

April 6, 2004

The Honorable Steve Chabot  
Chair, Subcommittee on the Constitution  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

Your subcommittee recently held its first hearing on 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. While we certainly do not dispute the authority of Congress to adopt a non-binding resolution directed to another branch of government, we have grave concerns over the purpose, breadth and consequences of this proposal. We are submitting this letter to explain our concerns and hope that it will contribute to a productive discussion on this important subject. We ask that it be incorporated into the hearing record.

First, 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 deals with the scope of the resolution. It is so broadly worded that it appears to contradict two hundred years of American constitutional history and to rewrite our common law, inherited from Great Britain, by limiting the ability of the federal judiciary to interpret treaties and apply the “law of nations”.

The U.S. Supreme Court has long recognized the relevance of the “law of nations” (the validity of which is substantiated by direct reference in our own Constitution, Art.1, sec. 8) in interpreting U.S. laws and resolving disputes before the courts. As far back as 1816, Justice Story, in a case about the jurisdiction of the federal courts, said that “the principles of law and comity of nations often form an essential inquiry” in the correct adjudication of a case. Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat) 304, 335 (1816). Almost 75 years later, the Supreme Court, in The Paquete Habana, 175 U.S. 677 (1900), reiterated long-standing legal principles that endure today: customary international law -- the unwritten “law of nations” -- is an integral part of our law and U.S. courts must apply the “law of nations” unless it conflicts with a U.S. statute, controlling judicial decision or executive order.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations...*Id.* at 700.

Likewise, it has long been a principle of American law that whenever a statute of the U.S. can be interpreted in conformity with the law of nations, it must be so interpreted. Chief Justice Rehnquist himself endorsed this principle in Weinberger v. Rossi, 456 U.S. 25, 32 (1982), citing the maxim first articulated 200 years ago by Chief Justice John Marshall, as follows: “It has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy... (1804) that ‘an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains....’”

Both the interpretation of U.S. treaties (which, of course, Article VI of the U.S. Constitution identifies as part of the supreme law of the land) and the “law of nations” depend in part on the decisions of international bodies and foreign courts in interpreting the terms of the treaties, giving rise to the “general practice of states” which is at the heart of customary international law. It makes no sense, for example, to have an international treaty that is interpreted five different ways in five different countries; to avoid this, courts everywhere take into account the judgments of other countries’ courts to help interpret both treaties and the “law of nations.” We should not make American courts an exception to this almost universal and salutary practice and principle of interpretation.

Further, the proposed resolution may put the U.S. in violation of its treaty commitments since it appears to direct the federal courts to disregard the interpretations of the international monitoring bodies charged with implementing treaties, such as the U.N. Committee on Torture, which implements the UN Convention Against Torture, to which we are a party.

Our third 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 decisional independence of our judges and, at worst, 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, is quoted as stating, “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.

In addition, we are genuinely concerned that admonitions such as these from Congress to the courts unnecessarily strain interbranch relations and 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. Because every inter-branch debate is played out as well in the public arena, we are also concerned that such actions will be perceived as an attempt by Congress to control the Third Branch and will undermine public trust in the independence of the federal judiciary.

Respect for a coordinate branch suggests that Congress should refrain from admonishing the federal courts about how they perform their core adjudicatory functions. Conversely, we believe that Congress also should try to protect itself from allegations that it is more concerned with political outcomes than with the interpretive constitutional questions at hand by presenting a non-partisan analysis of when and how the courts have alluded to, discussed, or relied on judgments, laws or pronouncements of foreign institutions.

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 the Justices and others on the 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 and we urge you to pursue different avenues so that there can be a genuine, respectful exchange of ideas and concerns between Congress and the courts.

Various entities within our Association have expressed an interest in examining these issues in more depth. We will continue to share our views with you and stand ready to help facilitate a robust and thorough discussion.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dennis W. Archer".

Dennis W. Archer

cc. Members of the Committee on the Judiciary  
Cosponsors of H. Res. 568