Resolution – Report and recommendations of the New York County Lawyers' Association on Judicial Independence

Approved by the House of Delegates on June 25, 2005

RESOLVED, that the New York State Bar Association hereby approves the report and recommendations by the New York County Lawyers' Association with respect to Congressional resolutions affecting judicial independence and opposes the adoption of U.S. House Resolution 97 and Senate Resolution 92; and it is further

RESOLVED, that consistent with this approval, the report of the New York County Lawyers' Association shall be reconfigured as that of the New York State Bar Association; and it is further

RESOLVED, that the officers of the New York State Bar Association are hereby authorized to transmit the report to the appropriate Congressional and Governmental officials and to pursue such other and appropriate steps to effectuate the purposes of the report.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #8

REQUESTED ACTION: Approval of the report and recommendations of the New York County Lawyers' Association regarding judicial independence.

Attached is a report prepared by the New York County Lawyers' Association Committee on the Federal Courts addressing resolutions proposed for adoption by the U.S. House of Representatives and the U.S. Senate, which express the view that judicial determinations regarding the meaning of the United States Constitution should not be based in whole or in part on foreign judgments, laws or pronouncements unless they inform an understanding of the original meaning of the Constitution. While noting that the resolutions are non-binding, the report expresses the concern that they will have a chilling effect on the federal judiciary and, if enacted, could serve as the basis for impeachment attempts based upon judicial opinions.

The report takes the position that the resolutions are based on the incorrect premise that federal courts have relied inappropriately on foreign judgments, noting that in none of the Supreme Court cases cited in the resolutions did the court rely on a foreign decision in interpreting the United States Constitution. Further, the report contends that the resolutions represent an undermining of the constitutional separation of powers, shifting the authority to interpret the Constitution from the judicial branch to the legislative branch.

Attached to the NYCLA report are House Resolution 568, originally introduced in March 2004 (which was broader in scope to apply to interpretations of United States laws, and was never voted out of the House Committee on the Judiciary); a September 28, 2004 letter from the ABA Governmental Affairs Office to F. James Sensenbrenner, Jr., chair of the House Committee on the Judiciary, regarding House Resolution 568; and the February 2005 House and Senate resolutions that are currently proposed for adoption. Finally, a resolution to approve the report as a NYSBA report and to authorize NYSBA officers to take appropriate steps with respect to the report is attached.

This report has been circulated for comment to interested NYSBA committees and sections. The Special Committee on Judicial Independence and the Committee on Federal Constitution and Legislation both have indicated that they support the report in its entirety.

The report will be presented at the June 25 meeting by NYCLA President Norman L. Reimer.

NEW YORK COUNTY LAWYERS' ASSOCIATION

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REPORT ON THE REAFFIRMATION OF AMERICAN INDEPENDENCE RESOLUTIONS
U.S. HOUSE RESOLUTION 97 AND SENATE RESOLUTION 92

Prepared by the New York County Lawyers' Association Committee on the Federal Courts

This Report was approved by the Board of Directors of the New York Lawyers' Association at its regular meeting on March 14, 2005.

The Subcommittee on H. Res. 97 (the "Subcommittee") was originally formed in the fall of 2004 by the Committee on the Federal Courts (the "Committee") to consider and report on what its sponsors called the *Reaffirmation of American Independence Resolution*, H. Res. 568, 108th Cong. (2004). Having done so, the Subcommittee was next asked, on behalf of the Committee, to review a successor resolution, H. Res. 97, introduced in the current 109th Congress. More recently, a substantially similar resolution was introduced in the Senate, S. Res. 92 (the House and Senate resolutions being referred to herein as the "Resolutions"). The Subcommittee's Report was subsequently adopted by the Committee.

A. BACKGROUND

1. The Original Resolution

As originally introduced, H. Res. 568 expressed the view of its sponsors that:

> [J]udicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.

The full text of H. Res. 568, as introduced in the 108th Congress, appears in the Appendix to this Report behind Tab 1. If adopted, H. Res. 568 would have expressed the "sense of the House of Representatives." H. Res. 568.

2. The Evolution of H. Res. 568 During the 108th Congress

H. Res. 568 was introduced by Representative Tom Feeney (R-Fla.) and 60 co-sponsors on March 17, 2004 (eventually garnering 75 sponsors), and was referred to the House Judiciary Committee. On May 13, 2004, after a hearing before the Subcommittee on the Constitution, a substitute amendment was proposed by Rep. Feeney, providing that the language of H. Res. 568 would apply only to judicial interpretations of the United States Constitution, not to all of the "laws of the United States." As amended, H. Res. 568 was approved that day by the Subcommittee on the Constitution by a 7-3 voice vote, with three abstentions.

