHR should also fully monitor the 2014 Hungarian parliamentary elections. This should include not just election-day or long-term monitoring missions. The comprehensively changed new constitutional framework warrants an early Needs Assessment Mission from OSCE/ODIHR, one that can fully review the effects of all the new provisions. It

should focus on the ability of political parties to organize and to get their message out, access to the media, and the fairness of the basic election framework including the creation of electoral districts and the compatibility of both the content and timing of the new electoral rules with the principles of free and fair elections.

Third, the US government should press the Hungarian government to live up to its international commitments to democracy, constitutionalism, the rule of law and robust rights protection. The US should be vigilant in monitoring backsliding from the high level of constitutional democratic protections that Hungary had achieved after 1989 and the US should cooperate with the Venice Commission, the Council of Europe Parliamentary Assembly Monitoring Committee, and the European Union (for example, the LIBE Committee of the European Parliament), all of which have ongoing monitoring processes in place.

But the US government should also be aware that, under pressure, the Fidesz government has in the past promised minor changes to its comprehensive framework and then has discarded those changes when the pressure lifted. Moreover, the changes that the Fidesz government has previously offered to make do not really address the key problems of the system. The Fidesz constitutional framework is a highly redundant system that must be understood as a whole. Each individual legal rule cannot be evaluated by itself because one must understand the function of that rule in the larger system. Changing a number of small features of this constitutional order may not in fact address the most serious problem – which is the concentration of political power in the hands of one party. In deciding whether the Hungarian government has been responsive to international and domestic criticism, Hungary's allies need to examine whether proposed changes really alter the way this complex and integrated system works as a whole.

The US should resist entering the battle of competing checklists of constitutional features. The Hungarian government often insists that some other European country has the same individual rule that its friends criticize. Perhaps we should remember Frankenstein's monster, who was stitched together from perfectly normal bits of other once-living things, but who was, nonetheless, a monster. No other constitutional democracy in the world, let alone in Europe, has the combination of constitutional features that Hungary now has. In evaluating Hungary for its compliance with international standards, its international friends must look at the whole constitutional system and not just at individual pieces as it assesses whether Hungary still belongs to the family of constitutional democracies.

Finally, Hungary is a small country in Europe. It may be hard to see why the United States should spend any of its political capital to address what former Secretary of State Hillary Clinton called Hungary's backsliding from constitutional democracy. There are two main reasons why the US should care, apart from the fact that it is painful to see any country retreat from democracy and one should always be concerned about the people adversely affected.

Hungary is a partner with the US not only in the OSCE, but also in NATO. OSCE commits its member states to the protection of human rights as defined under the Helsinki Final Act of 1975, and long experience shows that human rights receive their best protection from the maintenance of a constitutional and democratic government, both of which are now in doubt in Hungary. The NATO Charter creates a union of states "determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law." But these commitments are also being challenged by the concentration of power in Hungary under its new constitutional framework. Both the OSCE and NATO commit its member states to good behavior and good government, which these organizations should be able to monitor.

In addition, other countries in Hungary's neighborhood are looking with great interest at what Hungary is doing. They can see that the European Union, the Council of Europe, the OSCE, NATO and the United States have limited influence and ability to induce a national government to change its domestic laws. Hungary's neighbors understand that Hungary is getting away with consolidating all political power in the hands of one party, and many find that enticing. Troubling recent developments in Romania, Bulgaria and Slovenia show that the Hungarian problem of overly concentrated power could spread if the US and its European allies don't stand up for their values in the Hungarian case. The US should therefore treat constitutional problems in Hungary with a sense of urgency, both because of the speed with which this system is being locked in and because of the

likelihood that the Hungarian constitutional disease could spread around the neighborhood.

In closing then, I strongly urge the United States, the US Helsinki Commission and the OSCE to take Hungary seriously, engage with the Hungarian government on matters of constitutional reform, and work toward ensuring that the channels of democratic participation remain open in Hungary so that the Hungarian people retain the capacity to determine the sort of government under which they will live. The legal changes I have described today pose a real danger to fundamental democratic and constitutional values, and Hungary's friends need to sound the alarm.

TESTIMONY

U.S. COMMISSION ON SECURITY AND COOPERATION IN EUROPE

HEARING ON "THE TRAJECTORY OF DEMOCRACY – WHY HUNGARY MATTERS"

Capitol Visitor Center, Room SVC 210 (Senate Side)

March 19, 2013 at 3 pm

Kim Lane Scheppele

Laurance S. Rockefeller Professor of Sociology and International Affairs

Director, Program in Law and Public Affairs

Princeton University

I am honored to testify before you today. My name is Kim Lane Scheppele, and I am the Rockefeller Professor of Sociology and International Affairs, as well as the Director of the Program in Law and Public Affairs, at Princeton University. I am also a Faculty Fellow at the University of Pennsylvania Law School.

Nearly twenty years ago, the US National Science Foundation gave me a grant to move to Hungary to study the Hungarian Constitutional Court, then the most impressive of the new courts in Eastern Europe. I planned to go for one year but stayed for four, working as a researcher at the Constitutional Court and serving as an expert advisor to the constitutional drafting committee of the Hungarian Parliament in 1995-1996, a position I occupied with the assistance of a second NSF grant. I am grateful to the NSF for having funded my research on Hungary, which documented how the new Hungarian constitution of 1989 put down roots and grew to support a vibrant Hungarian constitutional democracy. I have followed Hungarian constitutional developments closely ever since.

I am here today because the current Hungarian government has felled the tree of democratic constitutionalism that Hungary planted in 1989.

Since its election in 2010, the Fidesz government has created a constitutional frenzy. It won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the constitution. Twelve times in its first year in office, it amended the constitution it inherited. Those amendments removed most of the institutional checks that could have stopped what the government did next – which was to install a new constitution. The new Fidesz constitution was drafted in secret, presented to the Parliament with only one month for debate, passed by the votes of only the Fidesz parliamentary bloc, and signed by a President that Fidesz had named. Neither the opposition parties nor civil society organizations nor the general public had any influence in the constitutional process. There was no popular ratification. The Fidesz constitution went into effect on January 1, 2012.

While the government claims it was given a mandate to make major changes, the general Hungarian public thinks otherwise. During the election campaign in 2010, Fidesz never said it would change the whole constitutional system. Once the Fidesz governing program became clear after the party came to power, the popularity of Fidesz has plummeted, even more so after the government undertook to replace the constitution.

Figure 1: Political Party Popularity in Hungary 2008-2013

Source: Ipsos/Portfolio.hu.

After the April 2010 election, Fidesz's popularity has steadily dropped. But none of the other parties – the MSzP (Socialists), Jobbik (far-right party), LMP (Politics Can be Different, a liberal/green/youth party) or the new liberal electoral coalition Együtt 2014 (Together 2014) – is any more popular. Surveys show that 50% or more of Hungarian voters say that there is no political party that they support.

Even though the government pushed through a one-party constitution without support from any other political fraction, except its own party-list partner the Christian Democrats, this didn't stop the constitutional juggernaut. The government has amended its new constitution four times in 15 months. Each time, the government has done so with the votes of only its own political bloc, rejecting all proposals from the political opposition or from civil society groups. The current Hungarian constitution remains a one-party constitution.

Just last week, the Fidesz government passed a 15-page amendment to the new 45-page constitution. László Sólyom, the conservative former president of both the Constitutional Court and the Republic of Hungary, said in a public statement last week that the "Fourth Amendment" removes the last traces of separation of powers from the Hungarian constitutional system. Under the constitution as amended, no institution has the legal right to check many of the key powers of the one-party government.

The Fourth Amendment nullifies more than 20 years of rights-protecting case law of the Hungarian Constitutional Court that had been developed before the new constitution went into effect. This leaves a giant gap where firm legal protection of basic rights once stood. The Fourth Amendment specifically overturns nearly all of the decisions that the Constitutional Court made in the last year striking down controversial new laws the Fidesz government had passed. The Fourth Amendment removes the Court's power to evaluate on substantive grounds any new constitutional amendments, a move which allows the government to escape review by inserting any controversial new proposal directly into the constitution. The Fourth Amendment entrenches political control of the judiciary and gives the government new tools to prevent the opposition from coming to power. The Fourth Amendment reverses many of the concessions Hungary made last year when the European Union, the Council of

Europe and the US State Department criticized fundamental aspects of that constitution.

Under cover of constitutional reform, the Fidesz government has given itself absolute power. It now has discretion to do virtually anything it wants, even if civil society, the general public, and all other political parties are opposed.

How could Hungary have fallen so far so fast from the family of stable constitutional democracies? The answer lies in the Achilles' heel of the old constitutional system: a disproportionate election law combined with an easy constitutional amendment rule.

Hungary's 1990 election law gave disproportionate numbers of seats to the winner of an election, a feature that was designed to help plurality parties form stable governments. When Fidesz got 53% of the vote in the 2010 election, the election law converted this victory into 68% of the seats in the Parliament. While Fidesz won this vote in a joint party list with the Christian Democrats (the KDNP), the Christian Democrats barely have an independent existence apart from Fidesz and its members vote in a bloc with Fidesz on every issue.

Figure 2: Composition of the Hungarian Parliament 2010

Source: Hungarian National Election Commission

Translation:

The Fidesz/KDNP joint party list (orange) received 52.7% of the vote, 263 of the seats and 68.1% of the Parliament. MSZP (Socialists) (red) received 19.3% of the vote, 59 of the seats and 15.3% of the Parliament. Jobbik (far-right party) (dark green) received 16.6% of the vote, 47 of the seats and 12.2% of the Parliament and LMP (Politics Can be Different) (light green) received 7.7% of the vote, 16 of the seats and 4.1% of the Parliament. There was one independent MP.

Armed with its two-thirds supermajority, the Fidesz government has been able to make use of the old constitution's amendment rule, dating to the communist constitution of 1949, which permitted the constitution to be changed with a single two-thirds vote of the Parliament. This "magic two-thirds" has enabled Fidesz to make all of its constitutional changes in a formally legal manner. Only one barrier remained: In 1995, under a prior two-thirds government, the old constitution was amended to require a four-fifths vote of the Parliament before any new constitutional drafting process could begin. One month into its term, Fidesz used its two-thirds vote to amend the constitution to remove the four-fifths requirement.

Many of the laws, including the constitution itself, many of the constitutional amendments and most of the cardinal laws, were introduced through the parliamentary procedure of a "private member's bill," which bypasses the stage of public consultation required of all government bills. That, combined with the fact that the Parliament instituted a new rule through which a two-thirds vote could cut off parliamentary debate on any topic, has meant that most of these new laws have received very little public discussion. It has not been uncommon for a constitutional amendment go from first proposal to final enactment in just a few weeks.

Taken over three years, the constitutional changes are complicated, detailed, and spread out across a new constitution, four major constitutional amendments, dozens of "cardinal" (super-majority) laws, and thousands of pages of ordinary laws that were all passed in a giant legislative blur, sometimes in the middle of the night. I strongly suspect that most Hungarians do not

understand the details of this new constitutional system. Even Hungarian lawyers are not able to keep up with the total revolution in the law. In what follows, I will try to explain how the new system of Hungarian government is structured, current as of March 15, 2013, taking all of this new law into account.

The primary source for my testimony is the Magyar Közlöny, the official gazette of the Hungarian government that publishes all of the laws. From my perch in the United States, I cannot say how the laws are being carried out. But I can say how the laws are structured and what they do and do not permit. I will call this whole new legal structure the “Fidesz constitution” even though not everything is in the single constitutional text or its amendments. Many elements of the system I describe are in two-thirds “cardinal” laws that are almost as entrenched as the constitution itself, which is why I don’t make the fine distinctions here except where they are crucial for understanding how the system works. I am happy to provide detailed legal citations for all of the claims I make below if you are interested in checking more precisely what I say or precisely where in the law each of these statements can find support.

Others who are providing testimony for this hearing will address other crucial issues raised by the current Hungarian government’s actions over the last three years. They will address the fate of civil liberties, the difficult situation for many churches in Hungary and the growing and increasingly virulent strains of anti-Semitism and anti-Roma agitation that have occurred alongside this constitutional revolution.

My remit at this hearing today is to talk about something altogether more boring, but no less important: the system of divided and checked powers necessary for a government to remain both constitutional and democratic. History tells us that a government that has no limits on what it can do and that concentrates all powers in a single party will soon cease to be either constitutional or democratic.

The importance of checked and limited powers was an insight very familiar to the American constitutional framers. The Philadelphia Convention did not even include a bill of rights in the US Constitution because the framers believed that the most effective protection for rights was a government that was limited by law. While American history has taught us that a bill of rights matters – and the ratification process of the US Constitution insisted on including one – we have also learned much from Princeton graduate James Madison, who wrote in Federalist #47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

By James Madison’s definition, Hungary is on the verge of tyranny.

In what follows, I will show that the Fidesz political party has gathered all of the powers of the Hungarian government into its own hands, without checks from any other political quarter and without any limits on what it can do.

We should start with the basics: Hungary has a unicameral parliamentary system of government. A unicameral Parliament has no upper house to check what the lower house does, no “Senate” to complicate life for the “House of Representatives” and vice versa. A parliamentary system means that the most powerful executive, the prime minister, is elected by the Parliament rather than directly by the people. As a result, the prime minister in Hungary is virtually guaranteed a majority for all of his legislative initiatives because that legislative majority put him into his job. Not surprisingly, the legislative-executive cooperation guaranteed in Hungary’s unicameral parliamentary system dates back to the communist constitution of 1949. (From the mid-19th to the mid-20th centuries, Hungary had a bicameral parliament.)

In 1989, however, major constitutional changes in Hungary added a number of checks to this basic framework. A

Constitutional Court was created as the primary watchdog on the majoritarian dangers of a unicameral parliamentary system. Unlike a Supreme Court which is the highest court of appeal in the legal system (something we are familiar with in the United States), a Constitutional Court is the only court that is allowed to hear and decide constitutional questions – and it does nothing else besides rule on constitutional matters. Because the Hungarian Constitutional Court conducts the primary oversight in a system that has little formal separation of legislative and executive power, it is even more important than the Supreme Court in the American separation-of-powers system.

Given such weighty responsibility in the 1989 constitutional design, the Constitutional Court was made highly accessible to the new democratic public in Hungary. Literally, anyone could ask the Constitutional Court to review a law for constitutionality using a so-called *actio popularis* petition. As a result, virtually every law was challenged. From the time it opened in January 1990, the active Constitutional Court kept each new government under constitutional constraint regardless of the political leanings of the government. Opinion polls showed that the Constitutional Court was consistently the most highly respected political institution in Hungary.

The procedure for electing judges to the Constitutional Court before 2010 prevented the Court from being captured by any one political fraction. Because each judicial nominee to the Constitutional Court had to first be approved by a majority of parliamentary parties before then being elected to the Court by a two-thirds vote of the Parliament, the Court always had a balance of different political views represented on the bench.

Other changes that were made to the constitutional system in 1989 provided more checks on Hungary's unicameral parliamentary government. Revamped parliamentary procedure required extensive consultation with both civil society and opposition parties before government bills could be put to a vote. Important issues of constitutional concern required a two-thirds vote of the Parliament. As we have seen, however, the private member's bill procedure allowed the consultation stage for legislation to be bypassed and the two-thirds laws could cease to be a real check on power when the government had two-thirds of the parliamentary seats, something the disproportionate election law made quite likely.

Four ombudsmen added after 1989 to the system of rights protection. Other independent institutions – the central bank, state audit office, prosecutor general's office, national election commission and media board – provided both expertise and additional checkpoints. For example, both the national election commission and the media board were structured to ensure representation from across the political spectrum. An independent self-governing judiciary ensured that the laws were fairly applied.

There were so many different checks instituted after 1989 on the power of the prime minister and his parliamentary majority that the post-1989 constitutional system worked reliably to ensure that the operation of majoritarian political power didn't ride roughshod over democratic guarantees and constitutional limitations.

By contrast with this robust system of complementary powers, the new "Fidesz constitution" removes virtually all of the checks added to the prior communist constitution after 1989. I will detail the major reversals here.

Under the Fidesz constitution, the Constitutional Court's power and independence have been compromised in multiple ways. The system for electing constitutional judges was changed so that now a single two-thirds vote of the Parliament is sufficient to put a judge on the Court, abolishing the multiparty agreement that was once necessary for nomination. The Fidesz constitution also expanded the number of judges on the Court from 11 to 15, giving the governing party four more judges to name immediately.

Between changing the process for electing judges and expanding the number of judges to be elected, Fidesz government has been able to select nine of the 15 judges on the Court in its first three years in office. The Fidesz parliamentary bloc, voting in unison as it always does, put these judges onto the Court without multiparty support, though a few of the new judges were able to garner some votes from the far-right Jobbik party. The new constitutional judges have almost always voted for the Fidesz government position in each case. Some of the new judges have just voted for the government's position without even giving reasons.

