HOUSE RESOLUTION ON THE APPROPRIATE ROLE OF FOREIGN JUDGMENTS IN THE INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

H. Res. 97

JULY 19, 2005

Serial No. 109–40

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

22–494 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
SPENCER BACHUS, Alabama
BOB INGLIS, South Carolina
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
DARRELL ISSA, California
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California
CHRIS VAN HOLLEN, Maryland
DEBBIE WASSERMAN SCHULTZ, Florida

PHILIP G. KIKO, *General Counsel-Chief of Staff*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

STEVE CHABOT, Ohio, *Chairman*

TRENT FRANKS, Arizona
WILLIAM L. JENKINS, Tennessee
SPENCER BACHUS, Alabama
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
STEVE KING, Iowa
TOM FEENEY, Florida

JERROLD NADLER, New York
JOHN CONYERS, JR., Michigan
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
CHRIS VAN HOLLEN, Maryland

PAUL B. TAYLOR, *Chief Counsel*
E. STEWART JEFFRIES, *Counsel*
HILARY FUNK, *Counsel*
KIMBERLY BETZ, *Full Committee Counsel*
DAVID LACHMANN, *Minority Professional Staff Member*

CONTENTS

JULY 19, 2005

HEARING ON H. RES. 97, 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

OPENING STATEMENT

	Page
The Honorable Steve Chabot, a Representative in Congress from the State of Ohio, and Chairman, Subcommittee on the Constitution	1
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution	3
The Honorable Tom Feeney, a Representative in Congress from the State of Florida, Subcommittee on the Constitution	4

WITNESSES

Mr. Viet D. Dinh, Professor, Georgetown University Law Center	
Oral Testimony	7
Prepared Statement	9
Mr. M. Edward Whelan, III, President, Ethics and Public Policy Center	
Oral Testimony	11
Prepared Statement	14
Mr. Nicholas Q. Rosenkranz, Professor, Georgetown University Law Center	
Oral Testimony	28
Prepared Statement	30
Ms. Sarah Cleveland, Professor, University of Texas School of Law	
Oral Testimony	36
Prepared Statement	38

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Tom Feeney, a Representative in Congress from the State of Florida	57
Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia	58
Prepared Statement of Public Citizen's Global Trade Watch	59

HOUSE RESOLUTION ON THE APPROPRIATE ROLE OF FOREIGN JUDGMENTS IN THE INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES

TUESDAY, JULY 19, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:05 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order.

Good afternoon. I would like to thank everyone for coming. This is the Subcommittee on the Constitution's hearing on H. Res. 97.

Today we are examining the appropriate role of foreign judgments in the interpretation of the Constitution of the United States. This hearing is important for a number of reasons, but, most importantly, to make clear from this Subcommittee's perspective that the Supreme Court's reliance, or any court's dependence for that matter, on foreign judgments in the interpretation of our Constitution has no place. I would like to thank the distinguished gentleman from Florida, Mr. Feeney, for his continued work on H. Res. 97.

We have a distinguished panel before us today, and I look forward to their testimony before this panel. I know that you all have busy schedules, and I know that Members of this Subcommittee join me in thanking you for taking the time to share your expertise.

This hearing is timely as our attention is turned to the activities unfolding across the street. As the nomination process moves forward, I am reminded of article VI of the U.S. Constitution, which states that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. The Senators and Representatives . . . and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

Article VI and the oath that we all, including judicial officers, take as representatives of our Federal system of government, binds us to uphold and protect the Constitution of the United States of America.

Unfortunately, over the last several years, we have witnessed a trend, a dangerous trend, I believe, in which the judiciary has strayed from its oath and duty to uphold the meaning of the Constitution. By looking to and relying on the decisions of foreign courts in the interpretation of the Constitution of the United States, the judiciary not only is undermining the vision of our Founding Fathers but is chipping away at the core principles on which this country was founded, chipping away at our Nation's sovereignty and independence.

When our country declared its independence from Britain, the Founders were very aware and concerned that King George had "combined to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws." and, in drafting the Constitution, Alexander Hamilton stated in Federalist No. 78 that "It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure, or anyone else's, to the constitutional intentions of the legislature," making clear in the Constitution that there is no place for the use of Federal opinion.

Despite our history, the vision of our Founding Fathers, and the clear mandates set forth in the Constitution, the judiciary has continued to rely, I think, and value foreign opinion in the interpretation of the United States Constitution. This past March 24, the Supreme Court in *Roper v. Simmons* cited the practice of other countries in striking down the death penalty, concluding that "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty." in looking to the international consensus, Justice Kennedy clearly neglected to look to the consensus citizens of the 20 States that continued to allow the practice until March.

This is not an isolated case. In 2003, in *Lawrence v. Texas,* the Court cited a decision by the European Court of Human Rights as a lack of world consensus on the illegality of such conduct.

In 2002, in *Adkins v. Virginia,* the Court referenced the views of the European Union's brief filed with the Court in a footnote to its decision to find death sentences for mentally retarded individuals unconstitutional.

Our country has evolved to where there is enough precedent and enough *corpus juris* which a court can use to interpret and determine whether the laws of Congress or of the several States are permissible under the confines of our Constitution. Furthermore, our Constitution is clear as to its supremacy and to the role of the judiciary in upholding this constitutional tenet.

Americans deserve certainty, most of all, from the principles on which this country was founded. They deserve to know the meaning of our Constitution as intended by our legislatures under our body of law, not as intended by the world. H. Res. 97 is necessary now more than ever to remind the Court and all representatives, elected and appointed, who took an oath to uphold their obligation, both to the Constitution, and to the American people.

I look forward to hearing from our panel of witnesses on this issue this afternoon and on H. Res. 97. And at this time, I will yield to the gentleman from New York, Mr. Nadler, the Ranking Member of this Committee for the purpose of making an opening statement.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, I want to join you in welcoming our witnesses today. As we await the President's nomination of a new justice of the Supreme Court, it is important that this Committee consider the role of the judiciary in our system of Government. I hope that the Senate will, in considering the lifetime appointment of a Supreme Court justice, exercise its constitutional duty of advice and consent and not act merely as a rubber stamp.

Our main concern, Mr. Chairman, is that attacks on the judiciary in this Committee have crossed the dangerous and inappropriate line between acceptable commentary and response, and potentially destructive attempts to destroy the separation of powers, which has been one of the foundations of our freedoms.

Congress may certainly change legislation if we are not satisfied with the Court's interpretation of the law. Congress may also choose not to exercise powers the Court has said we have under the Constitution. In rare and extraordinary circumstances, we can even initiate an amendment to the Constitution. We may not always agree on policy, but these are all powers given to Congress under the Constitution.