The American Bar Association urged the rejection of H. Res. 568, as amended, in a letter to the Chairman of the Judiciary Committee dated September 28, 2004, primarily on the ground that it was an inappropriate threat to the independence of the federal judiciary. The American Bar Association's letter is behind Tab 2 in the Appendix.

H. Res. 568, as amended, was considered with other matters by the full Judiciary Committee on September 29-30, 2004, but was never voted out of committee. H. Res. 568 became a dead letter when the term of the 108th Congress expired on December 31, 2004.

3. The Introduction of H. Res. 97

Rep. Feeney, together with 37 additional sponsors, introduced H. Res. 97 on February 15, 2005. The full text of H. Res. 97 is behind Tab 3. On February 15, it was referred to the House Committee on the Judiciary. The Chairman of the Judiciary Committee, Rep. F. James Sensenbrenner Jr. (R-Wis.), is one of the co-sponsors of the Resolution.

H. Res. 97 conforms to the amended version of H. Res. 568 and, therefore, applies to judicial determinations concerning the Constitution rather than the "laws of the United States." If adopted by the House, the Resolution would express the sense of one chamber that "judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements inform an understanding of the original meaning of the Constitution of the United States." H. Res. 97, 109th Cong. (2005) at 2-3.

4. The Introduction of S. Res. 92

On Sunday, March 20, 2005, Senator John Cornyn (R-Tex.) introduced S. Res. 92, which was referred to the Committee on the Judiciary. The full text of S. Res. 92 is behind Tab 4. The Senate resolution is virtually identical to H. Res. 97.

B. DISCUSSION

As an initial matter, we do not challenge the authority of Congress to adopt non-binding resolutions concerning the federal judiciary. Nor would we be concerned, ordinarily, with the substance of such resolutions, even if we or some of our members disagreed with the views expressed by the proponents.

The Resolutions, however, appear to rest upon fundamentally flawed premises concerning both the role and the performance of the federal judiciary. We note, by way of example only, that the preamble to the Resolutions cite Lawrence v. Texas, 539 U.S. 558 (2003),[1] to demonstrate that the Supreme Court has recently "relied" on foreign judgments, while citing a footnote in Printz v. United States, 521 U.S. 898, 921 n.11 (1997),[2] for the proposition that such "comparative analysis" is "inappropriate to the task of interpreting a constitution." In fact, the majority in Lawrence referred to foreign law to clarify and correct the Court's earlier foreign references in Bowers, 478 U.S. at 196-97 – concerning which the Resolutions offer no criticism. Nowhere in Lawrence, or in any other decision of the Supreme Court that we have found, has the Court relied upon a foreign decision or judgment for the meaning of the United States Constitution.

Most recently, in Roper v. Simmons, 543 U.S. __, 125 S. Ct. 1183 (Mar. 1, 2005),[3] Justice Kennedy, writing for the Court, reaffirmed its long-standing view that the laws of other nations can properly be considered as instructive in interpreting the Constitution – in this case the Eighth Amendment – but are never controlling:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become *controlling*, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from [1958] . . . , the Court has referred to the laws of other countries and to international authorities as *instructive* for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."

125 S. Ct. at 1198 (emphasis added) (citing Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (plurality opinion)).[4]

The respective preambles of the Resolutions go on to state, as if it were well-accepted Constitutional doctrine, that "it is the appropriate judicial role to faithfully interpret the popular

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[1] In Lawrence, a 6-3 majority of the Court overturned Bowers v. Hardwick, 478 U.S. 186 (1986), and held that a law criminalizing same-sex sexual conduct violated the equal protection clause. The principal opinion, joined by four justices, was authored by Justice Kennedy.

[2] In Printz, a 5-4 majority held, in a decision authored by Justice Scalia, that the Brady Act violated the Tenth Amendment in requiring State officials to conduct background checks on gun purchasers.

[3] In Roper, a 5-4 majority held that the Eighth Amendment prohibits the execution of persons who were juveniles at the time of the crime.