Even if the Court is in Fidesz-friendly hands, however, a powerful Court might still be dangerous to a government that shuns checks on its freedom of action. This may explain why the jurisdiction of the Court has been cut. The Court no longer has the power to review laws based on "actio popularis" petitions, which are petitions that anyone can file. Now, the only individuals who can challenge laws must show that they have been concretely injured by the application of a potentially unconstitutional law and that they have exhausted their remedies in the ordinary courts. If the Constitutional Court can only hear cases that have concrete victims, it is hard for the Court to rule on matters pertaining to separation of powers and the structure of democratic institutions. Individuals rarely get "standing" to challenge a law that creates a new system for judicial appointments or a law that gives a government agency the power to issue decrees without parliamentary oversight, both laws that have been passed since Fidesz came to power. Some elements of "abstract review" remain with the Constitutional Court, but these, too, have been restricted.

Abstract review allows the Court to hear challenges to laws without a concrete dispute before it. With the exception of the Parliamentary Commissioner for Human Rights (who will himself be replaced by Fidesz parliamentary majority later this year), the constitution gives the power to challenge laws abstractly only to particular offices that are currently occupied by people affiliated with Fidesz. One might guess that Fidesz appointees do not have a strong incentive to limit the power of their own government. While one-quarter of the Parliament is also given the power to challenge a law at the Constitutional Court, the one-third of the seats in the current Parliament that are not held by the governing party are divided between parties of the center-left and a party of the far right, who would have to agree on a challenge, something that is not very likely. As a result, many laws have been effectively insulated from constitutional challenge by the way that abstract review power has been designed.

Even with the limitations on access to the Constitutional Court that were built into the Fidesz constitution, the system of judicial review in Hungary may seem broader than the system we have in the United States. Therefore, the dangers of the new system in Hungary may not be apparent to an American eye. Limiting the power to initiate judicial review only to those who have been directly injured and only to officials who owe their jobs to this government limits the ability of the Court to reach constitutional violations that it used to be able to reach. The US Supreme Court cannot reach all constitutional violations either, but the United States has a bicameral Congress, a separately elected president, a vigilant and active civil society, and federalism, which adds state governments and state courts as additional checks on the power of temporary majorities. Hungary has none of those checking institutions and so relies on the Constitutional Court to carry more weight in the constitutional system. Making it difficult for this Court to reach all constitutional violations creates blind spots in which unconstrained political discretion can override constitutional values.

In addition to limiting access to the Court, the Fidesz constitution restricts the jurisdiction of the Court in other ways as well. The Court may no longer review any law that deals with taxes or budgets when those laws are passed at a time when the national debt is more than 50% of GDP. Under the Fourth Amendment passed last week, the Court will never have the power to review budget and tax laws that were passed under these circumstances. As a result, if a tax law passed this year infringes an individual's constitutionally guaranteed property rights or if such a tax is applied selectively to particular minority groups, there is nothing that the Constitutional Court can do – in perpetuity. This opens up a space for the government to violate many personal rights without any constitutional oversight.

The Fourth Amendment has also banned the Court from reviewing constitutional amendments for substantive conflicts with constitutional principles. As a result, if the constitution promises freedom of religion but a constitutional amendment requires a two-thirds parliamentary vote before a church is officially recognized (a provision that was added to the constitution with the Fourth Amendment), the Court can do nothing about this. Or if the constitution says anyone may freely express her opinion

but an amendment says that no one may defame the Hungarian nation (a provision that was also added to the constitution with the Fourth Amendment), there is nothing the Court can do. These examples show that the government can now directly amend the constitution any time it thinks the Constitutional Court might strike down some policy that the government wants to enact regardless of how much these new amendments violate principles that have been guaranteed elsewhere in the constitution. In fact, the Fourth Amendment already puts back into the constitution laws that the Constitutional Court has already struck down as unconstitutional once before under the new constitution.

To make matters worse, the Fourth Amendment also nullifies all decisions made by the Constitutional Court before the new constitution took effect. At one level, this makes sense: old constitution, old decisions/new constitution, new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights. With those decisions gone, no one can say for certain whether Hungarian law protects free speech, freedom of religion, equality of all Hungarians before the law, property rights, and virtually every other right in precisely the way that everyone in Hungary had come to take for granted.

What other checks on Fidesz's untrammelled power have now been removed in the Fidesz constitution? The independence of the ordinary judicial system has taken a big hit. In 2011, the Fidesz government suddenly lowered the judicial retirement age from 70 to 62, thus removing the most senior 10% of the judiciary, including 20% of the Supreme Court judges and more than half of the appeals court presidents. Both the Hungarian Constitutional Court and the European Court of Justice found that the sudden change in the judicial retirement age was illegal.

The government's first reaction was to defy both courts' judgments, before finally agreeing at the end of 2012 to reinstate fired judges who wanted to return to their jobs. In the meantime, however, all of the court leadership positions were filled with new judges, so the old judges who wanted to be reinstated were returned to much less important positions. Through this move, the government was able to replace much of the top leadership of the judiciary in a single year. One court leader who could not have been replaced in this manner (because he was too young) was the then-President of the Supreme Court, András Baka. He was removed from office when the new constitution went into effect because of a new requirement, effectively immediately, that judges must have five years of judicial experience in Hungary before being named to the Supreme Court (newly renamed the Curia). President Baka's 16 years of experience as a judge on the European Court of Human Rights did not count.

How were the new judges named? The new president of the Supreme Court/Curia was elected by a two-thirds vote of the Fidesz Parliament. Beyond that, a new institution was created to oversee the appointment of all other judges as well as the administration of the judiciary: the National Judicial Office. This office replaced a system of judicial self-government. The president of the NJO, elected by two-thirds of the Parliament, has the power to hire, fire, promote, demote and discipline all judges in the system without any substantive oversight from any other institution. The national President has to countersign in cases where a judge is appointed for the first time in the system, but it is not clear he could refuse to do so. The new leadership of the ordinary courts has thus been replaced by judges who owe their careers to an official elected by the "magic two-thirds" of the Fidesz Parliament.

The Council of Europe's Commission on Democracy through Law (the Venice Commission) sharply criticized the extraordinary powers of and general lack of legal standards governing the president of the National Judicial Office. The US State Department has also raised questions about the independence of the judiciary under this system. In a concession to criticism, the Fidesz government agreed to limit the powers of the president of the NJO in legislation passed in summer 2012. But with the Fourth Amendment to the Constitution, those concessions are clawed back. The constitution now entrenches the National Judicial Office (NJO), whose president has the constitutional power to "manage the central administrative affairs of the courts," a set of responsibilities in which the judges merely "participate." None of the constraints that the Fidesz government agreed to under international pressure – requiring a significant role for the judges in their own self-government,

establishing legal standards for the president of the NJO to use in managing the judiciary, and no longer allowing the president of the NJO to stay in office until her successor is elected – are in the constitution itself. In fact, the concessions that the Fidesz government made to Hungary’s international critics may be unconstitutional now that the Fourth Amendment gives the sole power to manage the courts without these constraints to the president of the National Judicial Office.

In another move that has attracted universal criticism, the Fidesz government gave the president of the National Judicial Office the power to take any case in the entire court system and move it to a court different from the one to which normal procedure would assign it. So, for example, if a political corruption case against members of the main opposition party would normally be assigned to the trial-level court in Pest, the president of the National Judicial Office can move the case to Kecskemét. In fact, this is not a hypothetical; that very example has already happened. The rationale given for this extraordinary power to move cases is that the courts are overcrowded and case resolution can be speeded up by moving cases to less crowded courts.

But this rationale is belied by the facts: From public sources, I have been keeping track of the movement of these cases in the first year that the president of the NJO has had this power. She has moved only a few dozen cases away from courts that have thousands of backlogged cases. And she has moved the cases not to the least crowded courts in the countryside but to other courts that also have backlogs. She has moved some of the most high-profile political cases in which the political opposition has a stake, leading the opposition to charge the government with picking the judges particularly in cases that have strong political overtones. While my statistics cannot reveal the motivation of the government, they can show that the government is not moving a substantial enough number of cases to make a difference in waiting times and it is not moving cases from the most to the least crowded courts. I am happy to make the data available upon request.

With the Fourth Amendment passed last week, the power of the president of the NJO to move any case to any court in the country is entrenched in the constitution itself. And the constitution does not include the legal constraints that Hungary agreed to under pressure. Giving power to the president of the NJO to select which court handles individual cases outside the rules of ordinary legal procedure is for many – myself included – the end of the rule of law in Hungary.

The Constitutional Court and the ordinary judiciary have suffered a severe blow under the Fidesz constitution. Other independent institutions have fared no better.

The ombudsman system, which once comprised four independent ombudsmen with independent jurisdictions, has now been folded into one office with a much smaller staff. The former data protection ombudsman was fired and the office has been absorbed directly into the government, something that has generated an infringement action launched by the European Commission against Hungary at the European Court of Justice because EU law requires an independent data privacy officer.

As of two weeks ago, the central bank has a new governor, who moved to that job from being minister of the economy. He used his ministerial power to unilaterally change the rules for the central bank. Without the need for parliamentary approval or Court review, then, György Matolcsy, as the Fidesz economics minister, gave the office of György Matolcsy, the new central bank governor, dramatically increased powers just before he moved from one job to the next. The charter of the central bank, as it turns out, is not even a statute passed by Parliament but a document that either the bank itself or the minister of the economy can change at will.

The new media council has a chair appointed directly by the prime minister and a membership that consists exclusively of members elected by the Fidesz parliamentary two-thirds, both for nine-year terms. The media council has draconian powers to levy bankrupting fines based on a review of the content of both public and private media, including broadcast, print and internet media. A Constitutional Court decision freed the print media from some of these constraints, but the Fidesz government could now easily amend the constitution to bring the print media back under control and the Constitutional Court could say nothing further about it.

The election commission has been revamped and now consists exclusively of members who have been elected by the Fidesz parliamentary two-thirds majority, all for terms of nine years. While each party with a national list in the next election (scheduled for April 2014) will have a temporary member on the commission during the campaign, opposition parties will be easily outvoted by the Fidesz majority.

The legal framework for the 2014 election is still in flux. The Fidesz parliamentary two-thirds has already enacted two election laws over vociferous protest from opposition parties, creating an even more disproportionate system than the one it replaced. One law gerrymanders the districts for the next election in such a way that it will be very difficult for the opposition to win. The law even fixes the exact boundaries of election districts in a cardinal law that requires a two-thirds vote of the Parliament to change. This law also eliminates the second round of voting for single-member districts so that someone without majority support in a district can enter Parliament, which was not previously the case.

The government passed a second cardinal law on elections that instituted a system of voter registration, even though the country has conducted more than 20 years of elections with an excellent “civil list” that has never produced any complaints of irregularity. The Constitutional Court struck down voter registration as unconstitutional, and for now the governing party seems to have given up on this idea. But with its parliamentary two-thirds vote, the government has the power to override the Constitutional Court by simply adding voter registration to the constitution. The government may also change other important features of the election system right up until the election takes place. In fact, at the moment, the election framework is presently incomplete. Among other things, no rules have yet been devised for making and verifying voter lists for ethnic Hungarians in the neighboring states who have recently become eligible for citizenship as the result of constitutional changes.

The Fourth Amendment added new electoral rules just last week. The amendment created a constitutional ban on political advertising during the election campaign in any venue other than in the public broadcast media, which is controlled by the all-Fidesz media board. Moreover, only parties with national party lists can advertise at all in the national media, which might exclude smaller and newer parties. These restrictions had been previously declared unconstitutional by the Constitutional Court, so the government amended the constitution to override that decision. And since these provisions are now in the constitution itself, the Constitutional Court cannot review them again.

But suppose that, despite all of the obstacles that the current governing party has put in the way of the political opposition, an opposition coalition manages to win the next election. The Fidesz constitution has created a trap that can be snapped in just such a case. The constitution creates a national budget council with the power to veto any future budget that adds to the national debt, which any foreseeable budget will do. The members of the budget council have been chosen by the Fidesz two-thirds majority for terms of 6 or 12 years and can be replaced only if two-thirds of the parliament can agree on their successors when their terms are over. Not only does this mean that, for three elections cycles out, any future government must follow a budgetary course agreed on by a council where all of the members were elected by the Fidesz government, but this budget council has even more power than that.

The constitution requires the Parliament to pass a budget by March 31 of each year. If the Parliament fails to do so, the president of the country can dissolve the Parliament and call new elections. When this provision is put together with the powers of the budgetary council, the constraints on any future government are clear. If a new non-Fidesz government passes a budget that adds to the debt, that budget can be vetoed by the all-Fidesz budgetary council at any time, including on the eve of the budget deadline given in the constitution. The parliament would then miss the deadline and the president (also named by Fidesz and serving through 2017) could call new elections. And this process can be repeated until an acceptable government is voted back into power.

The Fidesz government may have created this unfortunate interaction of constitutional provisions inadvertently in an earnest

attempt to create a binding mechanism to achieve budget discipline. But it would be easy for the Fidesz government to achieve fiscal discipline without creating this anti-democratic trap. The Fidesz government could amend the constitution to require that the budget council veto the budget by a deadline that would give the Parliament time to pass a new budget before the president gains the power to dissolve it. I have personally suggested this to high-level members of Fidesz, but an amendment to this effect has so far not appeared.

There is more that could be said about the new Fidesz constitution. I have only mentioned what I take to be the biggest obstacles posed to constitutionalism and democracy by this new constitutional framework.

What can be done about the Fidesz consolidation of power by the United States, the US Helsinki Commission, and by the Organization for Security and Cooperation in Europe?

First, of course, Hungarian democracy must be created and maintained by Hungarians themselves. But a democratic public must be an educated public and Hungarians themselves need to learn what has happened to their own constitution over the last three years. Most have no idea, and not because they couldn't or wouldn't understand.

The government celebrated its new constitution with great fanfare. They set up "constitutional tables" at every town hall where people could sign up to receive their very own copy of the constitution. Last June, the government presented to every secondary school graduate a coffee-table book with the words of the new constitution illustrated with historic and specially commissioned paintings. But much of what I have mentioned above is not contained in the text that government has distributed. Many of the most worrisome provisions that I have highlighted here are in the constitutional amendments made since that time or in the cardinal laws that can only be accessed through reading the immensely difficult legalese of the Magyar Közlöny. These laws are posted online only in PDF form, not searchable unless one goes through each individual daily issue separately.

Hungary's friends, including the United States, could assist financially with a program to educate citizens, lawyers and judges in Hungary about the new constitutional framework in Hungary. A public education campaign about the new constitutional structure – conducted by Hungarian constitutional experts from the government, from the opposition and from academia – may assist in giving Hungarians better information about their new constitutional system. Such a campaign would be especially effective if it could be conducted through the broadcast media in Hungary, though since the government functionally controls the broadcast media through its Media Council, some monitoring system would have to be put in place to ensure that both the government and opposition voices are heard. Having read thousands of petitions that ordinary Hungarians sent to the Constitutional Court in the 1990s, I am confident that Hungarians themselves will rise to the defense of both democracy and constitutionalism once they see the dangers of a flawed constitutional design.

Second, the Hungarian government vociferously claims that it is still a democracy because political parties may freely organize for the parliamentary elections next year. But its critics are concerned that the government presently controls the media landscape, has enacted a number of legal provisions that disadvantage opposition parties, and continues to change the electoral rules. In fact, nothing prohibits the government from changing important elements of the electoral framework at the last minute. With the election only one year away, it is important to get the rules of the game fixed – fairly – as soon as possible.

The OSCE has expertise in monitoring elections to ensure that they are free and fair. The OSCE should insist that the electoral rules be settled far enough ahead of the election so that all who want to contest the election have a reasonable amount of time to organize themselves accordingly.

Enough questions have been raised about the willingness of the current Hungarian government to recognize the political opposition that the OSCE/ODIHR should also fully monitor the 2014 Hungarian parliamentary elections. This should include not just election-day or long-term monitoring missions. The comprehensively changed new constitutional framework warrants an early Needs Assessment Mission from OSCE/ODIHR, one that can fully review the effects of all the new provisions. It should focus on the ability of political parties to organize and to get their message out, access to the media, and the fairness of the basic election framework including the creation of electoral districts and the compatibility of both the content and timing of the new electoral rules with the principles of free and fair elections.

Third, the US government should press the Hungarian government to live up to its international commitments to democracy, constitutionalism, the rule of law and robust rights protection. The US should be vigilant in monitoring backsliding from the high level of constitutional democratic protections that Hungary had achieved after 1989 and the US should cooperate with the Venice Commission, the Council of Europe Parliamentary Assembly Monitoring Committee, and the European Union (for example, the LIBE Committee of the European Parliament), all of which have ongoing monitoring processes in place.