This Committee and this Congress, however, have begun to stray from the appropriate to the dangerous. While I realize that some issues before the Court arouse strong feelings, Congress has a duty to set a reasoned example to the Nation. Lambasting the courts as unelected judges—if that were not the design of the Government—undercuts the protection of our liberties.

This Subcommittee, despite its name, has never taken the time to look into the Court's long and worrisome record of using the 11th amendment contrary to its intent, limiting the reach of the commerce clause in undercutting Congress' powers to enforce the 14th amendment in ways that have undercut our civil rights laws. The outrage has sometimes proved selective.

Threats of impeachment, attempts to eliminate Federal court jurisdiction to rule on certain select issues, even an amendment to the budget a few weeks ago, to the appropriations bill to say no funds appropriated herein to the Justice Department may be used to enforce a specifically named decision of a Federal district court, *ex parte* communications with Federal judges concerning their actions in a particular proceeding, threats or subpoenas in cases where Members of this Committee disagree with a certain result, and the even inflammatory comments approving of violence against judges do a disservice to the foundations of our constitutional system of Government.

Today we examine the use of non-U.S. sources in judicial decisions. I continue to believe that this is a big fuss over nothing. No case has ever turned on a foreign source. No foreign source has ever been treated as binding, and this phenomenon of citing foreign sources is certainly nothing new. What is really dangerous is the threats that accompany our deliberations, and the suggestion that Congress may exercise its power to tell the courts what is or is not appropriate, what is or is not an appropriate way to consider a complex issue. Our courts should not decide important issues with blinders anymore than should Congress.

I would also remind my colleagues who voted for NAFTA, who are contemplating voting for DR-CAFTA, that our sovereignty is far more threatened by the remedies available to foreign corporations and governments because of NAFTA, and prospectively because of CAFTA, than because of anything that has appeared in these court decisions, whether it is international bodies telling us which laws we cannot—we can and cannot have or enforce, or foreign corporations seeking remedies against our businesses. And if our Members are really concerned about threats to our sovereignty, they will look at these foreign agreements which cede sovereignty to World Trade Organization tribunals as to which of our own laws we can enforce and which we cannot.

I welcome our witnesses, and I look forward to hearing their testimony. I would also ask unanimous consent that Members have 5 days to revise and expand their remarks and include additional materials in the record.

I thank you, Mr. Chairman, and I yield back.

Mr. CHABOT. Thank you. Without objection, so ordered.

The gentleman from Florida, Mr. Feeney, who is one of the two principal sponsors of this legislation. If he would like to make a brief opening statement, I am sure the Committee would welcome that.

Mr. FEENEY. I thank the Chairman. But before I do that, I would like unanimous consent to place into the record a statement by our good colleague, Congressman Bob Goodlatte, who is cosponsor of the Feeney-Goodlatte resolution.

Mr. CHABOT. Without objection so ordered.

Mr. FEENEY. Thank you, Mr. Chairman, again for holding a hearing on a very important issue.

Six Supreme Court U.S. justices have approvingly been described by Professor—actually Yale Law Dean Harold Koh—as transnationalists. They have increasingly expressed essentially disappointment in our own U.S. Constitution as originally written by the Drafters and Framers of our Constitution by importing foreign laws, fads, constitutions, and political polls to somehow create or reinterpret against their own 20- or 10-year-old precedence on the bench from the U.S. Supreme Court to reinterpret the meaning of our very Constitution.

With disturbing frequency they have looked at and looked all over 191 nations recognized by the United States State Department for some favorable or agreeable laws that they could use to justify their result-oriented approach.

So I want to thank Mr. Goodlatte and many others on this Committee. We hope to have a great civics debate as part of this discussion as we tee it up in the United States Senate in terms of what the appropriate role of the United States justice ought to be.

If we are going to have a Republican government small arm—meaning that people get to elect policymakers—I think every American, from third grade to the end of their retirement years, ought to understand what the appropriate role of the Justice is.

That is, in my view, to interpret the original meaning of the Constitution and to interpret the laws as intended by the law-givers in the States and the Federal—at the Federal level.

In the Declaration of Independence, Jefferson and the Founders explained the rationale for war against and separation from Britain. Among other things, they alleged that the King had combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws.

Yet it appears that is exactly what is happening to the extent that we have Supreme Court Justices relying on contemporary fads, following polls, laws, *et cetera,* in order to somehow reinterpret the United States Constitution. The most recent alarming decision was in *Roper v. Simmons.* Again, the United States Supreme Court undermined its own precedent. This is not something that they were looking as comparative analysis or thought that it would be interesting to make note.

You know, I would say to my friend from New York that indeed they did rely at least in part on foreign laws to change their own precedent with respect to whether or not people under the age of 18 can ever be subject to the death penalty in America.

Never mind that a majority of the States that have the death penalty, elected legislatures by the people, allow a 17-year-old murderer under certain circumstances to be put to death. In Florida, over 70 percent of the people have amended our Constitution to allow for the egregious circumstances for people under the age of 18.

So with one fell swoop, based in part on foreign law, we have the United States Supreme Court—or a majority anyway—throwing out constitutional referendum in Florida and throwing out the laws of a significant portion of our States.

They did the same thing in *Adkins,* overturning their own precedent—democratically elected policymakers' decisions.

They did the same thing in *Lawrence v. Texas* on the issue of whether or not the State of Texas had the right to regulate sodomy.

By the way I won't necessarily quarrel with the outcome of any of their decisions. It's exactly the fact that they relied on international laws, fads, institutions, constitutions, *et cetera.*

It is important to read what the Feeney-Goodlatte resolution does. I would say to Professor Cleveland, we certainly welcome your comments. I am glad that you are here today because this is an interesting case. I was surprised, when I found and read your testimony, that I agree with a great deal of what you have to say. Indeed, it's often appropriate to cite what is going on in other countries.

In interpreting our Constitution, for example, it would be hard to understand the administration of powers if you hadn't referred to Montague, who Madison says is essentially the founder of the concept of separation of powers. Our Founders were terribly familiar with everybody from Plato, Cicero, Lock, Mill, Blackstone, for a definition of the words "law of nations." one of the problems we have here today is people are confusing the term "law of nations," which is in article I of the Constitution, with international law. These are very different things.

I would refer you to Mr. Blackstone's description of what the law of nations are. It is actually something that doesn't change over time; God-given rights like Jefferson referred to in our Declaration.

International law changes a great deal. It does not prohibit, by the way, anytime there is legislative history involved in citing foreign authorities.

If we decide to adopt the German pension system, for example, we debate the German pension system, we want to adopt a Social Security system designed on Bismarck's system which, in fact, to some extent happened—it may be terribly important for the courts to look at the history in Germany of the pension system that Congress adopted.