[4] Although Justice O'Connor dissented on the merits in Roper, she agreed with the majority that foreign law has a place in constitutional jurisprudence: "Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." 125 S. Ct. at 1215 (O'Connor, J., dissenting).

will through the Constitution." In fact, the Constitution – particularly the Bill of Rights – is famously anti-majoritarian, designed to protect the rights of unpopular individuals and minorities against the "popular will" of the day where necessary. E.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 623 (1943) (the purpose of the Bill of Rights was to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts"); THE FEDERALIST NO. 10 (James Madison) *in* 1 THE DEBATE ON THE CONSTITUTION 404, 408 (Bailyn ed. 1993) (to secure the public good and minority rights "against the danger [of an interested and over-bearing majority], and at the same time to preserve the spirit and the form of popular government, is . . . the great object to which our enquiries are directed").

Further, and more perniciously, the Resolutions constitute an attempt to shift the authority to interpret the Constitution – including the authority to select the intellectual tools with which to do so – from the judicial to the legislative branch. Therefore, we believe that the Resolutions inappropriately impinge on the independence of the judiciary, and undermine the constitutional separation of powers.

Judicial independence is fundamental to American democracy. Writing as Publius, Alexander Hamilton observed in THE FEDERALIST NO. 78 that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." 2 THE DEBATE ON THE CONSTITUTION at 469. Similarly, the system of checks and balances embodied in the Constitution has long been understood to require that the courts, not Congress, be the ultimate authority as to the meaning of our laws. "The interpretation of the laws is the proper and peculiar province of the courts." Id. at 470.

Interpreting the Constitution is also a core adjudicatory function. The Constitution itself, Article III, Section 2, provides in relevant part that "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution." The position of the Supreme Court as the ultimate arbiter of the meaning of the Constitution was confirmed in Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), and that precept has now been inviolate for over 200 years. To the extent the Resolutions attempt to restrict the ability of the judiciary to carry out this core function, they improperly intrude on the independence of a co-equal branch of government.

The sponsors of the Resolutions seek not only to restrict the source materials to which the courts can look when interpreting the Constitution, they also seek (by means of the exception for materials used "to inform an understanding of the original meaning of the Constitution") to impose upon the courts their own view as to the primacy of "original intent" in constitutional construction. We do not deem it our province to judge the merits of this theory of interpretation, which has critics as well as adherents. We are firmly of the view, however, that the merits and application of the theory are for the courts themselves to determine, not for Congress to dictate.

We appreciate that the Resolutions, as written, are non-binding. Nonetheless, we are concerned about the chilling effect that even a non-binding "Sense" of the House or Senate resolution would have upon the federal judiciary, particularly given Rep. Feeney's well-publicized prediction that judges who base decisions on foreign precedents would risk the "ultimate remedy" of impeachment. See *Rehnquist Resumes his Call for Judicial Independence*, NEW YORK TIMES, Jan. 1, 2005, at A10. We note as well that the Chief Justice of the United States

(notwithstanding that his own views concerning original intent appear to be similar to Rep. Feeney's[5]) has expressed concern about congressional attempts to restrict judicial independence. Most recently, in his annual report to the judiciary, the Chief Justice stated plainly, "[A] judge's *judicial* acts may not serve as a basis for impeachment. Any other rule would destroy judicial independence." 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (Jan. 1, 2005) (emphasis in original). Justice O'Connor has also gone on record regarding the predecessor to the Resolution, calling H. Res. 568 "very worrisome." *Rehnquist Resumes his Call for Judicial Independence*, NEW YORK TIMES, Jan. 1, 2005, at A10.

C. CONCLUSION

The Subcommittee has strong concerns about the tenor and content of H. Res. 97 and S. Res. 92. Even as non-binding Resolutions, we believe that they have the potential to chill judicial independence and, if enacted, could serve as a justification for impeachment attempts based upon the contents of judges' opinions, and/or as a blueprint for additional, putatively binding legislation that would further encroach on the independence of the judiciary and undermine the delicate balance of powers enshrined in our Constitution.

New York County Lawyers' Association Committee on the Federal Courts
Barbara Moses, Chair
Thomas V. Marino, Vice-Chair
Brian D. Graifman, Subcommittee Chair
Subcommittee Members
Gregg H. Kanter
Evelyn Konrad
Thomas V. Marino
Hon. Joseph Kevin McKay
Philip R. Schatz

[5] In Roper, the Chief Justice joined Justice Scalia's dissent, criticizing the majority opinion for interpreting the "cruel and unusual" clause according to "evolving standards of decency" rather than according to its "original meaning." 125 S. Ct. at 1217 (Scalia, J., dissenting).