But the US government should also be aware that, under pressure, the Fidesz government has in the past promised minor changes to its comprehensive framework and then has discarded those changes when the pressure lifted. Moreover, the changes that the Fidesz government has previously offered to make do not really address the key problems of the system. The Fidesz constitutional framework is a highly redundant system that must be understood as a whole. Each individual legal rule cannot be evaluated by itself because one must understand the function of that rule in the larger system. Changing a number of small features of this constitutional order may not in fact address the most serious problem – which is the concentration of political power in the hands of one party. In deciding whether the Hungarian government has been responsive to international and domestic criticism, Hungary's allies need to examine whether proposed changes really alter the way this complex and integrated system works as a whole.

The US should resist entering the battle of competing checklists of constitutional features. The Hungarian government often insists that some other European country has the same individual rule that its friends criticize. Perhaps we should remember Frankenstein's monster, who was stitched together from perfectly normal bits of other once-living things, but who was, nonetheless, a monster. No other constitutional democracy in the world, let alone in Europe, has the combination of constitutional features that Hungary now has. In evaluating Hungary for its compliance with international standards, its international friends must look at the whole constitutional system and not just at individual pieces as it assesses whether Hungary still belongs to the family of constitutional democracies.

Finally, Hungary is a small country in Europe. It may be hard to see why the United States should spend any of its political capital to address what former Secretary of State Hillary Clinton called Hungary's backsliding from constitutional democracy. There are two main reasons why the US should care, apart from the fact that it is painful to see any country retreat from democracy and one should always be concerned about the people adversely affected.

Hungary is a partner with the US not only in the OSCE, but also in NATO. OSCE commits its member states to the protection of human rights as defined under the Helsinki Final Act of 1975, and long experience shows that human rights receive their best protection from the maintenance of a constitutional and democratic government, both of which are now in doubt in Hungary. The NATO Charter creates a union of states "determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law." But these commitments are also being challenged by the concentration of power in Hungary under its new constitutional framework. Both the OSCE and NATO commit its member states to good behavior and good government, which these organizations should be able to monitor.

In addition, other countries in Hungary's neighborhood are looking with great interest at what Hungary is doing. They can see that the European Union, the Council of Europe, the OSCE, NATO and the United States have limited influence and ability to

induce a national government to change its domestic laws. Hungary's neighbors understand that Hungary is getting away with consolidating all political power in the hands of one party, and many find that enticing. Troubling recent developments in Romania, Bulgaria and Slovenia show that the Hungarian problem of overly concentrated power could spread if the US and its European allies don't stand up for their values in the Hungarian case. The US should therefore treat constitutional problems in Hungary with a sense of urgency, both because of the speed with which this system is being locked in and because of the likelihood that the Hungarian constitutional disease could spread around the neighborhood.

In closing then, I strongly urge the United States, the US Helsinki Commission and the OSCE to take Hungary seriously, engage with the Hungarian government on matters of constitutional reform, and work toward ensuring that the channels of democratic participation remain open in Hungary so that the Hungarian people retain the capacity to determine the sort of government under which they will live. The legal changes I have described today pose a real danger to fundamental democratic and constitutional values, and Hungary's friends need to sound the alarm.

TESTIMONY

U.S. COMMISSION ON SECURITY AND COOPERATION IN EUROPE

HEARING ON "THE TRAJECTORY OF DEMOCRACY – WHY HUNGARY MATTERS"

Capitol Visitor Center, Room SVC 210 (Senate Side)

March 19, 2013 at 3 pm

Kim Lane Scheppele

Laurance S. Rockefeller Professor of Sociology and International Affairs

Director, Program in Law and Public Affairs

Princeton University

I am honored to testify before you today. My name is Kim Lane Scheppele, and I am the Rockefeller Professor of Sociology and International Affairs, as well as the Director of the Program in Law and Public Affairs, at Princeton University. I am also a Faculty Fellow at the University of Pennsylvania Law School.

Nearly twenty years ago, the US National Science Foundation gave me a grant to move to Hungary to study the Hungarian Constitutional Court, then the most impressive of the new courts in Eastern Europe. I planned to go for one year but stayed for four, working as a researcher at the Constitutional Court and serving as an expert advisor to the constitutional drafting committee of the Hungarian Parliament in 1995-1996, a position I occupied with the assistance of a second NSF grant. I am

grateful to the NSF for having funded my research on Hungary, which documented how the new Hungarian constitution of 1989 put down roots and grew to support a vibrant Hungarian constitutional democracy. I have followed Hungarian constitutional developments closely ever since.

I am here today because the current Hungarian government has felled the tree of democratic constitutionalism that Hungary planted in 1989.

Since its election in 2010, the Fidesz government has created a constitutional frenzy. It won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the constitution. Twelve times in its first year in office, it amended the constitution it inherited. Those amendments removed most of the institutional checks that could have stopped what the government did next – which was to install a new constitution. The new Fidesz constitution was drafted in secret, presented to the Parliament with only one month for debate, passed by the votes of only the Fidesz parliamentary bloc, and signed by a President that Fidesz had named. Neither the opposition parties nor civil society organizations nor the general public had any influence in the constitutional process. There was no popular ratification. The Fidesz constitution went into effect on January 1, 2012.

While the government claims it was given a mandate to make major changes, the general Hungarian public thinks otherwise. During the election campaign in 2010, Fidesz never said it would change the whole constitutional system. Once the Fidesz governing program became clear after the party came to power, the popularity of Fidesz has plummeted, even more so after the government undertook to replace the constitution.

Figure 1: Political Party Popularity in Hungary 2008-2013

Source: Ipsos/Portfolio.hu.

After the April 2010 election, Fidesz's popularity has steadily dropped. But none of the other parties – the MSzP (Socialists), Jobbik (far-right party), LMP (Politics Can be Different, a liberal/green/youth party) or the new liberal electoral coalition Együtt 2014 (Together 2014) – is any more popular. Surveys show that 50% or more of Hungarian voters say that there is no political party that they support.

Even though the government pushed through a one-party constitution without support from any other political fraction, except its own party-list partner the Christian Democrats, this didn't stop the constitutional juggernaut. The government has amended its new constitution four times in 15 months. Each time, the government has done so with the votes of only its own political bloc, rejecting all proposals from the political opposition or from civil society groups. The current Hungarian constitution remains a one-party constitution.

Just last week, the Fidesz government passed a 15-page amendment to the new 45-page constitution. László Sólyom, the conservative former president of both the Constitutional Court and the Republic of Hungary, said in a public statement last week that the "Fourth Amendment" removes the last traces of separation of powers from the Hungarian constitutional system. Under the constitution as amended, no institution has the legal right to check many of the key powers of the one-party government.

The Fourth Amendment nullifies more than 20 years of rights-protecting case law of the Hungarian Constitutional Court that had been developed before the new constitution went into effect. This leaves a giant gap where firm legal protection of basic rights once stood. The Fourth Amendment specifically overturns nearly all of the decisions that the Constitutional Court made

in the last year striking down controversial new laws the Fidesz government had passed. The Fourth Amendment removes the Court's power to evaluate on substantive grounds any new constitutional amendments, a move which allows the government to escape review by inserting any controversial new proposal directly into the constitution. The Fourth Amendment entrenches political control of the judiciary and gives the government new tools to prevent the opposition from coming to power. The Fourth Amendment reverses many of the concessions Hungary made last year when the European Union, the Council of Europe and the US State Department criticized fundamental aspects of that constitution.

Under cover of constitutional reform, the Fidesz government has given itself absolute power. It now has discretion to do virtually anything it wants, even if civil society, the general public, and all other political parties are opposed.

How could Hungary have fallen so far so fast from the family of stable constitutional democracies? The answer lies in the Achilles' heel of the old constitutional system: a disproportionate election law combined with an easy constitutional amendment rule.

Hungary's 1990 election law gave disproportionate numbers of seats to the winner of an election, a feature that was designed to help plurality parties form stable governments. When Fidesz got 53% of the vote in the 2010 election, the election law converted this victory into 68% of the seats in the Parliament. While Fidesz won this vote in a joint party list with the Christian Democrats (the KDNP), the Christian Democrats barely have an independent existence apart from Fidesz and its members vote in a bloc with Fidesz on every issue.

Figure 2: Composition of the Hungarian Parliament 2010

Source: Hungarian National Election Commission

Translation:

The Fidesz/KDNP joint party list (orange) received 52.7% of the vote, 263 of the seats and 68.1% of the Parliament. MSzP (Socialists) (red) received 19.3% of the vote, 59 of the seats and 15.3% of the Parliament. Jobbik (far-right party) (dark green) received 16.6% of the vote, 47 of the seats and 12.2% of the Parliament and LMP (Politics Can be Different) (light green) received 7.7% of the vote, 16 of the seats and 4.1% of the Parliament. There was one independent MP.

Armed with its two-thirds supermajority, the Fidesz government has been able to make use of the old constitution's amendment rule, dating to the communist constitution of 1949, which permitted the constitution to be changed with a single two-thirds vote of the Parliament. This "magic two-thirds" has enabled Fidesz to make all of its constitutional changes in a formally legal manner. Only one barrier remained: In 1995, under a prior two-thirds government, the old constitution was amended to require a four-fifths vote of the Parliament before any new constitutional drafting process could begin. One month into its term, Fidesz used its two-thirds vote to amend the constitution to remove the four-fifths requirement.

Many of the laws, including the constitution itself, many of the constitutional amendments and most of the cardinal laws, were introduced through the parliamentary procedure of a "private member's bill," which bypasses the stage of public consultation required of all government bills. That, combined with the fact that the Parliament instituted a new rule through which a two-thirds vote could cut off parliamentary debate on any topic, has meant that most of these new laws have received very little public discussion. It has not been uncommon for a constitutional amendment go from first proposal to final enactment in just a few weeks.

Taken over three years, the constitutional changes are complicated, detailed, and spread out across a new constitution, four major constitutional amendments, dozens of “cardinal” (super-majority) laws, and thousands of pages of ordinary laws that were all passed in a giant legislative blur, sometimes in the middle of the night. I strongly suspect that most Hungarians do not understand the details of this new constitutional system. Even Hungarian lawyers are not able to keep up with the total revolution in the law. In what follows, I will try to explain how the new system of Hungarian government is structured, current as of March 15, 2013, taking all of this new law into account.

The primary source for my testimony is the Magyar Közlöny, the official gazette of the Hungarian government that publishes all of the laws. From my perch in the United States, I cannot say how the laws are being carried out. But I can say how the laws are structured and what they do and do not permit. I will call this whole new legal structure the “Fidesz constitution” even though not everything is in the single constitutional text or its amendments. Many elements of the system I describe are in two-thirds “cardinal” laws that are almost as entrenched as the constitution itself, which is why I don’t make the fine distinctions here except where they are crucial for understanding how the system works. I am happy to provide detailed legal citations for all of the claims I make below if you are interested in checking more precisely what I say or precisely where in the law each of these statements can find support.

Others who are providing testimony for this hearing will address other crucial issues raised by the current Hungarian government’s actions over the last three years. They will address the fate of civil liberties, the difficult situation for many churches in Hungary and the growing and increasingly virulent strains of anti-Semitism and anti-Roma agitation that have occurred alongside this constitutional revolution.

My remit at this hearing today is to talk about something altogether more boring, but no less important: the system of divided and checked powers necessary for a government to remain both constitutional and democratic. History tells us that a government that has no limits on what it can do and that concentrates all powers in a single party will soon cease to be either constitutional or democratic.

The importance of checked and limited powers was an insight very familiar to the American constitutional framers. The Philadelphia Convention did not even include a bill of rights in the US Constitution because the framers believed that the most effective protection for rights was a government that was limited by law. While American history has taught us that a bill of rights matters – and the ratification process of the US Constitution insisted on including one – we have also learned much from Princeton graduate James Madison, who wrote in Federalist #47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

By James Madison’s definition, Hungary is on the verge of tyranny.

In what follows, I will show that the Fidesz political party has gathered all of the powers of the Hungarian government into its own hands, without checks from any other political quarter and without any limits on what it can do.

We should start with the basics: Hungary has a unicameral parliamentary system of government. A unicameral Parliament has no upper house to check what the lower house does, no “Senate” to complicate life for the “House of Representatives” and vice versa. A parliamentary system means that the most powerful executive, the prime minister, is elected by the Parliament rather than directly by the people. As a result, the prime minister in Hungary is virtually guaranteed a majority for all of his legislative initiatives because that legislative majority put him into his job. Not surprisingly, the legislative-executive cooperation guaranteed in Hungary’s unicameral parliamentary system dates back to the communist constitution of 1949.

(From the mid-19th to the mid-20th centuries, Hungary had a bicameral parliament.)

In 1989, however, major constitutional changes in Hungary added a number of checks to this basic framework. A Constitutional Court was created as the primary watchdog on the majoritarian dangers of a unicameral parliamentary system. Unlike a Supreme Court which is the highest court of appeal in the legal system (something we are familiar with in the United States), a Constitutional Court is the only court that is allowed to hear and decide constitutional questions – and it does nothing else besides rule on constitutional matters. Because the Hungarian Constitutional Court conducts the primary oversight in a system that has little formal separation of legislative and executive power, it is even more important than the Supreme Court in the American separation-of-powers system.

Given such weighty responsibility in the 1989 constitutional design, the Constitutional Court was made highly accessible to the new democratic public in Hungary. Literally, anyone could ask the Constitutional Court to review a law for constitutionality using a so-called *actio popularis* petition. As a result, virtually every law was challenged. From the time it opened in January 1990, the active Constitutional Court kept each new government under constitutional constraint regardless of the political leanings of the government. Opinion polls showed that the Constitutional Court was consistently the most highly respected political institution in Hungary.

The procedure for electing judges to the Constitutional Court before 2010 prevented the Court from being captured by any one political fraction. Because each judicial nominee to the Constitutional Court had to first be approved by a majority of parliamentary parties before then being elected to the Court by a two-thirds vote of the Parliament, the Court always had a balance of different political views represented on the bench.

Other changes that were made to the constitutional system in 1989 provided more checks on Hungary's unicameral parliamentary government. Revamped parliamentary procedure required extensive consultation with both civil society and opposition parties before government bills could be put to a vote. Important issues of constitutional concern required a two-thirds vote of the Parliament. As we have seen, however, the private member's bill procedure allowed the consultation stage for legislation to be bypassed and the two-thirds laws could cease to be a real check on power when the government had two-thirds of the parliamentary seats, something the disproportionate election law made quite likely.

Four ombudsmen added after 1989 to the system of rights protection. Other independent institutions – the central bank, state audit office, prosecutor general's office, national election commission and media board – provided both expertise and additional checkpoints. For example, both the national election commission and the media board were structured to ensure representation from across the political spectrum. An independent self-governing judiciary ensured that the laws were fairly applied.

There were so many different checks instituted after 1989 on the power of the prime minister and his parliamentary majority that the post-1989 constitutional system worked reliably to ensure that the operation of majoritarian political power didn't ride roughshod over democratic guarantees and constitutional limitations.

By contrast with this robust system of complementary powers, the new "Fidesz constitution" removes virtually all of the checks added to the prior communist constitution after 1989. I will detail the major reversals here.

Under the Fidesz constitution, the Constitutional Court's power and independence have been compromised in multiple ways. The system for electing constitutional judges was changed so that now a single two-thirds vote of the Parliament is sufficient to put a judge on the Court, abolishing the multiparty agreement that was once necessary for nomination. The Fidesz

constitution also expanded the number of judges on the Court from 11 to 15, giving the governing party four more judges to name immediately.

Between changing the process for electing judges and expanding the number of judges to be elected, Fidesz government has been able to select nine of the 15 judges on the Court in its first three years in office. The Fidesz parliamentary bloc, voting in unison as it always does, put these judges onto the Court without multiparty support, though a few of the new judges were able to garner some votes from the far-right Jobbik party. The new constitutional judges have almost always voted for the Fidesz government position in each case. Some of the new judges have just voted for the government's position without even giving reasons.

Even if the Court is in Fidesz-friendly hands, however, a powerful Court might still be dangerous to a government that shuns checks on its freedom of action. This may explain why the jurisdiction of the Court has been cut. The Court no longer has the power to review laws based on "actio popularis" petitions, which are petitions that anyone can file. Now, the only individuals who can challenge laws must show that they have been concretely injured by the application of a potentially unconstitutional law and that they have exhausted their remedies in the ordinary courts. If the Constitutional Court can only hear cases that have concrete victims, it is hard for the Court to rule on matters pertaining to separation of powers and the structure of democratic institutions. Individuals rarely get "standing" to challenge a law that creates a new system for judicial appointments or a law that gives a government agency the power to issue decrees without parliamentary oversight, both laws that have been passed since Fidesz came to power. Some elements of "abstract review" remain with the Constitutional Court, but these, too, have been restricted.