The legislative history is always appropriate. Treaty, maritime law, all mentioned in the Constitution, are always appropriate for the courts to recognize.

What Feeney-Goodlatte prohibits is overturning constitutional precedent, is creating or finding new constitutional rights or privileges based on contemporary post-constitutional law.

With that, I think that there is no more important question to ask the nominee that we expect at any time now, and all future nominees in terms of their jurisprudential approach. It seems to me that it is appropriate for nominees to comment on this. After all, we have Judge Scalia, Judge Breyer, Judge Ginsburg, and Judge O'Connor at a minimum, not only in their opinions, but off the bench, debating the legitimate use of international law to determine our own constitutional rights.

I will end, Mr. Chairman, by suggesting that when courts do what I have suggested they have done in the three cases I have cited, they in my view violate article I, article II, article III, article IV, article V and article VI. Perhaps we will get into that. I can't find anything in article VII that the judges are violating with respect to their oath when they engage in this procedure. And I yield back to the Chairman.

Mr. CHABOT. Thank you very much. We have a very distinguished panel with us here this afternoon. We are anxious to get to them. I would like to introduce them at this time.

Our first witness will be Mr. Viet Dinh. Mr. Dinh currently is a professor of law at Georgetown University Law Center and founder and principal of Bancroft Associates. His credentials are too numerous to list, but I will note that he previously served as U.S. Assistant Attorney General for Legal Policy from 2001 to 2003, served as Special Counsel to the U.S. Senate Whitewater Committee, and as Special Counsel to Senator Pete Domenici for the impeachment trial of the President. He was a law clerk to both Judge Lawrence H. Silberman of the U.S. Court of Appeals and to U.S. Supreme Court Justice Sandra Day O'Connor. It is very nice to see you again, Professor.

Our second witness is Mr. Edward Whelan, and Mr. Whelan is the President of the Ethics and Public Policy Center, where he directs the Center's program on the Constitution, the Courts and the Culture. Prior to joining EPPC, Mr. Whelan worked at the Department of Justice where he served as the Principal Deputy Assistant Attorney General for the Office of Legal Counsel, starting the position right before September 11th. Mr. Whelan previously served as General Counsel to the U.S. Senate Committee on the Judiciary. He is a former law clerk to both Judge J. Clifford Wallace on the

U.S. Court of Appeals for the Ninth Circuit and for U.S. Supreme Court Justice Antonin Scalia. We welcome you here this afternoon.

Our third witness is Nick Rosenkranz, who also worked in the Department of Justice's Office of Legal Counsel, serving as an Attorney-Advisor. Prior to joining the Department of Justice, Mr. Rosenkranz served as a law clerk for both Judge Frank Easterbrook on the U.S. Court of Appeals for the Seventh Circuit and for U.S. Supreme Court Justice Anthony M. Kennedy. We welcome you here this afternoon, Mr. Rosenkranz.

Our fourth and final witness is Sarah Cleveland, Marrs McLean Professor in Law at the University of Texas School of Law. Ms. Cleveland is a former Rhodes Scholar and a law clerk to U.S. Supreme Court Justice Harry Blackmun. Her interests include international human and international labor rights, foreign affairs and the Constitution, and Federal civil procedure. She is the author of many publications, including "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power in Foreign Affairs," Texas Law Review, 2002. We thank you very much for being here this afternoon, Ms. Cleveland.

For those who have not testified before this Committee before, let me explain very briefly our lighting system. We have what is called the 5-minute rule. You basically have 5 minutes to testify. Everyone, including Members up here, are limited to 5 minutes.

We have the system there, the green light will be on for 4 minutes, the yellow light, we hope—it wasn't working in the last hearing we had a few hours ago, we hope it is working now. The yellow light is supposed come on for 1 minute. And then the red light, we would ask you to wrap up as close as possible when that light come on. We will give you a little leeway but we would ask you to keep as close to that as possible.

It is the practice of this Committee to swear in all the witnesses appearing before it. So if you would all please rise at this time and raise your right hand.

[Witnesses sworn.]

Mr. CHABOT. Thank you very much. All witnesses have answered in the affirmative.

We will begin with you this afternoon, Professor Dinh. You have 5 minutes.

TESTIMONY OF VIET D. DINH, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Mr. DINH. Thank you very much, Mr. Chairman, and Members of the Committee. Thank you for the opportunity to be here again to talk about this important topic raised by House Resolution 97: When, if ever, is it appropriate for American courts to consult foreign courts of law in an interpretation of purely American law, particularly the United States Constitution?

Let me start, as Mr. Feeney did, by listing the various areas in which, in my opinion, consideration of foreign sources of law would not only be appropriate but I think essential in the decisionmaking process of U.S. courts.

First, obviously, where the case turns on the meaning of a foreign law. For example, in the case 2 years ago of *J.P. Morgan v. Traffic Stream.* Second where the case turns on the actions and

wishes of foreign tribunals. For example, again, on the same term, the case of *Hoffman-LaRoche v. Empagran.* Third, where the case turns on the existence of meaning of the law of nations. Again, from the same term, *Sosa v. Alvarez-Machain.* And also when a court is interpreting a treaty, it is natural to look to the interpretation of that treaty by the courts of nations, who are also signatories to that treaty. *Olympic Airways v. Husain,* also in the same term, to which I return.

Where foreign sources of law is not relevant and appropriate, however, is in the interpretation of the United States Constitution. There are several reasons for this. The Chairman and Mr. Feeney have gone through them in length. I just want to summarize here my testimony.

First is the obvious fact that foreign courts are not interpreting the United States Constitution. How foreign courts interpret, for example, the European Convention on Human Rights tell us very little what a different document, that is our U.S. Constitution, means. It may well be, as many Justices have observed, that foreign judges often look to the United States Supreme Court precedent in interpreting constitutions and treaties, modeled after the United States Constitution. This is perfectly legitimate and normal; just as U.S. judges do and should look to the foreign antecedents to the U.S. Constitution to discern its meaning. But there is very little reason why the meaning of the U.S. Constitution should be informed by the views, the post-constitutional views, of contemporary foreign judges interpreting their own laws and constitution.

Second is democratic legitimacy. It is okay to consider foreign interpretations of a common treaty, say the Warsaw Convention, not only because the courts are interpreting the same document. Rather, it is also okay because the democratic process has said that it is, implicitly or explicitly. Congress, in ratifying a treaty, has the opportunity to decide whether or not to involve the Federal judiciary at all by making a treaty self-executing or not. Even where Congress has given a role to judges in interpreting and enforcing a treaty by making it self-executing, Congress can specify the terms of such judicial involvement through reservation and other statutory language. In fact, the preamble to some treaties, again such as the Warsaw Convention, expressly recognize that intent and purpose to provide uniform legal principles or a uniform manner of interpretation.