Tab 1

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108TH CONGRESS
2D SESSION **H. RES. 568**

Expressing the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the United States.

IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 2004

Mr. FEENEY (for himself, Mr. GOODLATTE, Mr. RYUN of Kansas, Mr. KiNG of Iowa, Mr. SOUDER, Mr. CHABOT, Mr. SMITH of Texas, Mr. SHADEGG, Mr. HOSTETTLER, Mr. PITTS, Mr. HERGER, Mr. FORBES, Mrs. Jo ANN DAVIS of Virginia, Mr. FRANKS of Arizona, Mr. DELAY, Mr. BARTLETT of Maryland, Mrs. MUSGRAVE, Mr. PEARCE, Mr. OTTER, Mr. AKIN, Mr. JONES of North Carolina, Mr. CRANE, Ms. HARRIS, Mr. SMITH of New Jersey, Ms.. HART, Mr. PICKERING, Mr. KELLER, Mr. TIAHRT, Mrs. BLACKBURN, Mr. GREEN of Wisconsin, Mr. WELDON of Florida, Mr. GOODE, Mr. CULBERSON, TYIr. SULLIVAN, Mr. GARRETT of New Jersey, Mr. WILSON of South Carolina, Mr. SAM JOHNSON of Texas, Mrs. CUBIN, Mr. BLUNT, Mr. TANCREDO, Mr. CAMP, Mr. HOEKSTRA, TYIr.
CANTOR, Mr. CHOCOLA, Mr. KLINE, Mr. HENSARLING, Mr. SMITH of Michigan, Mr. ISTOOK, Mr. ADERHOLT, Mr. LEWIS of Kentucky, Ms. GINNY BROWN-WAITE of Florida, Mr. CANNON, Mr. PENCE, Mr. SENSENBRENNER, Mr. OSE, Mr. NEUGEBAUER, Mr. TOOMEY, Mr. RoGERS of Alabama, Mr. RENZI, and Mr. FLAKE) submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Expressing the sense of the House of Representatives that judicial determinations regarding the meaning' of the laws of the United States should not be based on judg

ments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the United States.

Whereas the Declaration of Independence announced that one of the chief causes of the American Revolution was that King George had "combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws";

Whereas the Supreme Court has recently relied on the judgments, laws, or pronouncements of foreign institutions to support its interpretations of the laws of the United States, most recently in Lawrence v. Texas, 123 S.Ct. 2472, 2474 (2003);

Whereas the Supreme Court has stated previously in Printz v. United States, 521 U.S. 898, 921 n.11 (1997), that "We think such comparative analysis inappropriate to the task of interpreting a constitution. . .";

Whereas Americans' ability to live their lives within clear legal boundaries is the foundation of the rule of law, and essential to freedom;

Whereas it is the appropriate judicial role to faithfully interpret the expression of the popular will through laws enacted by duly elected representatives of the American people and our system of checks and balances;

Whereas Americans should not have to look for guidance on how to live their lives from the often contradictory deci
sions of any of hundreds of other foreign organizations;
and

Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncments threatens the sovereignty of the

United States, the separation of powers and the President's and the Senate's treaty-making authority: Now,
therefoJ;e, be it

1 *Resolved,* That it is the sense of the House of Rep

2 resentatives that judicial determinations regarding the 3 meaning of the laws of the United States should not be 4 based in whole or in part on judgments, laws, or pro5 nouncements of foreign institutions unless such foreign 6 judgments, laws, or pronouncements are incorporated into 7 the legislative history of laws passed by the elected legisla8 tive branches of the United States or otherwise inform an

9 understanding of the original meaning of the laws of the 10 United States.

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Defending liberty
Pursuing Justice

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Tab 2

September 28, 2004

The Honorable F. James Sensenbrenner, Jr.
Chair, Committee on the Judiciary
U.S. House of Representatives Washington,
DC 20515

Dear Mr. Chairman:

We understand that the House Judiciary Committee is planning this week to mark up H.Res.568, introduced by Rep. Tom Feeney to express the sense of the House of Representatives regarding the appropriate use of foreign judgments, laws and pronouncements by the federal courts. We remain steadfast in our opposition to H.Res.568. While we certainly do not dispute the authority of Congress to adopt a non-binding resolution directed to another branch of government, H.Res.568 is an affront to judicial independence and unnecessarily strains interbranch relations. We urge the House Judiciary Committee to vote to not approve this measure.