Abstract review allows the Court to hear challenges to laws without a concrete dispute before it. With the exception of the Parliamentary Commissioner for Human Rights (who will himself be replaced by Fidesz parliamentary majority later this year), the constitution gives the power to challenge laws abstractly only to particular offices that are currently occupied by people affiliated with Fidesz. One might guess that Fidesz appointees do not have a strong incentive to limit the power of their own government. While one-quarter of the Parliament is also given the power to challenge a law at the Constitutional Court, the one-third of the seats in the current Parliament that are not held by the governing party are divided between parties of the center-left and a party of the far right, who would have to agree on a challenge, something that is not very likely. As a result, many laws have been effectively insulated from constitutional challenge by the way that abstract review power has been designed.

Even with the limitations on access to the Constitutional Court that were built into the Fidesz constitution, the system of judicial review in Hungary may seem broader than the system we have in the United States. Therefore, the dangers of the new system in Hungary may not be apparent to an American eye. Limiting the power to initiate judicial review only to those who have been directly injured and only to officials who owe their jobs to this government limits the ability of the Court to reach constitutional violations that it used to be able to reach. The US Supreme Court cannot reach all constitutional violations either, but the United States has a bicameral Congress, a separately elected president, a vigilant and active civil society, and federalism, which adds state governments and state courts as additional checks on the power of temporary majorities. Hungary has none of those checking institutions and so relies on the Constitutional Court to carry more weight in the constitutional system. Making it difficult for this Court to reach all constitutional violations creates blind spots in which unconstrained political discretion can override constitutional values.

In addition to limiting access to the Court, the Fidesz constitution restricts the jurisdiction of the Court in other ways as well. The Court may no longer review any law that deals with taxes or budgets when those laws are passed at a time when the national debt is more than 50% of GDP. Under the Fourth Amendment passed last week, the Court will never have the power to review budget and tax laws that were passed under these circumstances. As a result, if a tax law passed this year infringes an individual's constitutionally guaranteed property rights or if such a tax is applied selectively to particular minority groups, there is nothing that the Constitutional Court can do – in perpetuity. This opens up a space for the government to violate many personal rights without any constitutional oversight.

The Fourth Amendment has also banned the Court from reviewing constitutional amendments for substantive conflicts with constitutional principles. As a result, if the constitution promises freedom of religion but a constitutional amendment requires a two-thirds parliamentary vote before a church is officially recognized (a provision that was added to the constitution with the Fourth Amendment), the Court can do nothing about this. Or if the constitution says anyone may freely express her opinion but an amendment says that no one may defame the Hungarian nation (a provision that was also added to the constitution with the Fourth Amendment), there is nothing the Court can do. These examples show that the government can now directly amend the constitution any time it thinks the Constitutional Court might strike down some policy that the government wants to enact regardless of how much these new amendments violate principles that have been guaranteed elsewhere in the constitution. In fact, the Fourth Amendment already puts back into the constitution laws that the Constitutional Court has already struck down as unconstitutional once before under the new constitution.

To make matters worse, the Fourth Amendment also nullifies all decisions made by the Constitutional Court before the new constitution took effect. At one level, this makes sense: old constitution, old decisions/new constitution, new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights. With those decisions gone, no one can say for certain whether Hungarian law protects free speech, freedom of religion, equality of all Hungarians before the law, property rights, and virtually every other right in precisely the way that everyone in Hungary had come to take for granted.

What other checks on Fidesz's untrammelled power have now been removed in the Fidesz constitution? The independence of the ordinary judicial system has taken a big hit. In 2011, the Fidesz government suddenly lowered the judicial retirement age from 70 to 62, thus removing the most senior 10% of the judiciary, including 20% of the Supreme Court judges and more than half of the appeals court presidents. Both the Hungarian Constitutional Court and the European Court of Justice found that the sudden change in the judicial retirement age was illegal.

The government's first reaction was to defy both courts' judgments, before finally agreeing at the end of 2012 to reinstate fired judges who wanted to return to their jobs. In the meantime, however, all of the court leadership positions were filled with new judges, so the old judges who wanted to be reinstated were returned to much less important positions. Through this move, the government was able to replace much of the top leadership of the judiciary in a single year. One court leader who could not have been replaced in this manner (because he was too young) was the then-President of the Supreme Court, András Baka. He was removed from office when the new constitution went into effect because of a new requirement, effectively immediately, that judges must have five years of judicial experience in Hungary before being named to the Supreme Court (newly renamed the Curia). President Baka's 16 years of experience as a judge on the European Court of Human Rights did not count.

How were the new judges named? The new president of the Supreme Court/Curia was elected by a two-thirds vote of the Fidesz Parliament. Beyond that, a new institution was created to oversee the appointment of all other judges as well as the administration of the judiciary: the National Judicial Office. This office replaced a system of judicial self-government. The president of the NJO, elected by two-thirds of the Parliament, has the power to hire, fire, promote, demote and discipline all judges in the system without any substantive oversight from any other institution. The national President has to countersign in cases where a judge is appointed for the first time in the system, but it is not clear he could refuse to do so. The new leadership of the ordinary courts has thus been replaced by judges who owe their careers to an official elected by the "magic two-thirds" of the Fidesz Parliament.

The Council of Europe's Commission on Democracy through Law (the Venice Commission) sharply criticized the extraordinary powers of and general lack of legal standards governing the president of the National Judicial Office. The US State Department has also raised questions about the independence of the judiciary under this system. In a concession to

criticism, the Fidesz government agreed to limit the powers of the president of the NJO in legislation passed in summer 2012. But with the Fourth Amendment to the Constitution, those concessions are clawed back. The constitution now entrenches the National Judicial Office (NJO), whose president has the constitutional power to “manage the central administrative affairs of the courts,” a set of responsibilities in which the judges merely “participate.” None of the constraints that the Fidesz government agreed to under international pressure – requiring a significant role for the judges in their own self-government, establishing legal standards for the president of the NJO to use in managing the judiciary, and no longer allowing the president of the NJO to stay in office until her successor is elected – are in the constitution itself. In fact, the concessions that the Fidesz government made to Hungary’s international critics may be unconstitutional now that the Fourth Amendment gives the sole power to manage the courts without these constraints to the president of the National Judicial Office.

In another move that has attracted universal criticism, the Fidesz government gave the president of the National Judicial Office the power to take any case in the entire court system and move it to a court different from the one to which normal procedure would assign it. So, for example, if a political corruption case against members of the main opposition party would normally be assigned to the trial-level court in Pest, the president of the National Judicial Office can move the case to Kecskemét. In fact, this is not a hypothetical; that very example has already happened. The rationale given for this extraordinary power to move cases is that the courts are overcrowded and case resolution can be speeded up by moving cases to less crowded courts.

But this rationale is belied by the facts: From public sources, I have been keeping track of the movement of these cases in the first year that the president of the NJO has had this power. She has moved only a few dozen cases away from courts that have thousands of backlogged cases. And she has moved the cases not to the least crowded courts in the countryside but to other courts that also have backlogs. She has moved some of the most high-profile political cases in which the political opposition has a stake, leading the opposition to charge the government with picking the judges particularly in cases that have strong political overtones. While my statistics cannot reveal the motivation of the government, they can show that the government is not moving a substantial enough number of cases to make a difference in waiting times and it is not moving cases from the most to the least crowded courts. I am happy to make the data available upon request.

With the Fourth Amendment passed last week, the power of the president of the NJO to move any case to any court in the country is entrenched in the constitution itself. And the constitution does not include the legal constraints that Hungary agreed to under pressure. Giving power to the president of the NJO to select which court handles individual cases outside the rules of ordinary legal procedure is for many – myself included – the end of the rule of law in Hungary.

The Constitutional Court and the ordinary judiciary have suffered a severe blow under the Fidesz constitution. Other independent institutions have fared no better.

The ombudsman system, which once comprised four independent ombudsmen with independent jurisdictions, has now been folded into one office with a much smaller staff. The former data protection ombudsman was fired and the office has been absorbed directly into the government, something that has generated an infringement action launched by the European Commission against Hungary at the European Court of Justice because EU law requires an independent data privacy officer.

As of two weeks ago, the central bank has a new governor, who moved to that job from being minister of the economy. He used his ministerial power to unilaterally change the rules for the central bank. Without the need for parliamentary approval or Court review, then, György Matolcsy, as the Fidesz economics minister, gave the office of György Matolcsy, the new central bank governor, dramatically increased powers just before he moved from one job to the next. The charter of the central bank, as it turns out, is not even a statute passed by Parliament but a document that either the bank itself or the minister of the economy can change at will.

The new media council has a chair appointed directly by the prime minister and a membership that consists exclusively of

members elected by the Fidesz parliamentary two-thirds, both for nine-year terms. The media council has draconian powers to levy bankrupting fines based on a review of the content of both public and private media, including broadcast, print and internet media. A Constitutional Court decision freed the print media from some of these constraints, but the Fidesz government could now easily amend the constitution to bring the print media back under control and the Constitutional Court could say nothing further about it.

The election commission has been revamped and now consists exclusively of members who have been elected by the Fidesz parliamentary two-thirds majority, all for terms of nine years. While each party with a national list in the next election (scheduled for April 2014) will have a temporary member on the commission during the campaign, opposition parties will be easily outvoted by the Fidesz majority.

The legal framework for the 2014 election is still in flux. The Fidesz parliamentary two-thirds has already enacted two election laws over vociferous protest from opposition parties, creating an even more disproportionate system than the one it replaced. One law gerrymanders the districts for the next election in such a way that it will be very difficult for the opposition to win. The law even fixes the exact boundaries of election districts in a cardinal law that requires a two-thirds vote of the Parliament to change. This law also eliminates the second round of voting for single-member districts so that someone without majority support in a district can enter Parliament, which was not previously the case.

The government passed a second cardinal law on elections that instituted a system of voter registration, even though the country has conducted more than 20 years of elections with an excellent "civil list" that has never produced any complaints of irregularity. The Constitutional Court struck down voter registration as unconstitutional, and for now the governing party seems to have given up on this idea. But with its parliamentary two-thirds vote, the government has the power to override the Constitutional Court by simply adding voter registration to the constitution. The government may also change other important features of the election system right up until the election takes place. In fact, at the moment, the election framework is presently incomplete. Among other things, no rules have yet been devised for making and verifying voter lists for ethnic Hungarians in the neighboring states who have recently become eligible for citizenship as the result of constitutional changes.

The Fourth Amendment added new electoral rules just last week. The amendment created a constitutional ban on political advertising during the election campaign in any venue other than in the public broadcast media, which is controlled by the all-Fidesz media board. Moreover, only parties with national party lists can advertise at all in the national media, which might exclude smaller and newer parties. These restrictions had been previously declared unconstitutional by the Constitutional Court, so the government amended the constitution to override that decision. And since these provisions are now in the constitution itself, the Constitutional Court cannot review them again.

But suppose that, despite all of the obstacles that the current governing party has put in the way of the political opposition, an opposition coalition manages to win the next election. The Fidesz constitution has created a trap that can be snapped in just such a case. The constitution creates a national budget council with the power to veto any future budget that adds to the national debt, which any foreseeable budget will do. The members of the budget council have been chosen by the Fidesz two-thirds majority for terms of 6 or 12 years and can be replaced only if two-thirds of the parliament can agree on their successors when their terms are over. Not only does this mean that, for three elections cycles out, any future government must follow a budgetary course agreed on by a council where all of the members were elected by the Fidesz government, but this budget council has even more power than that.

The constitution requires the Parliament to pass a budget by March 31 of each year. If the Parliament fails to do so, the president of the country can dissolve the Parliament and call new elections. When this provision is put together with the powers of the budgetary council, the constraints on any future government are clear. If a new non-Fidesz government passes a budget that adds to the debt, that budget can be vetoed by the all-Fidesz budgetary council at any time, including on the eve of the budget deadline given in the constitution. The parliament would then miss the deadline and the president (also named by Fidesz and serving through 2017) could call new elections. And this process can be repeated until an acceptable government is

voted back into power.

The Fidesz government may have created this unfortunate interaction of constitutional provisions inadvertently in an earnest attempt to create a binding mechanism to achieve budget discipline. But it would be easy for the Fidesz government to achieve fiscal discipline without creating this anti-democratic trap. The Fidesz government could amend the constitution to require that the budget council veto the budget by a deadline that would give the Parliament time to pass a new budget before the president gains the power to dissolve it. I have personally suggested this to high-level members of Fidesz, but an amendment to this effect has so far not appeared.

There is more that could be said about the new Fidesz constitution. I have only mentioned what I take to be the biggest obstacles posed to constitutionalism and democracy by this new constitutional framework.

What can be done about the Fidesz consolidation of power by the United States, the US Helsinki Commission, and by the Organization for Security and Cooperation in Europe?

First, of course, Hungarian democracy must be created and maintained by Hungarians themselves. But a democratic public must be an educated public and Hungarians themselves need to learn what has happened to their own constitution over the last three years. Most have no idea, and not because they couldn't or wouldn't understand.

The government celebrated its new constitution with great fanfare. They set up "constitutional tables" at every town hall where people could sign up to receive their very own copy of the constitution. Last June, the government presented to every secondary school graduate a coffee-table book with the words of the new constitution illustrated with historic and specially commissioned paintings. But much of what I have mentioned above is not contained in the text that government has distributed. Many of the most worrisome provisions that I have highlighted here are in the constitutional amendments made since that time or in the cardinal laws that can only be accessed through reading the immensely difficult legalese of the Magyar Közlöny. These laws are posted online only in PDF form, not searchable unless one goes through each individual daily issue separately.

Hungary's friends, including the United States, could assist financially with a program to educate citizens, lawyers and judges in Hungary about the new constitutional framework in Hungary. A public education campaign about the new constitutional structure – conducted by Hungarian constitutional experts from the government, from the opposition and from academia – may assist in giving Hungarians better information about their new constitutional system. Such a campaign would be especially effective if it could be conducted through the broadcast media in Hungary, though since the government functionally controls the broadcast media through its Media Council, some monitoring system would have to be put in place to ensure that both the government and opposition voices are heard. Having read thousands of petitions that ordinary Hungarians sent to the Constitutional Court in the 1990s, I am confident that Hungarians themselves will rise to the defense of both democracy and constitutionalism once they see the dangers of a flawed constitutional design.

Second, the Hungarian government vociferously claims that it is still a democracy because political parties may freely organize for the parliamentary elections next year. But its critics are concerned that the government presently controls the media landscape, has enacted a number of legal provisions that disadvantage opposition parties, and continues to change the electoral rules. In fact, nothing prohibits the government from changing important elements of the electoral framework at the last minute. With the election only one year away, it is important to get the rules of the game fixed – fairly – as soon as possible.

The OSCE has expertise in monitoring elections to ensure that they are free and fair. The OSCE should insist that the electoral rules be settled far enough ahead of the election so that all who want to contest the election have a reasonable amount of time to organize themselves accordingly.

Enough questions have been raised about the willingness of the current Hungarian government to recognize the political opposition that the OSCE/ODIHR should also fully monitor the 2014 Hungarian parliamentary elections. This should include not just election-day or long-term monitoring missions. The comprehensively changed new constitutional framework warrants an early Needs Assessment Mission from OSCE/ODIHR, one that can fully review the effects of all the new provisions. It should focus on the ability of political parties to organize and to get their message out, access to the media, and the fairness of the basic election framework including the creation of electoral districts and the compatibility of both the content and timing of the new electoral rules with the principles of free and fair elections.

Third, the US government should press the Hungarian government to live up to its international commitments to democracy, constitutionalism, the rule of law and robust rights protection. The US should be vigilant in monitoring backsliding from the high level of constitutional democratic protections that Hungary had achieved after 1989 and the US should cooperate with the Venice Commission, the Council of Europe Parliamentary Assembly Monitoring Committee, and the European Union (for example, the LIBE Committee of the European Parliament), all of which have ongoing monitoring processes in place.

But the US government should also be aware that, under pressure, the Fidesz government has in the past promised minor changes to its comprehensive framework and then has discarded those changes when the pressure lifted. Moreover, the changes that the Fidesz government has previously offered to make do not really address the key problems of the system. The Fidesz constitutional framework is a highly redundant system that must be understood as a whole. Each individual legal rule cannot be evaluated by itself because one must understand the function of that rule in the larger system. Changing a number of small features of this constitutional order may not in fact address the most serious problem – which is the concentration of political power in the hands of one party. In deciding whether the Hungarian government has been responsive to international and domestic criticism, Hungary's allies need to examine whether proposed changes really alter the way this complex and integrated system works as a whole.

The US should resist entering the battle of competing checklists of constitutional features. The Hungarian government often insists that some other European country has the same individual rule that its friends criticize. Perhaps we should remember Frankenstein's monster, who was stitched together from perfectly normal bits of other once-living things, but who was, nonetheless, a monster. No other constitutional democracy in the world, let alone in Europe, has the combination of constitutional features that Hungary now has. In evaluating Hungary for its compliance with international standards, its international friends must look at the whole constitutional system and not just at individual pieces as it assesses whether Hungary still belongs to the family of constitutional democracies.