By contrast, in cases of purely American law, there are no corresponding democratic authorization of nor legislative checks on the reliance on foreign judgments. There is simply no way that I or any other citizen, or you as elected representatives of us, can affect how a foreign court would view a U.S. Constitutional issue.

Thirdly and finally, there is simply a matter of consistent methodology. The reason why I bring up the Warsaw Convention and the case of *Olympic Airways v. Husain* so often in this brief statement is the fact that nobody doubts that consideration of foreign judgments in that context is legitimate. Yet a majority of the Supreme Court in deciding the matter neglected to even cite the fact that two other signatory nations have interpreted the exact same convention, deciding the exact same issue in a diametrically op-

posed way from which the Supreme Court had come to its conclusion.

In dissent, Justice Scalia threw up his hands and said, here I have been saying for the last 3 or 4 years we shouldn't consider foreign laws in illegitimate instances. In the one instance where it is legitimate, you can probably ignore the relevant judgment of foreign courts.

The reason for this, I think one of the explanations for this, is that we as American lawyers, and especially as American judges, are just not very good at doing foreign laws. We are not steeped in their tradition, we do not know the interpretation. We do not know the entire body of law of a particular nation or of a particular organization or of a particular convention. So what is left is that we would cherry-pick those sources of law which would tend to support our point of view, whether it be in a brief or in a particular opinion.

In the short run, that may ostensibly add to some ethereal legitimacy to or persuasiveness to that particular opinion or brief, but I would contend that in the long run and not very long either, but just a little bit of reflection would indicate the underlying illegitimacy and lack of reliability of such reliance.

I will close there and take any further questions. Thank you very much.

Mr. CHABOT. We appreciate it, Professor.

[The prepared statement of Mr. Dinh follows:]

PREPARED STATEMENT OF VIET D. DINH

Mr. Chairman and Members of the Subcommittee,

Thank you very much for this opportunity to comment on House Resolution 97 and the very important constitutional issues raised by the consideration and application of foreign judgments to the interpretation of United States law, and particularly upon interpretation of the United States Constitution.

The issue raised by today's hearing is indeed an important one: when, if ever, U.S. courts should consider or rely upon the decisions of foreign courts in the interpretation of American law. The issue is particularly important at this time, as in recent years it appears our courts are more often referring to foreign laws and foreign court decisions to justify the conclusion reached in a particular case. American courts often refer to foreign law even in cases involving interpretation of a purely domestic law. Thus, unfortunately, it appears our courts, most noticeably the Supreme Court, are looking to foreign decisions and legal principles in the wrong instances.

The consideration of foreign court decisions is not always improper or inappropriate. Where the law to be construed is a treaty, the interpretations given that treaty by other nations that are parties to the agreement are certainly relevant; our courts should consider these precedents in formulating their own interpretations of the same legal provision. Where, however, the law being interpreted is solely domestic, American law, and particularly where the interpretation is of a constitutional provision, decisions by foreign tribunals on a seemingly similar issue have no relevance. The foreign forum was not tasked with interpreting and applying U.S. law, but rather has the responsibility for applying its own laws.

Despite what I conclude is a clear and necessary distinction between when the consideration of foreign judgments is appropriate, many Justices of the Supreme Court have made it clear that the trend of considering foreign judgments is not coming to an end, but rather is expanding. It is for that reason that I believe this is such an important topic.

When the court is called upon to interpret a treaty or agreement among nations, the court must "accord the judgments of our sister signatories 'considerable weight.'" *Olympic Airways v. Husain,* 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (quoting *Air France v. Saks,* 470 U.S. 392, 404 (1985)). For example, in applying provisions of the Warsaw Convention, the Supreme Court has, in many instances, carefully considered the case law of parties to that treaty. *See, e.g., El Al*

Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 173–74 (1999); *Eastern Airlines, Inc. v. Floyd,* 499 U.S. 530, 550–51 (1991); *Air France,* 470 U.S. 392. *But see Olympic Airways,* 540 U.S. 644.

Unfortunately, in this area, where consideration of the judgments of foreign courts has significance, our courts have not consistently looked to such judgments. In at least one instance, foreign decisions were not considered at all by the majority. *See Olympic Airways,* 540 U.S. 644. This failure to consider the decisions of the courts of other countries who are parties to the relevant agreement represents a failure to follow a well-established legal principle—to ensure, to the extent possible, the consistent interpretation and application of a single law.

Where two nations have jointly adopted a single law, it is consistent with accepted legal principles that an attempt should be made to provide for consistent interpretations of that law. "Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Id.,* at 660 (Scalia, J., dissenting).

The legitimacy of considering foreign interpretations of a common treaty derives not simply from the technicality that the courts are interpreting the same document. Rather, it stems also from the interaction with the democratic process. First, Congress in exercising its constitutional authority to ratify a treaty has the opportunity to decide whether or not to involve the judiciary at all by making the treaty self-executing. Even where Congress has afforded judges a role in enforcing and interpreting a treaty, it can specify the terms of such judicial involvement through reservations and other statutory tools. In fact, the preamble to some treaties, such as the Warsaw Convention, expressly recognize that intent and purpose—to provide uniform legal principles or a uniform manner of regulation. Convention for the Unification of Certain Rules Relating to International Transportation by Air preamble, Oct. 29, 1934, 49 Stat. 3000, 3014, T.S. No. 876 (reprinted at 49 U.S.C. § 40105).

By contrast, in cases of purely American law, there are no corresponding democratic authorization of nor legislative checks on the reliance on foreign judgments. There is simply no way that I or any other citizen can affect how a foreign court would view a particular issue.

It is our own courts and not foreign courts that are tasked with interpreting our laws. The American judiciary is not independent of the Constitution and the laws of this country. Indeed, it is from the Constitution itself that any authority to interpret our laws vests in the judiciary. The Constitution does not separate and isolate us from other countries. It contains the treaty power, recognizing the need to cooperate and build relationships with other countries. It also does not limit or prevent our own lawmakers from looking to foreign laws and foreign court judgments in drafting, debating and developing our own laws.

Though most recent consideration of foreign legal trends has occurred in connection with social issues, courts could conceivably extend this practice to use foreign authorities when adjudicating other fundamental issues, including our approach to our own national defense. For example, we cannot tolerate a court's invalidating initiatives in the War on Terror on the grounds that some other nations view those actions as incorrect or unwise. To give weight to foreign decisions on matters of American concern opens the door for consideration of foreign decisions on all matters, even those that should ultimately be matters for us alone.