Weare concerned that the resolution and its "whereas" clauses assume that the federal judiciary already has relied inappropriately on foreign judgments, specifically citing Lawrence v. Texas as the most recent example. This misconstrues Lawrence. The Court's opinion used European judgments to clarify the mistaken historical premises relied upon by the Court in Bowers v. Hardwick, which Lawrence overruled. The opinion summarized foreign perspectives, not to reach a definitive historical judgment, but rather because such "considerations counsel against adopting the definitive conclusions upon which Bowers placed such reliance." Slip opinion, p. 7. Later, the opinion cited the practices of other European countries in the context of examining whether the unique conditions of our nation provide distinguishable reasons for our government to circumscribe personal choice. It is reasonable to conclude that Lawrence used foreign law not as precedent but rather as a tool to contrast and analyze our own jurisprudence.

Our second concern centers on the fact that this resolution indirectly propounds a doctrine of constitutional construction that is itself highly controversial. The resolution states that judicial determinations should not rely on foreign judgments, laws or pronouncements of foreign institutions unless they" . . . otherwise inform an understanding of the *original meaning* [emphasis added] of the laws of the United States." The debate over whether interpretation should always be limited to an inquiry into the original meaning of a text, or whether meanings may evolve over time to reflect a changing society, is as old as the Constitution and still unresolved. Our concern is that this incorporated jurisprudence of original intent is presented as the normative mode of constitutional interpretation and therefore not a focus of discussion and debate.

The fifth "whereas" clause poses another concern for us because it appears to elevate one essential function of the federal judiciary over all others - that of "faithfully interpreting the popular will," expressed "through laws enacted... and our system of checks and balances." The founders devised a system whereby the federal judiciary was made an independent, coequal branch of government precisely so that it could withstand the "tyranny of the majority" in order to protect the rights of individuals and keep the political branches in check. The federal courts not only have the obligation to faithfully interpret the laws popularly enacted, but also to strike them down if they run afoul of the U.S. Constitution.

Finally, we are deeply concerned that both the proposed resolution and the explanatory statements of its sponsors intrude on the independence of a co-equal branch of government and of the judges that the political branches have nominated and confirmed. At best, such congressional actions will have a chilling effect on the decisional independence of our judges; and, at worst, they may be construed as an attempt to usurp the judicial function in violation of the separation of powers doctrine, so central to our tripartite system of government. Congressman Feeney, in an interview with MSNBC.com stated: "To the extent they *(judges)* deliberately ignore Congress' admonishment, they are no longer engaging in good behavior in the meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment." We disagree. We do not believe that Congress can accomplish through a non-binding resolution that which it lacks the power to do through the legislative process, nor do we believe that non-adherence to a non-binding resolution constitutes a basis for determining "good behavior" or grounds for impeachment.

Respect for a coordinate branch suggests that Congress should refrain from admonishing the federal courts about how they perform their core adjudicatory functions. The provisions of H.Res.568 demonstrate a disregard for the need for mutual respect and restraint in a system of government that gives each separate but co-equal branch power to hold the other accountable, yet requires cooperation and communication among the branches in order to accomplish the business of government. Further, because every inter-branch debate is played out as well in the public arena, H.Res.568 has the potential to undermine public trust in the independence of the federal judiciary.

We realize that the issues raised by H.Res.568 are complex and that its cosponsors are concerned about preserving the supremacy of the U.S Constitution and protecting the sovereignty of the United States. However, the central issue addressed in this resolution -- the appropriate use of foreign sources by our federal courts -- is an evolving issue, and it has implications for many

other issues such as the pitfalls and advantages of consulting other legal traditions, whether our courts should engage in comparative constitutional analysis, the effect of globalization on the types of cases that our courts are asked to settle, and the impact on foreign policy of the judgments of our courts. The debate is occurring not only in the halls of Congress but throughout academia, bar associations and judicial organizations. As evidenced by comments of several of our Supreme Court Justices and others on the federal bench, our judges are fully engaged in the discussion and fully aware of what is at stake. In time, as with so many important issues of the day, after ample discussion and debate, a consensus over the relevant issues and guiding principles may emerge.

We believe that there are better ways for Congress to participate in this debate than to propose or endorse this or similar resolutions. We urge you to reject this resolution and to pursue different avenues so that there can be a genuine, respectful exchange of ideas and concerns between Congress and the courts.