Finally, Hungary is a small country in Europe. It may be hard to see why the United States should spend any of its political capital to address what former Secretary of State Hillary Clinton called Hungary's backsliding from constitutional democracy. There are two main reasons why the US should care, apart from the fact that it is painful to see any country retreat from democracy and one should always be concerned about the people adversely affected.

Hungary is a partner with the US not only in the OSCE, but also in NATO. OSCE commits its member states to the protection of human rights as defined under the Helsinki Final Act of 1975, and long experience shows that human rights receive their best protection from the maintenance of a constitutional and democratic government, both of which are now in doubt in Hungary. The NATO Charter creates a union of states "determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law." But these commitments are also being challenged by the concentration of power in Hungary under its new constitutional framework. Both the OSCE and NATO commit its member states to good behavior and good government, which these organizations should be able to monitor.

In addition, other countries in Hungary's neighborhood are looking with great interest at what Hungary is doing. They can see that the European Union, the Council of Europe, the OSCE, NATO and the United States have limited influence and ability to induce a national government to change its domestic laws. Hungary's neighbors understand that Hungary is getting away with consolidating all political power in the hands of one party, and many find that enticing. Troubling recent developments in Romania, Bulgaria and Slovenia show that the Hungarian problem of overly concentrated power could spread if the US and its European allies don't stand up for their values in the Hungarian case. The US should therefore treat constitutional problems in Hungary with a sense of urgency, both because of the speed with which this system is being locked in and because of the likelihood that the Hungarian constitutional disease could spread around the neighborhood.

In closing then, I strongly urge the United States, the US Helsinki Commission and the OSCE to take Hungary seriously, engage with the Hungarian government on matters of constitutional reform, and work toward ensuring that the channels of democratic participation remain open in Hungary so that the Hungarian people retain the capacity to determine the sort of government under which they will live. The legal changes I have described today pose a real danger to fundamental democratic and constitutional values, and Hungary's friends need to sound the alarm.

TESTIMONY

U.S. COMMISSION ON SECURITY AND COOPERATION IN EUROPE

HEARING ON "THE TRAJECTORY OF DEMOCRACY – WHY HUNGARY MATTERS"

Capitol Visitor Center, Room SVC 210 (Senate Side)

March 19, 2013 at 3 pm

Kim Lane Scheppelle

Laurance S. Rockefeller Professor of Sociology and International Affairs

Director, Program in Law and Public Affairs

Princeton University

I am honored to testify before you today. My name is Kim Lane Scheppelle, and I am the Rockefeller Professor of Sociology and International Affairs, as well as the Director of the Program in Law and Public Affairs, at Princeton University. I am also a Faculty Fellow at the University of Pennsylvania Law School.

Nearly twenty years ago, the US National Science Foundation gave me a grant to move to Hungary to study the Hungarian Constitutional Court, then the most impressive of the new courts in Eastern Europe. I planned to go for one year but stayed for four, working as a researcher at the Constitutional Court and serving as an expert advisor to the constitutional drafting committee of the Hungarian Parliament in 1995-1996, a position I occupied with the assistance of a second NSF grant. I am grateful to the NSF for having funded my research on Hungary, which documented how the new Hungarian constitution of 1989 put down roots and grew to support a vibrant Hungarian constitutional democracy. I have followed Hungarian constitutional developments closely ever since.

I am here today because the current Hungarian government has felled the tree of democratic constitutionalism that Hungary planted in 1989.

Since its election in 2010, the Fidesz government has created a constitutional frenzy. It won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the constitution. Twelve times in its first year in office, it amended the constitution it inherited. Those amendments removed most of the institutional checks that could have stopped what the government did next – which was to install a new constitution. The new Fidesz constitution was drafted in secret, presented to the Parliament with only one month for debate, passed by the votes of only the Fidesz parliamentary bloc, and signed by a President that Fidesz had named. Neither the opposition parties nor civil society organizations nor the general public had any influence in the constitutional process. There was no popular ratification. The Fidesz constitution went into effect on January 1, 2012.

While the government claims it was given a mandate to make major changes, the general Hungarian public thinks otherwise. During the election campaign in 2010, Fidesz never said it would change the whole constitutional system. Once the Fidesz governing program became clear after the party came to power, the popularity of Fidesz has plummeted, even more so after the government undertook to replace the constitution.

Figure 1: Political Party Popularity in Hungary 2008-2013

Source: Ipsos/Portfolio.hu.

After the April 2010 election, Fidesz's popularity has steadily dropped. But none of the other parties – the MSZP (Socialists), Jobbik (far-right party), LMP (Politics Can be Different, a liberal/green/youth party) or the new liberal electoral coalition Együtt 2014 (Together 2014) – is any more popular. Surveys show that 50% or more of Hungarian voters say that there is no political party that they support.

Even though the government pushed through a one-party constitution without support from any other political fraction, except its own party-list partner the Christian Democrats, this didn't stop the constitutional juggernaut. The government has amended its new constitution four times in 15 months. Each time, the government has done so with the votes of only its own political bloc, rejecting all proposals from the political opposition or from civil society groups. The current Hungarian constitution remains a one-party constitution.

Just last week, the Fidesz government passed a 15-page amendment to the new 45-page constitution. László Sólyom, the conservative former president of both the Constitutional Court and the Republic of Hungary, said in a public statement last week that the "Fourth Amendment" removes the last traces of separation of powers from the Hungarian constitutional system. Under the constitution as amended, no institution has the legal right to check many of the key powers of the one-party government.

The Fourth Amendment nullifies more than 20 years of rights-protecting case law of the Hungarian Constitutional Court that had been developed before the new constitution went into effect. This leaves a giant gap where firm legal protection of basic rights once stood. The Fourth Amendment specifically overturns nearly all of the decisions that the Constitutional Court made in the last year striking down controversial new laws the Fidesz government had passed. The Fourth Amendment removes the Court's power to evaluate on substantive grounds any new constitutional amendments, a move which allows the government to escape review by inserting any controversial new proposal directly into the constitution. The Fourth Amendment entrenches political control of the judiciary and gives the government new tools to prevent the opposition from coming to power. The Fourth Amendment reverses many of the concessions Hungary made last year when the European Union, the Council of Europe and the US State Department criticized fundamental aspects of that constitution.

Under cover of constitutional reform, the Fidesz government has given itself absolute power. It now has discretion to do virtually anything it wants, even if civil society, the general public, and all other political parties are opposed.

How could Hungary have fallen so far so fast from the family of stable constitutional democracies? The answer lies in the Achilles' heel of the old constitutional system: a disproportionate election law combined with an easy constitutional amendment rule.

Hungary's 1990 election law gave disproportionate numbers of seats to the winner of an election, a feature that was designed to help plurality parties form stable governments. When Fidesz got 53% of the vote in the 2010 election, the election law converted this victory into 68% of the seats in the Parliament. While Fidesz won this vote in a joint party list with the Christian Democrats (the KDNP), the Christian Democrats barely have an independent existence apart from Fidesz and its members vote in a bloc with Fidesz on every issue.

Figure 2: Composition of the Hungarian Parliament 2010

Source: Hungarian National Election Commission

Translation:

The Fidesz/KDNP joint party list (orange) received 52.7% of the vote, 263 of the seats and 68.1% of the Parliament. MSzP (Socialists) (red) received 19.3% of the vote, 59 of the seats and 15.3% of the Parliament. Jobbik (far-right party) (dark green) received 16.6% of the vote, 47 of the seats and 12.2% of the Parliament and LMP (Politics Can be Different) (light green) received 7.7% of the vote, 16 of the seats and 4.1% of the Parliament. There was one independent MP.

Armed with its two-thirds supermajority, the Fidesz government has been able to make use of the old constitution's amendment rule, dating to the communist constitution of 1949, which permitted the constitution to be changed with a single two-thirds vote of the Parliament. This "magic two-thirds" has enabled Fidesz to make all of its constitutional changes in a formally legal manner. Only one barrier remained: In 1995, under a prior two-thirds government, the old constitution was amended to require a four-fifths vote of the Parliament before any new constitutional drafting process could begin. One month into its term, Fidesz used its two-thirds vote to amend the constitution to remove the four-fifths requirement.

Many of the laws, including the constitution itself, many of the constitutional amendments and most of the cardinal laws, were introduced through the parliamentary procedure of a "private member's bill," which bypasses the stage of public consultation

required of all government bills. That, combined with the fact that the Parliament instituted a new rule through which a two-thirds vote could cut off parliamentary debate on any topic, has meant that most of these new laws have received very little public discussion. It has not been uncommon for a constitutional amendment go from first proposal to final enactment in just a few weeks.

Taken over three years, the constitutional changes are complicated, detailed, and spread out across a new constitution, four major constitutional amendments, dozens of “cardinal” (super-majority) laws, and thousands of pages of ordinary laws that were all passed in a giant legislative blur, sometimes in the middle of the night. I strongly suspect that most Hungarians do not understand the details of this new constitutional system. Even Hungarian lawyers are not able to keep up with the total revolution in the law. In what follows, I will try to explain how the new system of Hungarian government is structured, current as of March 15, 2013, taking all of this new law into account.

The primary source for my testimony is the Magyar Közlöny, the official gazette of the Hungarian government that publishes all of the laws. From my perch in the United States, I cannot say how the laws are being carried out. But I can say how the laws are structured and what they do and do not permit. I will call this whole new legal structure the “Fidesz constitution” even though not everything is in the single constitutional text or its amendments. Many elements of the system I describe are in two-thirds “cardinal” laws that are almost as entrenched as the constitution itself, which is why I don’t make the fine distinctions here except where they are crucial for understanding how the system works. I am happy to provide detailed legal citations for all of the claims I make below if you are interested in checking more precisely what I say or precisely where in the law each of these statements can find support.

Others who are providing testimony for this hearing will address other crucial issues raised by the current Hungarian government’s actions over the last three years. They will address the fate of civil liberties, the difficult situation for many churches in Hungary and the growing and increasingly virulent strains of anti-Semitism and anti-Roma agitation that have occurred alongside this constitutional revolution.

My remit at this hearing today is to talk about something altogether more boring, but no less important: the system of divided and checked powers necessary for a government to remain both constitutional and democratic. History tells us that a government that has no limits on what it can do and that concentrates all powers in a single party will soon cease to be either constitutional or democratic.

The importance of checked and limited powers was an insight very familiar to the American constitutional framers. The Philadelphia Convention did not even include a bill of rights in the US Constitution because the framers believed that the most effective protection for rights was a government that was limited by law. While American history has taught us that a bill of rights matters – and the ratification process of the US Constitution insisted on including one – we have also learned much from Princeton graduate James Madison, who wrote in Federalist #47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

By James Madison’s definition, Hungary is on the verge of tyranny.

In what follows, I will show that the Fidesz political party has gathered all of the powers of the Hungarian government into its own hands, without checks from any other political quarter and without any limits on what it can do.

We should start with the basics: Hungary has a unicameral parliamentary system of government. A unicameral Parliament has

no upper house to check what the lower house does, no “Senate” to complicate life for the “House of Representatives” and vice versa. A parliamentary system means that the most powerful executive, the prime minister, is elected by the Parliament rather than directly by the people. As a result, the prime minister in Hungary is virtually guaranteed a majority for all of his legislative initiatives because that legislative majority put him into his job. Not surprisingly, the legislative-executive cooperation guaranteed in Hungary’s unicameral parliamentary system dates back to the communist constitution of 1949. (From the mid-19th to the mid-20th centuries, Hungary had a bicameral parliament.)

In 1989, however, major constitutional changes in Hungary added a number of checks to this basic framework. A Constitutional Court was created as the primary watchdog on the majoritarian dangers of a unicameral parliamentary system. Unlike a Supreme Court which is the highest court of appeal in the legal system (something we are familiar with in the United States), a Constitutional Court is the only court that is allowed to hear and decide constitutional questions – and it does nothing else besides rule on constitutional matters. Because the Hungarian Constitutional Court conducts the primary oversight in a system that has little formal separation of legislative and executive power, it is even more important than the Supreme Court in the American separation-of-powers system.

Given such weighty responsibility in the 1989 constitutional design, the Constitutional Court was made highly accessible to the new democratic public in Hungary. Literally, anyone could ask the Constitutional Court to review a law for constitutionality using a so-called *actio popularis* petition. As a result, virtually every law was challenged. From the time it opened in January 1990, the active Constitutional Court kept each new government under constitutional constraint regardless of the political leanings of the government. Opinion polls showed that the Constitutional Court was consistently the most highly respected political institution in Hungary.

The procedure for electing judges to the Constitutional Court before 2010 prevented the Court from being captured by any one political fraction. Because each judicial nominee to the Constitutional Court had to first be approved by a majority of parliamentary parties before then being elected to the Court by a two-thirds vote of the Parliament, the Court always had a balance of different political views represented on the bench.

Other changes that were made to the constitutional system in 1989 provided more checks on Hungary’s unicameral parliamentary government. Revamped parliamentary procedure required extensive consultation with both civil society and opposition parties before government bills could be put to a vote. Important issues of constitutional concern required a two-thirds vote of the Parliament. As we have seen, however, the private member’s bill procedure allowed the consultation stage for legislation to be bypassed and the two-thirds laws could cease to be a real check on power when the government had two-thirds of the parliamentary seats, something the disproportionate election law made quite likely.

Four ombudsmen added after 1989 to the system of rights protection. Other independent institutions – the central bank, state audit office, prosecutor general’s office, national election commission and media board – provided both expertise and additional checkpoints. For example, both the national election commission and the media board were structured to ensure representation from across the political spectrum. An independent self-governing judiciary ensured that the laws were fairly applied.

There were so many different checks instituted after 1989 on the power of the prime minister and his parliamentary majority that the post-1989 constitutional system worked reliably to ensure that the operation of majoritarian political power didn’t ride roughshod over democratic guarantees and constitutional limitations.

By contrast with this robust system of complementary powers, the new “Fidesz constitution” removes virtually all of the checks added to the prior communist constitution after 1989. I will detail the major reversals here.

Under the Fidesz constitution, the Constitutional Court's power and independence have been compromised in multiple ways. The system for electing constitutional judges was changed so that now a single two-thirds vote of the Parliament is sufficient to put a judge on the Court, abolishing the multiparty agreement that was once necessary for nomination. The Fidesz constitution also expanded the number of judges on the Court from 11 to 15, giving the governing party four more judges to name immediately.

Between changing the process for electing judges and expanding the number of judges to be elected, Fidesz government has been able to select nine of the 15 judges on the Court in its first three years in office. The Fidesz parliamentary bloc, voting in unison as it always does, put these judges onto the Court without multiparty support, though a few of the new judges were able to garner some votes from the far-right Jobbik party. The new constitutional judges have almost always voted for the Fidesz government position in each case. Some of the new judges have just voted for the government's position without even giving reasons.

Even if the Court is in Fidesz-friendly hands, however, a powerful Court might still be dangerous to a government that shuns checks on its freedom of action. This may explain why the jurisdiction of the Court has been cut. The Court no longer has the power to review laws based on "actio popularis" petitions, which are petitions that anyone can file. Now, the only individuals who can challenge laws must show that they have been concretely injured by the application of a potentially unconstitutional law and that they have exhausted their remedies in the ordinary courts. If the Constitutional Court can only hear cases that have concrete victims, it is hard for the Court to rule on matters pertaining to separation of powers and the structure of democratic institutions. Individuals rarely get "standing" to challenge a law that creates a new system for judicial appointments or a law that gives a government agency the power to issue decrees without parliamentary oversight, both laws that have been passed since Fidesz came to power. Some elements of "abstract review" remain with the Constitutional Court, but these, too, have been restricted.

Abstract review allows the Court to hear challenges to laws without a concrete dispute before it. With the exception of the Parliamentary Commissioner for Human Rights (who will himself be replaced by Fidesz parliamentary majority later this year), the constitution gives the power to challenge laws abstractly only to particular offices that are currently occupied by people affiliated with Fidesz. One might guess that Fidesz appointees do not have a strong incentive to limit the power of their own government. While one-quarter of the Parliament is also given the power to challenge a law at the Constitutional Court, the one-third of the seats in the current Parliament that are not held by the governing party are divided between parties of the center-left and a party of the far right, who would have to agree on a challenge, something that is not very likely. As a result, many laws have been effectively insulated from constitutional challenge by the way that abstract review power has been designed.

Even with the limitations on access to the Constitutional Court that were built into the Fidesz constitution, the system of judicial review in Hungary may seem broader than the system we have in the United States. Therefore, the dangers of the new system in Hungary may not be apparent to an American eye. Limiting the power to initiate judicial review only to those who have been directly injured and only to officials who owe their jobs to this government limits the ability of the Court to reach constitutional violations that it used to be able to reach. The US Supreme Court cannot reach all constitutional violations either, but the United States has a bicameral Congress, a separately elected president, a vigilant and active civil society, and federalism, which adds state governments and state courts as additional checks on the power of temporary majorities. Hungary has none of those checking institutions and so relies on the Constitutional Court to carry more weight in the constitutional system. Making it difficult for this Court to reach all constitutional violations creates blind spots in which unconstrained political discretion can override constitutional values.