Constitutional rights exist because of the Constitution itself. They do not derive from any source external to that document. It is through this contract between our government and our citizens that the government has the authority to enact laws and the courts have the authority to interpret them. The Constitution tasks our country's courts with the interpretation of the document. It is not within the purview of any foreign tribunal to interpret the meaning of any provision of our Constitution. Foreign views of how our Constitution should be interpreted should provide no instruction to our own courts; nor should our courts eschew their own responsibility of interpretation by relying instead on the views of foreign jurists. In the same way that the parties to a treaty should respect each other's interpretations of those mutually binding agreements, so too should American courts look to the understanding (as set forth in its text) the document was given by the actual parties to it—i.e., the American people at the time of its drafting and ratification.

The recent reliance on international sources raises issues of sovereignty and separation of powers, and ultimately the dilution of the power of the people in this country. As Justice Scalia explains,

> We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among

> our people is not merely a historical accident, but rather so implicit in the concept of ordered liberty that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.

Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (internal quotation marks and citations omitted).

This conclusion holds across the spectrum of interpretive theories. Indeed, it is perhaps most necessary for expansive methodologies, such as ones depending on "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 99–101 (1958). Because such expansive strategies are less anchored in the Constitution's text, structure or history, a jurisprudential limitation on the geographic or jurisdiction sources of law is necessary to ensure that constitutional law remains predicated on neutral principles and not on the whims of individual judges or court compositions.

To be sure, legislative direction to the courts on how to interpret the Constitution may raise significant separation of powers concerns. This Resolution, however, does not provide such direction, or otherwise require the courts to adhere to any of its statements. Rather, the Resolution merely provides the sense of this body that interpretations of our Constitution should not be governed by foreign judgments or views.

It is wholly appropriate for the House of Representatives to provide its opinions on the interpretation of the Constitution, a document that its members, just as the members of the judiciary, have sworn to uphold and defend. It is certainly no more inappropriate than the all-too-often practice of federal judges, at all levels, to suggest legislative changes to Congress or even to make policy pronouncements on pending legislative matters.

In the final analysis, I conclude that there is a place for the consideration of foreign judgments, and that place is in the interpretation of treaties with those foreign nations. Where consideration of foreign judgments is inappropriate is in the arena of purely domestic laws, for only when a formal agreement has been reached via a ratified treaty to conduct ourselves as they do in other countries is such consideration appropriate in our democratic system. Thus, I support the declaration set forth in House Resolution 97 that "judicial interpretations regarding the meaning of the Constitution 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 inform an understanding of the original meaning of the Constitution of the United States."

Mr. CHABOT. Mr. Whelan, you are recognized for 5 minutes.

TESTIMONY OF M. EDWARD WHELAN, III, PRESIDENT, ETHICS AND PUBLIC POLICY CENTER

Mr. WHELAN. Good afternoon, Chairman Chabot and other Members of the Committee. Thank you for the opportunity to testify here today.

Mr. CHABOT. I am not sure the mike is on. If it is, you need to pull it a little closer.

Mr. WHELAN. Should be on now.

Mr. CHABOT. Thank you.

Mr. WHELAN. Good afternoon. Thank you for inviting me to testify here today.

Two recent developments confirm that the threat posed by the Court's misuse of foreign law is real and growing.

First is the Supreme Court's ruling in March in *Roper v. Simmons.* There, a five-Justice majority relied on international opinion as it held the execution of offenders who were 17 at the time of their offense violates the eighth amendment. And the sixth Justice, although in dissent, approved of the majority's resort to foreign law. The facts of *Roper* warrant special attention as they starkly

illustrate how the same Justices who bow to the views of foreigners, are disdainfully dismissive of the rights of American citizens to engage in self-governance in this country.

When he was 17, Christopher Simmons planned a brutal murder. He assured his friends they could get away with it because they were minors. In the middle of the night, Simmons and a friend broke into a woman's home, awakened her, covered her eyes and mouth with duct tape, bound her hands, put her in her minivan, drove to a State park, walked her to a railroad trestle spanning a river, tied her hands and feet together with electrical wire, wrapped her whole face in duct tape, and threw her from the bridge. Exactly as Simmons planned, his victim drowned, an unspeakably cruel death, in the waters below. Simmons confessed to the murder.

At the death penalty phase of his trial, the judge instructed the jurors that they could consider Simmons' age as a mitigating factor and the defense relied heavily on that factor. The jury recommended and the trial judge imposed the death penalty.

Overturning its own precedent, the five-Justice majority ruled that the death penalty for juvenile offenders violates the eighth amendment. In support of its ruling, it found what it called "respected and significant confirmation" in the "overwhelming weight of international opinion against a juvenile death penalty." According to the majority, the fact that the United States, alone with Somalia in the world, has not ratified article 37 of the U.N. Convention, which contains an express prohibition on capital punishment for crimes committed by juveniles, supports its conclusion that the juvenile death penalty is unconstitutional.

But as Justice Scalia observed in dissent, "unless the court has added to its arsenal the power to join and ratify treaties on behalf of the United States," the United States' nonratification of article 37 undercuts rather than supports the majority's position. Scalia also points out that the Justices in the majority would never aim to conform American law to the rest of the world on matters like the exclusionary rule, church-state relations, and abortion.

Second, in recent months, at least two Justices in the *Roper* majority have made remarkably feeble efforts to justify free-wheeling resort to foreign law on a broad range of constitutional questions. Addressing a group of international lawyers, Justice Ginsburg resorts to kindergarten talk. "We can learn from others," she says. "We can join hands with others." We should "share our experience."

But she never explains how a foreign court's decision on how a foreign law measures up to a foreign charter can have analytical value in construing our Constitution.

Justice Breyer argues that citing foreign judges might "give them a leg up" in dealing with legislators in their own countries. In short, he seems to think it part of his job to attempt to influence internal disputes in foreign countries. Beyond that, Breyer utters irrelevant platitudes like "Americans are human and so is everybody else," and "our people in this country are not that much different than people other places."

There is no legitimate basis for the Supreme Court to rely on contemporary foreign laws or decisions in determining the meaning of provisions in our Constitution. The six Justices who resort to

these materials do so because they embrace an essentially lawless, utterly unconstrained view of their own role as Justices.

It is no coincidence that it is these same six Justices who have endorsed the vacuous New Age declaration that "At the heart of liberty is the right to define one's own concept of existence of meaning, of the universe, and of the mystery of human life." For that declaration is nothing more than camouflage for the underlying claim by those Justices to have the limitless power to define for all Americans which particular interests those Justices think should be beyond the bounds of American citizens to address through legislation.

