

GOVERNMENTAL AFFAIRS
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

DIRECTOR

Robert D. Evans
(202) 662-1765
rdevans@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

Denise A. Cardman
(202) 662-1761
cardmand@staff.abanet.org

Kevin J. Driscoll
(202) 662-1766
driscollk@staff.abanet.org

Lillian B. Gaskin
(202) 662-1768
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

R. Larson Frisby
(202) 662-1098
frisbyr@staff.abanet.org

Kristi Gaines
(202) 662-1763
gainesk@staff.abanet.org

Kenneth J. Goldsmith
(202) 662-1789
goldsmithk@staff.abanet.org

Ellen McBarnette
(202) 662-1767
mcbarnee@staff.abanet.org

E. Bruce Nicholson
(202) 662-1769
nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS
OPERATIONS/LEGISLATIVE COUNSEL

Julie M. Strandlie
(202) 662-1764
strandlj@staff.abanet.org

INTELLECTUAL PROPERTY
LAW CONSULTANT

Hayden Gregory
(202) 662-1772
gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL

Rita C. Aguilar
(202) 662-1780
aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT

Julie Pasatiempo
(202) 662-1776
jpasatiempo@staff.abanet.org

STAFF DIRECTOR FOR
INFORMATION SERVICES

Sharon Greene
(202) 662-1014
greenes@staff.abanet.org

EDITOR WASHINGTON LETTER

Rhonda J. McMillion
(202) 662-1017
mcmillionr@staff.abanet.org

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.

We are 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,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc. Members of the Committee on the Judiciary