In addition to limiting access to the Court, the Fidesz constitution restricts the jurisdiction of the Court in other ways as well. The Court may no longer review any law that deals with taxes or budgets when those laws are passed at a time when the national debt is more than 50% of GDP. Under the Fourth Amendment passed last week, the Court will never have the power to review budget and tax laws that were passed under these circumstances. As a result, if a tax law passed this year infringes

an individual's constitutionally guaranteed property rights or if such a tax is applied selectively to particular minority groups, there is nothing that the Constitutional Court can do – in perpetuity. This opens up a space for the government to violate many personal rights without any constitutional oversight.

The Fourth Amendment has also banned the Court from reviewing constitutional amendments for substantive conflicts with constitutional principles. As a result, if the constitution promises freedom of religion but a constitutional amendment requires a two-thirds parliamentary vote before a church is officially recognized (a provision that was added to the constitution with the Fourth Amendment), the Court can do nothing about this. Or if the constitution says anyone may freely express her opinion but an amendment says that no one may defame the Hungarian nation (a provision that was also added to the constitution with the Fourth Amendment), there is nothing the Court can do. These examples show that the government can now directly amend the constitution any time it thinks the Constitutional Court might strike down some policy that the government wants to enact regardless of how much these new amendments violate principles that have been guaranteed elsewhere in the constitution. In fact, the Fourth Amendment already puts back into the constitution laws that the Constitutional Court has already struck down as unconstitutional once before under the new constitution.

To make matters worse, the Fourth Amendment also nullifies all decisions made by the Constitutional Court before the new constitution took effect. At one level, this makes sense: old constitution, old decisions/new constitution, new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights. With those decisions gone, no one can say for certain whether Hungarian law protects free speech, freedom of religion, equality of all Hungarians before the law, property rights, and virtually every other right in precisely the way that everyone in Hungary had come to take for granted.

What other checks on Fidesz's untrammelled power have now been removed in the Fidesz constitution? The independence of the ordinary judicial system has taken a big hit. In 2011, the Fidesz government suddenly lowered the judicial retirement age from 70 to 62, thus removing the most senior 10% of the judiciary, including 20% of the Supreme Court judges and more than half of the appeals court presidents. Both the Hungarian Constitutional Court and the European Court of Justice found that the sudden change in the judicial retirement age was illegal.

The government's first reaction was to defy both courts' judgments, before finally agreeing at the end of 2012 to reinstate fired judges who wanted to return to their jobs. In the meantime, however, all of the court leadership positions were filled with new judges, so the old judges who wanted to be reinstated were returned to much less important positions. Through this move, the government was able to replace much of the top leadership of the judiciary in a single year. One court leader who could not have been replaced in this manner (because he was too young) was the then-President of the Supreme Court, András Baka. He was removed from office when the new constitution went into effect because of a new requirement, effectively immediately, that judges must have five years of judicial experience in Hungary before being named to the Supreme Court (newly renamed the Curia). President Baka's 16 years of experience as a judge on the European Court of Human Rights did not count.

How were the new judges named? The new president of the Supreme Court/Curia was elected by a two-thirds vote of the Fidesz Parliament. Beyond that, a new institution was created to oversee the appointment of all other judges as well as the administration of the judiciary: the National Judicial Office. This office replaced a system of judicial self-government. The president of the NJO, elected by two-thirds of the Parliament, has the power to hire, fire, promote, demote and discipline all judges in the system without any substantive oversight from any other institution. The national President has to countersign in cases where a judge is appointed for the first time in the system, but it is not clear he could refuse to do so. The new leadership of the ordinary courts has thus been replaced by judges who owe their careers to an official elected by the "magic two-thirds" of the Fidesz Parliament.

The Council of Europe's Commission on Democracy through Law (the Venice Commission) sharply criticized the extraordinary powers of and general lack of legal standards governing the president of the National Judicial Office. The US State Department has also raised questions about the independence of the judiciary under this system. In a concession to criticism, the Fidesz government agreed to limit the powers of the president of the NJO in legislation passed in summer 2012. But with the Fourth Amendment to the Constitution, those concessions are clawed back. The constitution now entrenches the National Judicial Office (NJO), whose president has the constitutional power to "manage the central administrative affairs of the courts," a set of responsibilities in which the judges merely "participate." None of the constraints that the Fidesz government agreed to under international pressure – requiring a significant role for the judges in their own self-government, establishing legal standards for the president of the NJO to use in managing the judiciary, and no longer allowing the president of the NJO to stay in office until her successor is elected – are in the constitution itself. In fact, the concessions that the Fidesz government made to Hungary's international critics may be unconstitutional now that the Fourth Amendment gives the sole power to manage the courts without these constraints to the president of the National Judicial Office.

In another move that has attracted universal criticism, the Fidesz government gave the president of the National Judicial Office the power to take any case in the entire court system and move it to a court different from the one to which normal procedure would assign it. So, for example, if a political corruption case against members of the main opposition party would normally be assigned to the trial-level court in Pest, the president of the National Judicial Office can move the case to Kecskemét. In fact, this is not a hypothetical; that very example has already happened. The rationale given for this extraordinary power to move cases is that the courts are overcrowded and case resolution can be speeded up by moving cases to less crowded courts.

But this rationale is belied by the facts: From public sources, I have been keeping track of the movement of these cases in the first year that the president of the NJO has had this power. She has moved only a few dozen cases away from courts that have thousands of backlogged cases. And she has moved the cases not to the least crowded courts in the countryside but to other courts that also have backlogs. She has moved some of the most high-profile political cases in which the political opposition has a stake, leading the opposition to charge the government with picking the judges particularly in cases that have strong political overtones. While my statistics cannot reveal the motivation of the government, they can show that the government is not moving a substantial enough number of cases to make a difference in waiting times and it is not moving cases from the most to the least crowded courts. I am happy to make the data available upon request.

With the Fourth Amendment passed last week, the power of the president of the NJO to move any case to any court in the country is entrenched in the constitution itself. And the constitution does not include the legal constraints that Hungary agreed to under pressure. Giving power to the president of the NJO to select which court handles individual cases outside the rules of ordinary legal procedure is for many – myself included – the end of the rule of law in Hungary.

The Constitutional Court and the ordinary judiciary have suffered a severe blow under the Fidesz constitution. Other independent institutions have fared no better.

The ombudsman system, which once comprised four independent ombudsmen with independent jurisdictions, has now been folded into one office with a much smaller staff. The former data protection ombudsman was fired and the office has been absorbed directly into the government, something that has generated an infringement action launched by the European Commission against Hungary at the European Court of Justice because EU law requires an independent data privacy officer.

As of two weeks ago, the central bank has a new governor, who moved to that job from being minister of the economy. He used his ministerial power to unilaterally change the rules for the central bank. Without the need for parliamentary approval or Court review, then, György Matolcsy, as the Fidesz economics minister, gave the office of György Matolcsy, the new central bank governor, dramatically increased powers just before he moved from one job to the next. The charter of the central bank, as it turns out, is not even a statute passed by Parliament but a document that either the bank itself or the minister of the

economy can change at will.

The new media council has a chair appointed directly by the prime minister and a membership that consists exclusively of members elected by the Fidesz parliamentary two-thirds, both for nine-year terms. The media council has draconian powers to levy bankrupting fines based on a review of the content of both public and private media, including broadcast, print and internet media. A Constitutional Court decision freed the print media from some of these constraints, but the Fidesz government could now easily amend the constitution to bring the print media back under control and the Constitutional Court could say nothing further about it.

The election commission has been revamped and now consists exclusively of members who have been elected by the Fidesz parliamentary two-thirds majority, all for terms of nine years. While each party with a national list in the next election (scheduled for April 2014) will have a temporary member on the commission during the campaign, opposition parties will be easily outvoted by the Fidesz majority.

The legal framework for the 2014 election is still in flux. The Fidesz parliamentary two-thirds has already enacted two election laws over vociferous protest from opposition parties, creating an even more disproportionate system than the one it replaced. One law gerrymanders the districts for the next election in such a way that it will be very difficult for the opposition to win. The law even fixes the exact boundaries of election districts in a cardinal law that requires a two-thirds vote of the Parliament to change. This law also eliminates the second round of voting for single-member districts so that someone without majority support in a district can enter Parliament, which was not previously the case.

The government passed a second cardinal law on elections that instituted a system of voter registration, even though the country has conducted more than 20 years of elections with an excellent "civil list" that has never produced any complaints of irregularity. The Constitutional Court struck down voter registration as unconstitutional, and for now the governing party seems to have given up on this idea. But with its parliamentary two-thirds vote, the government has the power to override the Constitutional Court by simply adding voter registration to the constitution. The government may also change other important features of the election system right up until the election takes place. In fact, at the moment, the election framework is presently incomplete. Among other things, no rules have yet been devised for making and verifying voter lists for ethnic Hungarians in the neighboring states who have recently become eligible for citizenship as the result of constitutional changes.

The Fourth Amendment added new electoral rules just last week. The amendment created a constitutional ban on political advertising during the election campaign in any venue other than in the public broadcast media, which is controlled by the all-Fidesz media board. Moreover, only parties with national party lists can advertise at all in the national media, which might exclude smaller and newer parties. These restrictions had been previously declared unconstitutional by the Constitutional Court, so the government amended the constitution to override that decision. And since these provisions are now in the constitution itself, the Constitutional Court cannot review them again.

But suppose that, despite all of the obstacles that the current governing party has put in the way of the political opposition, an opposition coalition manages to win the next election. The Fidesz constitution has created a trap that can be snapped in just such a case. The constitution creates a national budget council with the power to veto any future budget that adds to the national debt, which any foreseeable budget will do. The members of the budget council have been chosen by the Fidesz two-thirds majority for terms of 6 or 12 years and can be replaced only if two-thirds of the parliament can agree on their successors when their terms are over. Not only does this mean that, for three elections cycles out, any future government must follow a budgetary course agreed on by a council where all of the members were elected by the Fidesz government, but this budget council has even more power than that.

The constitution requires the Parliament to pass a budget by March 31 of each year. If the Parliament fails to do so, the

president of the country can dissolve the Parliament and call new elections. When this provision is put together with the powers of the budgetary council, the constraints on any future government are clear. If a new non-Fidesz government passes a budget that adds to the debt, that budget can be vetoed by the all-Fidesz budgetary council at any time, including on the eve of the budget deadline given in the constitution. The parliament would then miss the deadline and the president (also named by Fidesz and serving through 2017) could call new elections. And this process can be repeated until an acceptable government is voted back into power.

The Fidesz government may have created this unfortunate interaction of constitutional provisions inadvertently in an earnest attempt to create a binding mechanism to achieve budget discipline. But it would be easy for the Fidesz government to achieve fiscal discipline without creating this anti-democratic trap. The Fidesz government could amend the constitution to require that the budget council veto the budget by a deadline that would give the Parliament time to pass a new budget before the president gains the power to dissolve it. I have personally suggested this to high-level members of Fidesz, but an amendment to this effect has so far not appeared.

There is more that could be said about the new Fidesz constitution. I have only mentioned what I take to be the biggest obstacles posed to constitutionalism and democracy by this new constitutional framework.

What can be done about the Fidesz consolidation of power by the United States, the US Helsinki Commission, and by the Organization for Security and Cooperation in Europe?

First, of course, Hungarian democracy must be created and maintained by Hungarians themselves. But a democratic public must be an educated public and Hungarians themselves need to learn what has happened to their own constitution over the last three years. Most have no idea, and not because they couldn't or wouldn't understand.

The government celebrated its new constitution with great fanfare. They set up "constitutional tables" at every town hall where people could sign up to receive their very own copy of the constitution. Last June, the government presented to every secondary school graduate a coffee-table book with the words of the new constitution illustrated with historic and specially commissioned paintings. But much of what I have mentioned above is not contained in the text that government has distributed. Many of the most worrisome provisions that I have highlighted here are in the constitutional amendments made since that time or in the cardinal laws that can only be accessed through reading the immensely difficult legalese of the Magyar Közlöny. These laws are posted online only in PDF form, not searchable unless one goes through each individual daily issue separately.

Hungary's friends, including the United States, could assist financially with a program to educate citizens, lawyers and judges in Hungary about the new constitutional framework in Hungary. A public education campaign about the new constitutional structure – conducted by Hungarian constitutional experts from the government, from the opposition and from academia – may assist in giving Hungarians better information about their new constitutional system. Such a campaign would be especially effective if it could be conducted through the broadcast media in Hungary, though since the government functionally controls the broadcast media through its Media Council, some monitoring system would have to be put in place to ensure that both the government and opposition voices are heard. Having read thousands of petitions that ordinary Hungarians sent to the Constitutional Court in the 1990s, I am confident that Hungarians themselves will rise to the defense of both democracy and constitutionalism once they see the dangers of a flawed constitutional design.

Second, the Hungarian government vociferously claims that it is still a democracy because political parties may freely organize for the parliamentary elections next year. But its critics are concerned that the government presently controls the media landscape, has enacted a number of legal provisions that disadvantage opposition parties, and continues to change the electoral rules. In fact, nothing prohibits the government from changing important elements of the electoral framework at the

last minute. With the election only one year away, it is important to get the rules of the game fixed – fairly – as soon as possible.

The OSCE has expertise in monitoring elections to ensure that they are free and fair. The OSCE should insist that the electoral rules be settled far enough ahead of the election so that all who want to contest the election have a reasonable amount of time to organize themselves accordingly.

Enough questions have been raised about the willingness of the current Hungarian government to recognize the political opposition that the OSCE/ODIHR should also fully monitor the 2014 Hungarian parliamentary elections. This should include not just election-day or long-term monitoring missions. The comprehensively changed new constitutional framework warrants an early Needs Assessment Mission from OSCE/ODIHR, one that can fully review the effects of all the new provisions. It should focus on the ability of political parties to organize and to get their message out, access to the media, and the fairness of the basic election framework including the creation of electoral districts and the compatibility of both the content and timing of the new electoral rules with the principles of free and fair elections.

Third, the US government should press the Hungarian government to live up to its international commitments to democracy, constitutionalism, the rule of law and robust rights protection. The US should be vigilant in monitoring backsliding from the high level of constitutional democratic protections that Hungary had achieved after 1989 and the US should cooperate with the Venice Commission, the Council of Europe Parliamentary Assembly Monitoring Committee, and the European Union (for example, the LIBE Committee of the European Parliament), all of which have ongoing monitoring processes in place.

But the US government should also be aware that, under pressure, the Fidesz government has in the past promised minor changes to its comprehensive framework and then has discarded those changes when the pressure lifted. Moreover, the changes that the Fidesz government has previously offered to make do not really address the key problems of the system. The Fidesz constitutional framework is a highly redundant system that must be understood as a whole. Each individual legal rule cannot be evaluated by itself because one must understand the function of that rule in the larger system. Changing a number of small features of this constitutional order may not in fact address the most serious problem – which is the concentration of political power in the hands of one party. In deciding whether the Hungarian government has been responsive to international and domestic criticism, Hungary's allies need to examine whether proposed changes really alter the way this complex and integrated system works as a whole.

The US should resist entering the battle of competing checklists of constitutional features. The Hungarian government often insists that some other European country has the same individual rule that its friends criticize. Perhaps we should remember Frankenstein's monster, who was stitched together from perfectly normal bits of other once-living things, but who was, nonetheless, a monster. No other constitutional democracy in the world, let alone in Europe, has the combination of constitutional features that Hungary now has. In evaluating Hungary for its compliance with international standards, its international friends must look at the whole constitutional system and not just at individual pieces as it assesses whether Hungary still belongs to the family of constitutional democracies.

Finally, Hungary is a small country in Europe. It may be hard to see why the United States should spend any of its political capital to address what former Secretary of State Hillary Clinton called Hungary's backsliding from constitutional democracy. There are two main reasons why the US should care, apart from the fact that it is painful to see any country retreat from democracy and one should always be concerned about the people adversely affected.

Hungary is a partner with the US not only in the OSCE, but also in NATO. OSCE commits its member states to the protection of human rights as defined under the Helsinki Final Act of 1975, and long experience shows that human rights receive their best protection from the maintenance of a constitutional and democratic government, both of which are now in doubt in

Hungary. The NATO Charter creates a union of states “determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law.” But these commitments are also being challenged by the concentration of power in Hungary under its new constitutional framework. Both the OSCE and NATO commit its member states to good behavior and good government, which these organizations should be able to monitor.