The Framers established a constitutional structure into which American citizens, within the broad bounds delineated by the Constitution, have the power and responsibility to decide how their own States and communities and the Nation should be governed. In their ongoing project to demolish that structure, these six Justices see foreign law as another powerful tool that they can wield whenever it suits them.

Thus the broader long-term resolution to the problem that House Resolution 97 usefully addresses is the confirmation to the Supreme Court of originalist Justices like Scalia and Thomas who understand that the Constitution constrains them to construe its provisions in accordance with the meaning those provisions bore at the time they were promulgated—Justices, in short, who understand that the Constitution does not give them free rein to impose their own policy preferences on the grand questions of the day.

Thank you.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Whelan follows:]

PREPARED STATEMENT OF M. EDWARD WHELAN III

United States House of Representatives
Committee on the Judiciary, Subcommittee on the Constitution
Hearing on "H. Res. 97 and the Appropriate Role of Foreign Judgments in the Interpretation of American Law"
July 19, 2005

Testimony of M. Edward Whelan III

Good afternoon, Chairman Chabot. Thank you very much for inviting me to testify before you and your subcommittee on this important subject.

Introduction

I am Edward Whelan, president of the Ethics and Public Policy Center. The Ethics and Public Policy Center is a think tank that for three decades has been dedicated to exploring and explaining how this country's foundational principles ought to inform and shape public policy on critical issues.

The Ethics and Public Policy Center's program on The Constitution, the Courts, and the Culture, which I direct, explores competing conceptions of the role of the courts in our political system. This program focuses, in particular, on what the battle over the proper role of the courts means for American culture writ large—for the ability of the American people to function fully as citizens and to engage in responsible self-government.

Two weeks ago Americans celebrated the 229th anniversary of the Declaration of Independence. In that document, representatives of the thirteen United States of America proclaimed that these States were "dissolv[ing] the Political Bands which [had] connected them with" Great Britain. The "History of repeated Injuries and Usurpations" that the Declaration recited against King George III included the charge that "He has combined with others to subject us to a Jurisdiction foreign to our Constitution."

In March 2004 this subcommittee held an outstanding hearing on the perceived threat by six Supreme Court Justices to combine with each other to subject American citizens to interpretations of the United States Constitution that give weight to cor [illegible] oreign laws and legal decisions. I broadly

embrace the views expressed by Professors John O. McGinnis, Jeremy Rabkin, and Michael D. Ramsey at that hearing. These witnesses carefully distinguished between proper and improper uses of foreign legal materials by American courts. They explained that consideration of the views and experiences of foreign jurisdictions is entirely appropriate in the formulation of moral and social policy, but that it is the function of Congress and state legislatures, not the courts, to make moral and social policy. They also discussed why a principled use of foreign legal materials would likely lead to a substantial reduction of rights in the United States, whereas an unprincipled use would merely provide cover for the Justices to implement their own policy preferences. Either way, they explained, reliance on foreign legal opinions would undermine the proper American understanding of what is fundamentally distinctive about our constitutional framework.

The transcript of last year's hearing suggests that some took solace in the understanding that the Court's use of foreign law was incidental at worst. Unfortunately, two developments since last year's hearing refute that understanding. These developments demonstrate that the threat posed by the Court's use of foreign law is real and growing. Rather than reiterate the points powerfully made by Professors McGinnis, Rabkin, and Ramsey, I will focus my written testimony on these developments and what they signify and portend.

As I will discuss, in its March 1, 2005, ruling in *Roper v. Simmons*, a five-Justice majority of the Supreme Court explained at length its view that the "overwhelming weight of international opinion against the juvenile death penalty" provided "respected and significant confirmation" for its ruling that execution of offenders who were 17 at the time of their offense violates the Eighth Amendment's protection against "cruel and unusual punishment." And a sixth Justice, although in dissent, approved of the majority's resort to foreign legal materials. Moreover, although the majority argued that there was precedent in the Eighth Amendment context for regarding foreign and international authorities as

"instructive," there is nothing in the majority's approach that would limit use of these materials to this context. Indeed, in recent months, at least two Justices in the *Roper* majority have, in public appearances, attempted to offer their own justifications for freewheeling resort to foreign authorities on a broad range of constitutional questions. The striking feebleness of their justifications provides ample testament to the illegitimacy of their enterprise.

House Resolution 97 is a fit and proper step in response to the Supreme Court's improper reliance on foreign law. The members of the House of Representatives have the right and duty to uphold the Constitution and to encourage the Supreme Court to construe the Constitution properly. By making clear that judicial interpretations of the Constitution "should not be based in whole or in part 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," House Resolution 97 would be a faithful exercise of that right and duty.

1. ***Roper v. Simmons***

The most significant development since this subcommittee's March 2004 hearing is the Supreme Court's March 1, 2005, ruling in *Roper v. Simmons*. In that case, a five-Justice majority overturned the Court's 1989 ruling in *Stanford v. Kentucky*, 492 U.S. 361 (1989) and ruled that the Eighth Amendment's bar on "cruel and unusual punishments" prohibits the execution of a brutal murderer who was 17 years old at the time of his crime.

a. Facts

The facts of *Roper* warrant special attention, as they starkly illustrate how dismissive Justice Kennedy's majority opinion is of the constitutional power of the people to decide through their state representatives what laws ought to govern their own states. My summary and my specific quotations are drawn entirely from Justice Kennedy's majority opinion.

17

When he was 17, Christopher Simmons planned, instigated, and committed a brutal murder. "Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends .... Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could 'get away with it' because they were minors."

In the middle of the night, Simmons and a friend "entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, 'Who's there?' In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her."

"Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below."

"By the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fishermen recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman 'because the bitch seen my face.'"

Arrested the following day, Simmons confessed to the murder and performed a videotaped reenactment at the crime scene.

At trial, Simmons did not call any witnesses in his defense in the guilt phase. At the penalty phase, the trial judge instructed the jurors that they could consider Simmons' age as a mitigating factor,

and Simmons' counsel argued that Simmons' age mitigated his responsibility and should make a "huge difference" to the jurors. The jury recommended, and the trial judge imposed, the death penalty.

b. The Majority Ruling

Justice Kennedy's majority opinion, which was joined by Justices Stevens, Souter, Ginsburg, and Breyer, set for itself the task of ascertaining whether execution of an offender who was 16 or 17 years old at the time of his capital crime measured up to "the evolving standards of decency that mark the progress of a maturing society." Kennedy's determination proceeds in three parts.