Sincerely,

Robert D. Evans

cc. Members of the Committee on the Judiciary

109TH CONGRESS
1ST SESSION **H. RES. 97**

Expressing the sense of the House of Representatives that judicial detern,.inations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2005

Mr. FEENEY (for himself, Mr. GOODLATTE, Mr. DELAY, Mr. SENSEN BRENNER, Mr. CHABOT, Mr. SMITH of Texas, Mr. CANNON, Mr. KING of Iowa, Mr. BAKER, Mr. HAYWORTH, Mr. CHOCOLA, Mr. JONES of North Carolina, Mr. *AlaN,* Mr. BARTLETT of Maryland, Mr. PENCE, Mr. WILSON of South Carolina, Mr. WELDON of Florida, Mr. 'I'ERRY, Mr. PIcKERING, Mr. GARRETT of New Jersey, Mr. PITTS, Mr. FRANKS of Axizona, Mrs. Jo ANN DAVIS of Virginia, Mr. BACHUS, Mr. SULLIVAN, Mr. SOUDER, Mr. BOOZMAN, Mr. FORTUNO, Mr. CANTOR, Mr. DOOLITTLE, Mr. FORBES, Mr. POE, Mr. HOSTETTLER, Mr. CARTER, Ms. GINNY BROWN-WAITE of Florida, Mr. GALLEGLY, Mrs. MUSGRAVE, and Mr. MACK) submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Expressing the sense of the House of Representatives that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.

Whereas the Declaration of Independence announced that one of the chief causes of the American Revolution was that King George had "combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws";

Whereas the Supreme Court has recently relied on the judgments, laws, or pron,ouncements of foreign institutions to support its interpretations of. the laws of the United States, most recently in Lawrence v. Texas, 123 RCt. 2472, 2474 (2003);

Whereas the Supreme Court has stated previously in Printz v. United States, 521 U.S. 898, 921 n.11 (1997), that "We think such comparative analysis inappropriate to the task of interpreting a constitution . . ."

Whereas Americans' ability to live their lives within clear legal boundaries is the foundation of the rule of law, and essential to freedom;

Whereas it is the appropriate judicial role to faithfully interpret the expression of the popular will through the Constitution and laws enacted by duly elected representatives of the American people and our system of checks and balances;

Whereas Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations; and

Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncments threatens the sovereignty of the United States, the separation of powers and the President's and the Senate's treaty-making authority: Now, therefore, be it

1 *Resolved,* That it is the sense of the House of Rep

2 resentatives that judicial interpretations regarding the 3 meaning of the Constitution of the United States should 4 not be based in whole or in part on judgments, laws, or 5 pronouncements of foreign institutions unless such foreign 6 judgments, laws, or pronouncements inform an under

7 standing of the original meaning of the Constitution of 8 the United States.

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109TH CONGRESS
1ST SESSION

S. RES.' 92

Expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.

IN THE SENATE OF THE UNITED STATES

MARCH 20, 2005 Mr. CORNYN submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.

Whereas the Declaration of Independence announced that one of the chief causes of the American Revolution was that King George had "combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by. our laws";

Whereas the Supreme Court has recently relied on the judgments, laws, or pronouncements of foreign institutions to support its interpretations of. the laws of the United States, most recently in Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002), Lawrence v. Texas, 539 U.S. 558, 573 (2003), and Roper v. Simmons, 125 S.Ct. 1183, 119899 (2005);

Whereas the Supreme Court has stated previously in Printz v. United States, 521 U.S. 898, 921 n.11 (1997), that , 'We think such comparative analysis inappropriate to the task of interpreting a constitution . . .";

Whereas the ability of Americans to live their lives within clear legal boundaries is the foundation of the rule of law, and essential to freedom;

Whereas it is the appropriate judicial role to faithfully interpret the expression of the popular will through the Constitution and laws enacted by duly elected representatives of the American people and under our system of checks and balances;

Whereas Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations; and

Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States, the separation of powers, and the President's and the Senate's treaty-making authority: Now, therefore, be it

1 *Resolved,* That it is the sense of the Senate that judi

2 cial interpretations regarding the meaning of the Constitu3 tion

of the United States should not be based in whole

1 or in part on judgments, laws, or pronouncements of for2 eign institutions unless such foreign judgments, laws, or 3 pronouncements inform an understanding of the original 4 meaning of the Constitution of the United States.

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