In addition, other countries in Hungary’s neighborhood are looking with great interest at what Hungary is doing. They can see that the European Union, the Council of Europe, the OSCE, NATO and the United States have limited influence and ability to induce a national government to change its domestic laws. Hungary’s neighbors understand that Hungary is getting away with consolidating all political power in the hands of one party, and many find that enticing. Troubling recent developments in Romania, Bulgaria and Slovenia show that the Hungarian problem of overly concentrated power could spread if the US and its European allies don’t stand up for their values in the Hungarian case. The US should therefore treat constitutional problems in Hungary with a sense of urgency, both because of the speed with which this system is being locked in and because of the likelihood that the Hungarian constitutional disease could spread around the neighborhood.

In closing then, I strongly urge the United States, the US Helsinki Commission and the OSCE to take Hungary seriously, engage with the Hungarian government on matters of constitutional reform, and work toward ensuring that the channels of democratic participation remain open in Hungary so that the Hungarian people retain the capacity to determine the sort of government under which they will live. The legal changes I have described today pose a real danger to fundamental democratic and constitutional values, and Hungary’s friends need to sound the alarm.

TESTIMONY

U.S. COMMISSION ON SECURITY AND COOPERATION IN EUROPE

HEARING ON “THE TRAJECTORY OF DEMOCRACY – WHY HUNGARY MATTERS”

Capitol Visitor Center, Room SVC 210 (Senate Side)

March 19, 2013 at 3 pm

Kim Lane Scheppele

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Director, Program in Law and Public Affairs

Princeton University

I am honored to testify before you today. My name is Kim Lane Scheppelle, and I am the Rockefeller Professor of Sociology and International Affairs, as well as the Director of the Program in Law and Public Affairs, at Princeton University. I am also a Faculty Fellow at the University of Pennsylvania Law School.

Nearly twenty years ago, the US National Science Foundation gave me a grant to move to Hungary to study the Hungarian Constitutional Court, then the most impressive of the new courts in Eastern Europe. I planned to go for one year but stayed for four, working as a researcher at the Constitutional Court and serving as an expert advisor to the constitutional drafting committee of the Hungarian Parliament in 1995-1996, a position I occupied with the assistance of a second NSF grant. I am grateful to the NSF for having funded my research on Hungary, which documented how the new Hungarian constitution of 1989 put down roots and grew to support a vibrant Hungarian constitutional democracy. I have followed Hungarian constitutional developments closely ever since.

I am here today because the current Hungarian government has felled the tree of democratic constitutionalism that Hungary planted in 1989.

Since its election in 2010, the Fidesz government has created a constitutional frenzy. It won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the constitution. Twelve times in its first year in office, it amended the constitution it inherited. Those amendments removed most of the institutional checks that could have stopped what the government did next – which was to install a new constitution. The new Fidesz constitution was drafted in secret, presented to the Parliament with only one month for debate, passed by the votes of only the Fidesz parliamentary bloc, and signed by a President that Fidesz had named. Neither the opposition parties nor civil society organizations nor the general public had any influence in the constitutional process. There was no popular ratification. The Fidesz constitution went into effect on January 1, 2012.

While the government claims it was given a mandate to make major changes, the general Hungarian public thinks otherwise. During the election campaign in 2010, Fidesz never said it would change the whole constitutional system. Once the Fidesz governing program became clear after the party came to power, the popularity of Fidesz has plummeted, even more so after the government undertook to replace the constitution.

Figure 1: Political Party Popularity in Hungary 2008-2013

Source: Ipsos/Portfolio.hu.

After the April 2010 election, Fidesz's popularity has steadily dropped. But none of the other parties – the MSzP (Socialists), Jobbik (far-right party), LMP (Politics Can be Different, a liberal/green/youth party) or the new liberal electoral coalition Együtt 2014 (Together 2014) – is any more popular. Surveys show that 50% or more of Hungarian voters say that there is no political party that they support.

Even though the government pushed through a one-party constitution without support from any other political fraction, except its own party-list partner the Christian Democrats, this didn't stop the constitutional juggernaut. The government has amended its new constitution four times in 15 months. Each time, the government has done so with the votes of only its own political bloc, rejecting all proposals from the political opposition or from civil society groups. The current Hungarian constitution remains a one-party constitution.

Just last week, the Fidesz government passed a 15-page amendment to the new 45-page constitution. László Sólyom, the

conservative former president of both the Constitutional Court and the Republic of Hungary, said in a public statement last week that the “Fourth Amendment” removes the last traces of separation of powers from the Hungarian constitutional system. Under the constitution as amended, no institution has the legal right to check many of the key powers of the one-party government.

The Fourth Amendment nullifies more than 20 years of rights-protecting case law of the Hungarian Constitutional Court that had been developed before the new constitution went into effect. This leaves a giant gap where firm legal protection of basic rights once stood. The Fourth Amendment specifically overturns nearly all of the decisions that the Constitutional Court made in the last year striking down controversial new laws the Fidesz government had passed. The Fourth Amendment removes the Court’s power to evaluate on substantive grounds any new constitutional amendments, a move which allows the government to escape review by inserting any controversial new proposal directly into the constitution. The Fourth Amendment entrenches political control of the judiciary and gives the government new tools to prevent the opposition from coming to power. The Fourth Amendment reverses many of the concessions Hungary made last year when the European Union, the Council of Europe and the US State Department criticized fundamental aspects of that constitution.

Under cover of constitutional reform, the Fidesz government has given itself absolute power. It now has discretion to do virtually anything it wants, even if civil society, the general public, and all other political parties are opposed.

How could Hungary have fallen so far so fast from the family of stable constitutional democracies? The answer lies in the Achilles’ heel of the old constitutional system: a disproportionate election law combined with an easy constitutional amendment rule.

Hungary’s 1990 election law gave disproportionate numbers of seats to the winner of an election, a feature that was designed to help plurality parties form stable governments. When Fidesz got 53% of the vote in the 2010 election, the election law converted this victory into 68% of the seats in the Parliament. While Fidesz won this vote in a joint party list with the Christian Democrats (the KDNP), the Christian Democrats barely have an independent existence apart from Fidesz and its members vote in a bloc with Fidesz on every issue.

Figure 2: Composition of the Hungarian Parliament 2010

Source: Hungarian National Election Commission

Translation:

The Fidesz/KDNP joint party list (orange) received 52.7% of the vote, 263 of the seats and 68.1% of the Parliament. MSzP (Socialists) (red) received 19.3% of the vote, 59 of the seats and 15.3% of the Parliament. Jobbik (far-right party) (dark green) received 16.6% of the vote, 47 of the seats and 12.2% of the Parliament and LMP (Politics Can be Different) (light green) received 7.7% of the vote, 16 of the seats and 4.1% of the Parliament. There was one independent MP.

Armed with its two-thirds supermajority, the Fidesz government has been able to make use of the old constitution’s amendment rule, dating to the communist constitution of 1949, which permitted the constitution to be changed with a single two-thirds vote of the Parliament. This “magic two-thirds” has enabled Fidesz to make all of its constitutional changes in a formally legal manner. Only one barrier remained: In 1995, under a prior two-thirds government, the old constitution was amended to require a four-fifths vote of the Parliament before any new constitutional drafting process could begin. One month into its term, Fidesz used its two-thirds vote to amend the constitution to remove the four-fifths requirement.

Many of the laws, including the constitution itself, many of the constitutional amendments and most of the cardinal laws, were introduced through the parliamentary procedure of a “private member’s bill,” which bypasses the stage of public consultation required of all government bills. That, combined with the fact that the Parliament instituted a new rule through which a two-thirds vote could cut off parliamentary debate on any topic, has meant that most of these new laws have received very little public discussion. It has not been uncommon for a constitutional amendment to go from first proposal to final enactment in just a few weeks.

Taken over three years, the constitutional changes are complicated, detailed, and spread out across a new constitution, four major constitutional amendments, dozens of “cardinal” (super-majority) laws, and thousands of pages of ordinary laws that were all passed in a giant legislative blur, sometimes in the middle of the night. I strongly suspect that most Hungarians do not understand the details of this new constitutional system. Even Hungarian lawyers are not able to keep up with the total revolution in the law. In what follows, I will try to explain how the new system of Hungarian government is structured, current as of March 15, 2013, taking all of this new law into account.

The primary source for my testimony is the Magyar Közlöny, the official gazette of the Hungarian government that publishes all of the laws. From my perch in the United States, I cannot say how the laws are being carried out. But I can say how the laws are structured and what they do and do not permit. I will call this whole new legal structure the “Fidesz constitution” even though not everything is in the single constitutional text or its amendments. Many elements of the system I describe are in two-thirds “cardinal” laws that are almost as entrenched as the constitution itself, which is why I don’t make the fine distinctions here except where they are crucial for understanding how the system works. I am happy to provide detailed legal citations for all of the claims I make below if you are interested in checking more precisely what I say or precisely where in the law each of these statements can find support.

Others who are providing testimony for this hearing will address other crucial issues raised by the current Hungarian government’s actions over the last three years. They will address the fate of civil liberties, the difficult situation for many churches in Hungary and the growing and increasingly virulent strains of anti-Semitism and anti-Roma agitation that have occurred alongside this constitutional revolution.

My remit at this hearing today is to talk about something altogether more boring, but no less important: the system of divided and checked powers necessary for a government to remain both constitutional and democratic. History tells us that a government that has no limits on what it can do and that concentrates all powers in a single party will soon cease to be either constitutional or democratic.

The importance of checked and limited powers was an insight very familiar to the American constitutional framers. The Philadelphia Convention did not even include a bill of rights in the US Constitution because the framers believed that the most effective protection for rights was a government that was limited by law. While American history has taught us that a bill of rights matters – and the ratification process of the US Constitution insisted on including one – we have also learned much from Princeton graduate James Madison, who wrote in Federalist #47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

By James Madison’s definition, Hungary is on the verge of tyranny.

In what follows, I will show that the Fidesz political party has gathered all of the powers of the Hungarian government into its

own hands, without checks from any other political quarter and without any limits on what it can do.

We should start with the basics: Hungary has a unicameral parliamentary system of government. A unicameral Parliament has no upper house to check what the lower house does, no “Senate” to complicate life for the “House of Representatives” and vice versa. A parliamentary system means that the most powerful executive, the prime minister, is elected by the Parliament rather than directly by the people. As a result, the prime minister in Hungary is virtually guaranteed a majority for all of his legislative initiatives because that legislative majority put him into his job. Not surprisingly, the legislative-executive cooperation guaranteed in Hungary’s unicameral parliamentary system dates back to the communist constitution of 1949. (From the mid-19th to the mid-20th centuries, Hungary had a bicameral parliament.)

In 1989, however, major constitutional changes in Hungary added a number of checks to this basic framework. A Constitutional Court was created as the primary watchdog on the majoritarian dangers of a unicameral parliamentary system. Unlike a Supreme Court which is the highest court of appeal in the legal system (something we are familiar with in the United States), a Constitutional Court is the only court that is allowed to hear and decide constitutional questions – and it does nothing else besides rule on constitutional matters. Because the Hungarian Constitutional Court conducts the primary oversight in a system that has little formal separation of legislative and executive power, it is even more important than the Supreme Court in the American separation-of-powers system.

Given such weighty responsibility in the 1989 constitutional design, the Constitutional Court was made highly accessible to the new democratic public in Hungary. Literally, anyone could ask the Constitutional Court to review a law for constitutionality using a so-called *actio popularis* petition. As a result, virtually every law was challenged. From the time it opened in January 1990, the active Constitutional Court kept each new government under constitutional constraint regardless of the political leanings of the government. Opinion polls showed that the Constitutional Court was consistently the most highly respected political institution in Hungary.

The procedure for electing judges to the Constitutional Court before 2010 prevented the Court from being captured by any one political fraction. Because each judicial nominee to the Constitutional Court had to first be approved by a majority of parliamentary parties before then being elected to the Court by a two-thirds vote of the Parliament, the Court always had a balance of different political views represented on the bench.

Other changes that were made to the constitutional system in 1989 provided more checks on Hungary’s unicameral parliamentary government. Revamped parliamentary procedure required extensive consultation with both civil society and opposition parties before government bills could be put to a vote. Important issues of constitutional concern required a two-thirds vote of the Parliament. As we have seen, however, the private member’s bill procedure allowed the consultation stage for legislation to be bypassed and the two-thirds laws could cease to be a real check on power when the government had two-thirds of the parliamentary seats, something the disproportionate election law made quite likely.

Four ombudsmen added after 1989 to the system of rights protection. Other independent institutions – the central bank, state audit office, prosecutor general’s office, national election commission and media board – provided both expertise and additional checkpoints. For example, both the national election commission and the media board were structured to ensure representation from across the political spectrum. An independent self-governing judiciary ensured that the laws were fairly applied.

There were so many different checks instituted after 1989 on the power of the prime minister and his parliamentary majority that the post-1989 constitutional system worked reliably to ensure that the operation of majoritarian political power didn’t ride roughshod over democratic guarantees and constitutional limitations.

By contrast with this robust system of complementary powers, the new “Fidesz constitution” removes virtually all of the checks added to the prior communist constitution after 1989. I will detail the major reversals here.

Under the Fidesz constitution, the Constitutional Court’s power and independence have been compromised in multiple ways. The system for electing constitutional judges was changed so that now a single two-thirds vote of the Parliament is sufficient to put a judge on the Court, abolishing the multiparty agreement that was once necessary for nomination. The Fidesz constitution also expanded the number of judges on the Court from 11 to 15, giving the governing party four more judges to name immediately.

Between changing the process for electing judges and expanding the number of judges to be elected, Fidesz government has been able to select nine of the 15 judges on the Court in its first three years in office. The Fidesz parliamentary bloc, voting in unison as it always does, put these judges onto the Court without multiparty support, though a few of the new judges were able to garner some votes from the far-right Jobbik party. The new constitutional judges have almost always voted for the Fidesz government position in each case. Some of the new judges have just voted for the government’s position without even giving reasons.

Even if the Court is in Fidesz-friendly hands, however, a powerful Court might still be dangerous to a government that shuns checks on its freedom of action. This may explain why the jurisdiction of the Court has been cut. The Court no longer has the power to review laws based on “*actio popularis*” petitions, which are petitions that anyone can file. Now, the only individuals who can challenge laws must show that they have been concretely injured by the application of a potentially unconstitutional law and that they have exhausted their remedies in the ordinary courts. If the Constitutional Court can only hear cases that have concrete victims, it is hard for the Court to rule on matters pertaining to separation of powers and the structure of democratic institutions. Individuals rarely get “standing” to challenge a law that creates a new system for judicial appointments or a law that gives a government agency the power to issue decrees without parliamentary oversight, both laws that have been passed since Fidesz came to power. Some elements of “abstract review” remain with the Constitutional Court, but these, too, have been restricted.

Abstract review allows the Court to hear challenges to laws without a concrete dispute before it. With the exception of the Parliamentary Commissioner for Human Rights (who will himself be replaced by Fidesz parliamentary majority later this year), the constitution gives the power to challenge laws abstractly only to particular offices that are currently occupied by people affiliated with Fidesz. One might guess that Fidesz appointees do not have a strong incentive to limit the power of their own government. While one-quarter of the Parliament is also given the power to challenge a law at the Constitutional Court, the one-third of the seats in the current Parliament that are not held by the governing party are divided between parties of the center-left and a party of the far right, who would have to agree on a challenge, something that is not very likely. As a result, many laws have been effectively insulated from constitutional challenge by the way that abstract review power has been designed.

Even with the limitations on access to the Constitutional Court that were built into the Fidesz constitution, the system of judicial review in Hungary may seem broader than the system we have in the United States. Therefore, the dangers of the new system in Hungary may not be apparent to an American eye. Limiting the power to initiate judicial review only to those who have been directly injured and only to officials who owe their jobs to this government limits the ability of the Court to reach constitutional violations that it used to be able to reach. The US Supreme Court cannot reach all constitutional violations either, but the United States has a bicameral Congress, a separately elected president, a vigilant and active civil society, and federalism, which adds state governments and state courts as additional checks on the power of temporary majorities. Hungary has none of those checking institutions and so relies on the Constitutional Court to carry more weight in the constitutional system. Making it difficult for this Court to reach all constitutional violations creates blind spots in which unconstrained political discretion can override constitutional values.

In addition to limiting access to the Court, the Fidesz constitution restricts the jurisdiction of the Court in other ways as well. The Court may no longer review any law that deals with taxes or budgets when those laws are passed at a time when the national debt is more than 50% of GDP. Under the Fourth Amendment passed last week, the Court will never have the power to review budget and tax laws that were passed under these circumstances. As a result, if a tax law passed this year infringes an individual's constitutionally guaranteed property rights or if such a tax is applied selectively to particular minority groups, there is nothing that the Constitutional Court can do – in perpetuity. This opens up a space for the government to violate many personal rights without any constitutional oversight.