First, Kennedy undertakes to engage in "a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." Kennedy looks to the 12 states that have no death penalty and the 18 states that, "by express provision or judicial interpretation, exclude juveniles from its reach" to conclude that a majority of states—30 in total—reject the death penalty for 16- and 17-year-olds. This factor, together with the infrequent use of the death penalty for 16- and 17-year-olds in those states that authorize it and the "consistency in the trend toward abolition of the practice," leads him to conclude that the "objective indicia" provide "sufficient evidence" that "our society" views 16- and 17-year-olds as "'categorically less culpable than the average criminal.'"

Second, in an "exercise of our own independent judgment," Kennedy then explains three "general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders": (a) "[A]s any parent knows" and as "scientific and sociological studies … tend to confirm," the young more often have a "lack of maturity" and "an underdeveloped sense of responsibility." (b) "[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (c) "[T]he character of an juvenile

is not as well formed as that of an adult." For these reasons, the "penological justifications for the death penalty apply to [juveniles] with lesser force than to adults."

Third, and of most direct bearing on this hearing, Kennedy then finds "respected and significant confirmation" for his conclusion that the Constitution bars the death penalty for juvenile offenders "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." Notably, Kennedy finds that the fact that the United States, alone with Somalia in the world, has *not* ratified Article 37 of the United Nations Convention on the Rights of the Child, which "contains an express prohibition on capital punishment for crimes committed by juveniles under 18," *supports* his conclusion that the juvenile death penalty is unconstitutional. Kennedy concludes his discussion with this assertion:

> "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."

c. O'Connor's dissent

In her dissent, Justice O'Connor opines that no "genuine national consensus" has developed on whether capital punishment should be available for 17-year-old offenders. O'Connor, however, agrees with the majority's proposition that "the existence of an international consensus … can serve to confirm the reasonableness of a consonant and genuine American consensus."

d. Scalia's dissent

Justice Scalia's devastating dissent (joined in full by Chief Justice Rehnquist and Justice Thomas) cannot fairly be summarized in brief and should be read in full by anyone interested in this case. But I will nonetheless attempt to highlight Scalia's core response to the majority's three major points:

First, Scalia explains that it makes no sense to count states that have no death penalty together with states that prohibit merely the execution of offenders who were younger than 18, because the former set of states have expressed no position that offenders under 18 deserve special immunity. In Scalia's colorful analogy: "Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car." It follows that "[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."

Second, Scalia criticizes the majority for "proclaim[ing] itself sole arbiter of our Nation's moral standards," rather than discerning those standards from the "practices of our people." He points out that Kennedy "pick[s] and choos[es]" the scientific and sociological studies that support his position and that none of these studies even "opines that all individuals under 18 are unable to appreciate the nature of their crimes." He explains that Kennedy's "startling conclusion" that juries "cannot be trusted with the delicate task of weighing a defendant's youth" "undermines the very foundations of our capital sentencing system."

Third, Scalia confronts head-on the remarkable confirming role that Kennedy awards the "world community":

- "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage."
- As for Kennedy's reliance on Article 37 of the U.N. Convention on the Rights of the Child: "Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position."
- "[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe

it." Scalia proceeds to point out that the Court has never sought to follow foreign law on matters ranging from the exclusionary rule, to church-state relations, to abortion. "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."

- With respect to Kennedy's closing oration: "I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our 'fidelity' to the Constitution, our 'pride in its origins,' and 'our own [American] heritage.' To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty." (Emphasis and brackets in original.)

2. **Public Declarations by Justices**

Since this subcommittee's March 2004 hearing, at least two Justices have publicly defended—and, indeed, advocated—the use of foreign law in support of rulings on the meaning of the Constitution. The inability of these Justices to ground that practice in legitimate legal principle and the lack of any discernible limits on their employment of that practice fully justify the alarms expressed by members of this subcommittee about that practice.

a. Justice Ginsburg

On April 1, 2005, Justice Ginsburg delivered a speech to the American Society of International Law that defended the Supreme Court's increasing use of foreign law in support of its rulings on the meaning of the Constitution. The title of her speech—"'A decent Respect to the Opinions of

[Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication"—nicely encapsulates the core flaws in her position.

First is her thinly disguised contempt for the Framers. Obtusely appealing to the Declaration of *Independence* to justify the Supreme Court's *dependence* on foreign law, Ginsburg cannot resist the urge to purge the gender bias she perceives in the Framers' observation that "a decent Respect to the Opinions of *Man*kind" requires a declaration of the "causes which impel them to the Separation." Nor, apparently, did she notice that one of those stated causes was that King George III "has combined with others to subject us to a Jurisdiction foreign to our Constitution."

The rhetorical centerpiece of Ginsburg's speech is a crude attack against originalists—those who adhere to the original understanding of the Framers' Constitution and of the various amendments to it. Ginsburg absurdly insinuates that the position taken by Chief Justice Rehnquist and Justices Scalia and Thomas that constitutional rulings should not be based on foreign developments has some special kinship with Chief Justice Taney's notorious ruling in the *Dred Scott* case.

Taney's opinion in *Dred Scott* is deservedly infamous, but not because of its recitation of originalist orthodoxy. Besides its overt racism, the main legal defect in Taney's opinion is that, while pretending to be faithful to originalist principles, it in fact marked the Court's first use of the modern judicial activist's favorite tool, "substantive due process," to invalidate a statute—the Missouri Compromise of 1820, which prohibited slavery in the northern portion of the Louisiana Territories. Notably, the dissenters in *Dred Scott* invoked and properly applied the very originalist principles that Ginsburg finds abhorrent: "I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings," wrote Justice McLean. "[I]f a prohibition of slavery in a Territory in 1820 violated this principle of [due process], the ordinance of 1787 also violated it," explained Justice Curtis in exposing Taney's deviation from originalism.

In attacking originalism as "frozen in time," Ginsburg slights the genius of the Framers in setting up a system in which the people, through their elected representatives and within the broad bounds established by the Constitution, adapt the laws to changing times. She claims that judges "honor the Framers' intent 'to create [*sic*] a more perfect Union'" when they rewrite the Constitution to comport with their own understandings of the needs of the day. But it is "We the People of the United States," not judges, to whom the Constitution looks to "form a more perfect Union."

The second basic flaw in Ginsburg's speech is signaled by her elusive subtitle. What exactly does a "comparative perspective" in constitutional adjudication mean, and what is its value? Addressing a group of international lawyers, Ginsburg resorts to kindergarten talk—"we can learn from others," "we can join hands with others," we should "share our experience"—but never even attempts to explain how a foreign court's decision on how a foreign law measures up to a foreign charter can or should have analytical value in construing our Constitution. She emphasizes that she does not regard foreign decisions as "controlling authorities." But she clearly leaves open the possibility that those foreign decisions could be the dispositive tipping factor in any particular case.