The Fourth Amendment has also banned the Court from reviewing constitutional amendments for substantive conflicts with constitutional principles. As a result, if the constitution promises freedom of religion but a constitutional amendment requires a two-thirds parliamentary vote before a church is officially recognized (a provision that was added to the constitution with the Fourth Amendment), the Court can do nothing about this. Or if the constitution says anyone may freely express her opinion but an amendment says that no one may defame the Hungarian nation (a provision that was also added to the constitution with the Fourth Amendment), there is nothing the Court can do. These examples show that the government can now directly amend the constitution any time it thinks the Constitutional Court might strike down some policy that the government wants to enact regardless of how much these new amendments violate principles that have been guaranteed elsewhere in the constitution. In fact, the Fourth Amendment already puts back into the constitution laws that the Constitutional Court has already struck down as unconstitutional once before under the new constitution.

To make matters worse, the Fourth Amendment also nullifies all decisions made by the Constitutional Court before the new constitution took effect. At one level, this makes sense: old constitution, old decisions/new constitution, new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights. With those decisions gone, no one can say for certain whether Hungarian law protects free speech, freedom of religion, equality of all Hungarians before the law, property rights, and virtually every other right in precisely the way that everyone in Hungary had come to take for granted.

What other checks on Fidesz's untrammled power have now been removed in the Fidesz constitution? The independence of the ordinary judicial system has taken a big hit. In 2011, the Fidesz government suddenly lowered the judicial retirement age from 70 to 62, thus removing the most senior 10% of the judiciary, including 20% of the Supreme Court judges and more than half of the appeals court presidents. Both the Hungarian Constitutional Court and the European Court of Justice found that the sudden change in the judicial retirement age was illegal.

The government's first reaction was to defy both courts' judgments, before finally agreeing at the end of 2012 to reinstate fired judges who wanted to return to their jobs. In the meantime, however, all of the court leadership positions were filled with new judges, so the old judges who wanted to be reinstated were returned to much less important positions. Through this move, the government was able to replace much of the top leadership of the judiciary in a single year. One court leader who could not have been replaced in this manner (because he was too young) was the then-President of the Supreme Court, András Baka. He was removed from office when the new constitution went into effect because of a new requirement, effectively immediately, that judges must have five years of judicial experience in Hungary before being named to the Supreme Court (newly renamed the Curia). President Baka's 16 years of experience as a judge on the European Court of Human Rights did not count.

How were the new judges named? The new president of the Supreme Court/Curia was elected by a two-thirds vote of the Fidesz Parliament. Beyond that, a new institution was created to oversee the appointment of all other judges as well as the administration of the judiciary: the National Judicial Office. This office replaced a system of judicial self-government. The president of the NJO, elected by two-thirds of the Parliament, has the power to hire, fire, promote, demote and discipline all

judges in the system without any substantive oversight from any other institution. The national President has to countersign in cases where a judge is appointed for the first time in the system, but it is not clear he could refuse to do so. The new leadership of the ordinary courts has thus been replaced by judges who owe their careers to an official elected by the “magic two-thirds” of the Fidesz Parliament.

The Council of Europe’s Commission on Democracy through Law (the Venice Commission) sharply criticized the extraordinary powers of and general lack of legal standards governing the president of the National Judicial Office. The US State Department has also raised questions about the independence of the judiciary under this system. In a concession to criticism, the Fidesz government agreed to limit the powers of the president of the NJO in legislation passed in summer 2012. But with the Fourth Amendment to the Constitution, those concessions are clawed back. The constitution now entrenches the National Judicial Office (NJO), whose president has the constitutional power to “manage the central administrative affairs of the courts,” a set of responsibilities in which the judges merely “participate.” None of the constraints that the Fidesz government agreed to under international pressure – requiring a significant role for the judges in their own self-government, establishing legal standards for the president of the NJO to use in managing the judiciary, and no longer allowing the president of the NJO to stay in office until her successor is elected – are in the constitution itself. In fact, the concessions that the Fidesz government made to Hungary’s international critics may be unconstitutional now that the Fourth Amendment gives the sole power to manage the courts without these constraints to the president of the National Judicial Office.

In another move that has attracted universal criticism, the Fidesz government gave the president of the National Judicial Office the power to take any case in the entire court system and move it to a court different from the one to which normal procedure would assign it. So, for example, if a political corruption case against members of the main opposition party would normally be assigned to the trial-level court in Pest, the president of the National Judicial Office can move the case to Kecskemét. In fact, this is not a hypothetical; that very example has already happened. The rationale given for this extraordinary power to move cases is that the courts are overcrowded and case resolution can be speeded up by moving cases to less crowded courts.

But this rationale is belied by the facts: From public sources, I have been keeping track of the movement of these cases in the first year that the president of the NJO has had this power. She has moved only a few dozen cases away from courts that have thousands of backlogged cases. And she has moved the cases not to the least crowded courts in the countryside but to other courts that also have backlogs. She has moved some of the most high-profile political cases in which the political opposition has a stake, leading the opposition to charge the government with picking the judges particularly in cases that have strong political overtones. While my statistics cannot reveal the motivation of the government, they can show that the government is not moving a substantial enough number of cases to make a difference in waiting times and it is not moving cases from the most to the least crowded courts. I am happy to make the data available upon request.

With the Fourth Amendment passed last week, the power of the president of the NJO to move any case to any court in the country is entrenched in the constitution itself. And the constitution does not include the legal constraints that Hungary agreed to under pressure. Giving power to the president of the NJO to select which court handles individual cases outside the rules of ordinary legal procedure is for many – myself included – the end of the rule of law in Hungary.

The Constitutional Court and the ordinary judiciary have suffered a severe blow under the Fidesz constitution. Other independent institutions have fared no better.

The ombudsman system, which once comprised four independent ombudsmen with independent jurisdictions, has now been folded into one office with a much smaller staff. The former data protection ombudsman was fired and the office has been absorbed directly into the government, something that has generated an infringement action launched by the European Commission against Hungary at the European Court of Justice because EU law requires an independent data privacy officer.

As of two weeks ago, the central bank has a new governor, who moved to that job from being minister of the economy. He used his ministerial power to unilaterally change the rules for the central bank. Without the need for parliamentary approval or Court review, then, György Matolcsy, as the Fidesz economics minister, gave the office of György Matolcsy, the new central bank governor, dramatically increased powers just before he moved from one job to the next. The charter of the central bank, as it turns out, is not even a statute passed by Parliament but a document that either the bank itself or the minister of the economy can change at will.

The new media council has a chair appointed directly by the prime minister and a membership that consists exclusively of members elected by the Fidesz parliamentary two-thirds, both for nine-year terms. The media council has draconian powers to levy bankrupting fines based on a review of the content of both public and private media, including broadcast, print and internet media. A Constitutional Court decision freed the print media from some of these constraints, but the Fidesz government could now easily amend the constitution to bring the print media back under control and the Constitutional Court could say nothing further about it.

The election commission has been revamped and now consists exclusively of members who have been elected by the Fidesz parliamentary two-thirds majority, all for terms of nine years. While each party with a national list in the next election (scheduled for April 2014) will have a temporary member on the commission during the campaign, opposition parties will be easily outvoted by the Fidesz majority.

The legal framework for the 2014 election is still in flux. The Fidesz parliamentary two-thirds has already enacted two election laws over vociferous protest from opposition parties, creating an even more disproportionate system than the one it replaced. One law gerrymanders the districts for the next election in such a way that it will be very difficult for the opposition to win. The law even fixes the exact boundaries of election districts in a cardinal law that requires a two-thirds vote of the Parliament to change. This law also eliminates the second round of voting for single-member districts so that someone without majority support in a district can enter Parliament, which was not previously the case.

The government passed a second cardinal law on elections that instituted a system of voter registration, even though the country has conducted more than 20 years of elections with an excellent “civil list” that has never produced any complaints of irregularity. The Constitutional Court struck down voter registration as unconstitutional, and for now the governing party seems to have given up on this idea. But with its parliamentary two-thirds vote, the government has the power to override the Constitutional Court by simply adding voter registration to the constitution. The government may also change other important features of the election system right up until the election takes place. In fact, at the moment, the election framework is presently incomplete. Among other things, no rules have yet been devised for making and verifying voter lists for ethnic Hungarians in the neighboring states who have recently become eligible for citizenship as the result of constitutional changes.

The Fourth Amendment added new electoral rules just last week. The amendment created a constitutional ban on political advertising during the election campaign in any venue other than in the public broadcast media, which is controlled by the all-Fidesz media board. Moreover, only parties with national party lists can advertise at all in the national media, which might exclude smaller and newer parties. These restrictions had been previously declared unconstitutional by the Constitutional Court, so the government amended the constitution to override that decision. And since these provisions are now in the constitution itself, the Constitutional Court cannot review them again.

But suppose that, despite all of the obstacles that the current governing party has put in the way of the political opposition, an opposition coalition manages to win the next election. The Fidesz constitution has created a trap that can be snapped in just such a case. The constitution creates a national budget council with the power to veto any future budget that adds to the national debt, which any foreseeable budget will do. The members of the budget council have been chosen by the Fidesz two-thirds majority for terms of 6 or 12 years and can be replaced only if two-thirds of the parliament can agree on their successors when their terms are over. Not only does this mean that, for three elections cycles out, any future government must follow a budgetary course agreed on by a council where all of the members were elected by the Fidesz government, but this budget

council has even more power than that.

The constitution requires the Parliament to pass a budget by March 31 of each year. If the Parliament fails to do so, the president of the country can dissolve the Parliament and call new elections. When this provision is put together with the powers of the budgetary council, the constraints on any future government are clear. If a new non-Fidesz government passes a budget that adds to the debt, that budget can be vetoed by the all-Fidesz budgetary council at any time, including on the eve of the budget deadline given in the constitution. The parliament would then miss the deadline and the president (also named by Fidesz and serving through 2017) could call new elections. And this process can be repeated until an acceptable government is voted back into power.

The Fidesz government may have created this unfortunate interaction of constitutional provisions inadvertently in an earnest attempt to create a binding mechanism to achieve budget discipline. But it would be easy for the Fidesz government to achieve fiscal discipline without creating this anti-democratic trap. The Fidesz government could amend the constitution to require that the budget council veto the budget by a deadline that would give the Parliament time to pass a new budget before the president gains the power to dissolve it. I have personally suggested this to high-level members of Fidesz, but an amendment to this effect has so far not appeared.

There is more that could be said about the new Fidesz constitution. I have only mentioned what I take to be the biggest obstacles posed to constitutionalism and democracy by this new constitutional framework.

What can be done about the Fidesz consolidation of power by the United States, the US Helsinki Commission, and by the Organization for Security and Cooperation in Europe?

First, of course, Hungarian democracy must be created and maintained by Hungarians themselves. But a democratic public must be an educated public and Hungarians themselves need to learn what has happened to their own constitution over the last three years. Most have no idea, and not because they couldn't or wouldn't understand.

The government celebrated its new constitution with great fanfare. They set up "constitutional tables" at every town hall where people could sign up to receive their very own copy of the constitution. Last June, the government presented to every secondary school graduate a coffee-table book with the words of the new constitution illustrated with historic and specially commissioned paintings. But much of what I have mentioned above is not contained in the text that government has distributed. Many of the most worrisome provisions that I have highlighted here are in the constitutional amendments made since that time or in the cardinal laws that can only be accessed through reading the immensely difficult legalese of the Magyar Közlöny. These laws are posted online only in PDF form, not searchable unless one goes through each individual daily issue separately.

Hungary's friends, including the United States, could assist financially with a program to educate citizens, lawyers and judges in Hungary about the new constitutional framework in Hungary. A public education campaign about the new constitutional structure – conducted by Hungarian constitutional experts from the government, from the opposition and from academia – may assist in giving Hungarians better information about their new constitutional system. Such a campaign would be especially effective if it could be conducted through the broadcast media in Hungary, though since the government functionally controls the broadcast media through its Media Council, some monitoring system would have to be put in place to ensure that both the government and opposition voices are heard. Having read thousands of petitions that ordinary Hungarians sent to the Constitutional Court in the 1990s, I am confident that Hungarians themselves will rise to the defense of both democracy and constitutionalism once they see the dangers of a flawed constitutional design.

Second, the Hungarian government vociferously claims that it is still a democracy because political parties may freely organize for the parliamentary elections next year. But its critics are concerned that the government presently controls the media landscape, has enacted a number of legal provisions that disadvantage opposition parties, and continues to change the electoral rules. In fact, nothing prohibits the government from changing important elements of the electoral framework at the last minute. With the election only one year away, it is important to get the rules of the game fixed – fairly – as soon as possible.

The OSCE has expertise in monitoring elections to ensure that they are free and fair. The OSCE should insist that the electoral rules be settled far enough ahead of the election so that all who want to contest the election have a reasonable amount of time to organize themselves accordingly.

Enough questions have been raised about the willingness of the current Hungarian government to recognize the political opposition that the OSCE/ODIHR should also fully monitor the 2014 Hungarian parliamentary elections. This should include not just election-day or long-term monitoring missions. The comprehensively changed new constitutional framework warrants an early Needs Assessment Mission from OSCE/ODIHR, one that can fully review the effects of all the new provisions. It should focus on the ability of political parties to organize and to get their message out, access to the media, and the fairness of the basic election framework including the creation of electoral districts and the compatibility of both the content and timing of the new electoral rules with the principles of free and fair elections.

Third, the US government should press the Hungarian government to live up to its international commitments to democracy, constitutionalism, the rule of law and robust rights protection. The US should be vigilant in monitoring backsliding from the high level of constitutional democratic protections that Hungary had achieved after 1989 and the US should cooperate with the Venice Commission, the Council of Europe Parliamentary Assembly Monitoring Committee, and the European Union (for example, the LIBE Committee of the European Parliament), all of which have ongoing monitoring processes in place.

But the US government should also be aware that, under pressure, the Fidesz government has in the past promised minor changes to its comprehensive framework and then has discarded those changes when the pressure lifted. Moreover, the changes that the Fidesz government has previously offered to make do not really address the key problems of the system. The Fidesz constitutional framework is a highly redundant system that must be understood as a whole. Each individual legal rule cannot be evaluated by itself because one must understand the function of that rule in the larger system. Changing a number of small features of this constitutional order may not in fact address the most serious problem – which is the concentration of political power in the hands of one party. In deciding whether the Hungarian government has been responsive to international and domestic criticism, Hungary's allies need to examine whether proposed changes really alter the way this complex and integrated system works as a whole.

The US should resist entering the battle of competing checklists of constitutional features. The Hungarian government often insists that some other European country has the same individual rule that its friends criticize. Perhaps we should remember Frankenstein's monster, who was stitched together from perfectly normal bits of other once-living things, but who was, nonetheless, a monster. No other constitutional democracy in the world, let alone in Europe, has the combination of constitutional features that Hungary now has. In evaluating Hungary for its compliance with international standards, its international friends must look at the whole constitutional system and not just at individual pieces as it assesses whether Hungary still belongs to the family of constitutional democracies.

Finally, Hungary is a small country in Europe. It may be hard to see why the United States should spend any of its political capital to address what former Secretary of State Hillary Clinton called Hungary's backsliding from constitutional democracy. There are two main reasons why the US should care, apart from the fact that it is painful to see any country retreat from democracy and one should always be concerned about the people adversely affected.

Hungary is a partner with the US not only in the OSCE, but also in NATO. OSCE commits its member states to the protection of human rights as defined under the Helsinki Final Act of 1975, and long experience shows that human rights receive their best protection from the maintenance of a constitutional and democratic government, both of which are now in doubt in Hungary. The NATO Charter creates a union of states “determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law.” But these commitments are also being challenged by the concentration of power in Hungary under its new constitutional framework. Both the OSCE and NATO commit its member states to good behavior and good government, which these organizations should be able to monitor.

In addition, other countries in Hungary’s neighborhood are looking with great interest at what Hungary is doing. They can see that the European Union, the Council of Europe, the OSCE, NATO and the United States have limited influence and ability to induce a national government to change its domestic laws. Hungary’s neighbors understand that Hungary is getting away with consolidating all political power in the hands of one party, and many find that enticing. Troubling recent developments in Romania, Bulgaria and Slovenia show that the Hungarian problem of overly concentrated power could spread if the US and its European allies don’t stand up for their values in the Hungarian case. The US should therefore treat constitutional problems in Hungary with a sense of urgency, both because of the speed with which this system is being locked in and because of the likelihood that the Hungarian constitutional disease could spread around the neighborhood.

In closing then, I strongly urge the United States, the US Helsinki Commission and the OSCE to take Hungary seriously, engage with the Hungarian government on matters of constitutional reform, and work toward ensuring that the channels of democratic participation remain open in Hungary so that the Hungarian people retain the capacity to determine the sort of government under which they will live. The legal changes I have described today pose a real danger to fundamental democratic and constitutional values, and Hungary’s friends need to sound the alarm.