Preserving her own flexibility to pick and choose opportunistically, Ginsburg also utterly fails to delineate any principle that would dictate when foreign decisions should come into play and what weight they should have. In short, she has no response to Scalia's criticism: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."

When Ginsburg's position is clear, her understanding is muddled. Ginsburg points out that the Framers understood that the United States "would be bound by 'the Law of Nations,' today called international law." But even setting aside her badly confused and simplistic equation of the Law of Nations with international law, the Constitution's conferral of power on Congress "[t]o define and

punish … Offenses against the Law of Nations" makes clear that it is up to Congress, not judges, to determine which obligations under the Law of Nations should apply domestically.

Similarly, Ginsburg points out with pride that her separate opinions in the Michigan racial-preference cases cite two United Nations Conventions—one that the United States has ratified, and one that "sadly" it "has not yet ratified"—as evidence that the international understanding of racial preferences supports her application of the Equal Protection Clause. But the very fact that she sees no effective difference between a ratified treaty—which (whether or not it has any domestic effect) is part of "the supreme Law of the Land" under the Constitution—and an unratified convention demonstrates the incoherence of her views.

Ginsburg also specifically expresses her disapproval of H. Res. 97 and asserts that "it is disquieting that [H. Res. 97 and its Senate counterpart] have attracted sizable support."

b. Justice Breyer

In January 2005, Justice Breyer and Justice Scalia engaged in a public debate on the constitutional relevance of foreign court decisions. The transcript of that debate is available online at http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument. My quotations below are taken from that transcript.

In his remarks, Breyer made explicit what was fairly implicit in Ginsburg's speech—namely, that it is impossible to develop any rules on when the Court should rely on foreign court decisions in construing the Constitution and which decisions it should look to. ("[I]f you're going to develop a jurisprudence of when to refer to a non-binding decision of a foreign court, I mean, it's—I'll agree that isn't going to work.") Nonetheless, he offered the following propositions in support of invoking foreign court decisions in construing the Constitution. I respond very briefly to each.

1. "[I]n some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They're having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up, even if we just say it's an interesting example."

- The idea that Supreme Court Justices should craft their opinions with an eye towards influencing internal political struggles in foreign countries is truly a remarkable misconception of the judicial role.

2. "I think I may have made what I call a tactical error in citing a case from Zimbabwe—not the human rights capital of the world. But it was at an earlier time—Judge Gubei (ph) was a very good judge. So I had written this. And of course I looked—I don't think that's controlling. But I'm thinking, Well, *on this kind of an issue you're asking a human question, and the Americans are human—and so is everybody else.* And I don't know, it doesn't determine it, but it's an effort to reach out beyond myself to see how other people have done—though it does not control." (Emphasis added.)

- Of course foreigners are human. That proposition does not remotely explain how a foreign court's decision on how a foreign law measures up to a foreign charter can or should have analytical value (or any other force) in construing our Constitution.

3. "Well, it's relevant in the sense that you have a person who's a judge, who has similar training, who's trying to, let's say, apply a similar document, something like cruel and unusual or—there are different words, but they come to roughly the same thing—who has a society that's somewhat structured like ours. And really, it isn't true that England is the moon, nor is India. I mean, there are

human beings there just as there are here and there are differences and similarities.... And the fact that this has gone on all over the world and people have come to roughly similar conclusions, in my opinion, was the reason for thinking it at least is the kind of issue that maybe we ought to hear in our court, because I thought *our people in this country are not that much different than people other places*." (Emphasis added.)

- It is a foundational principle of this nation that "all Men are created equal [and] are endowed by their Creator with certain unalienable Rights." In this fundamental respect, and many more incidental respects, it is clearly the case that the American people "are not that much different" from foreigners. One obvious relevant difference, however, is that "We the People of the United States" are governed by the Constitution of the United States, and people who live in other countries are governed by their own countries' laws. Breyer's observation has no weight in explaining why provisions in our Constitution—which was established in an exercise of the principle that "Governments ... deriv[e] their just Powers from the Consent of the Governed"—should be construed in light of foreign laws or legal decisions that either reflect the consent of the governed in those countries or were imposed on them.

Conclusion

No Justice has articulated, and there is not, any legitimate basis for the Supreme Court to rely on contemporary foreign laws or decisions in determining the meaning of provisions of the Constitution. Moreover, it is clear that there is no principle that any Justice has devised or will adopt that will explain why it would be proper to look to some contemporary foreign and international legal materials, but not others, to construe the Constitution in some instances but not in others. The six Justices who nonetheless resort to these materials do so because they embrace an essentially lawless—i.e., unconstrained—view of their own role as Justices.

It is no coincidence that it is these same six Justices who have endorsed the vacuous New Age declaration that "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." For that declaration is nothing more than camouflage for the underlying claim by those Justices to have the unconstrained power to define for all Americans which particular interests they think should be beyond the bounds of American citizens to address through legislation.

The Framers established a constitutional structure under which American citizens, within the broad bounds delineated by the Constitution, have the power and responsibility to decide how their own states and communities and the nation should be governed. In their ongoing project to demolish that structure, these six Justices see foreign law as another powerful tool that they can wield whenever it suits them.

It follows that the broader long-term solution to the problem that H. Res. 97 usefully addresses is the confirmation to the Supreme Court of originalist Justices, like Scalia and Thomas, who understand that the Constitution constrains them to construe its provisions in accordance with the meaning they bore at the time they were promulgated and that it does not permit them to impose their own policy preferences on the grand (or minor) questions of the day.

Mr. CHABOT. Mr. Rosenkranz, or Professor Rosenkranz, you are recognized for 5 minutes.

TESTIMONY OF NICHOLAS Q. ROSENKRANZ, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Mr. ROSENKRANZ. I thank you, and I thank the Committee for the opportunity to express my views on this important topic.

I largely agree with what has been said so far, so I will limit myself to three brief comments:

First, I will discuss the separation of powers implications of directing a resolution regarding constitutional interpretation to the judiciary.

Second, I hope to show that the reliance on current foreign law undermines the bedrock principle of democratic self-governance.

Third, I will explore whether the Congress should also take up the same issue in the context of statutory interpretation.

The first point I wish to make is that House Resolution 97 is consistent with separation of powers. At a prior hearing before this Committee, my colleague, Professor Vicki Jackson, suggested that legislative directions to the courts on how to interpret the Constitution raise serious separation of powers questions. She may well be right.

But the key point today is that House Resolution 97 does not give directions to the courts. It does not purport to bind them. It simply expresses the sense of the House on this question. Because the resolution does not bind the judiciary, it cannot be objected to on separation of powers grounds. Indeed it should be applauded on these grounds. It is entirely proper for Congress to inform the courts of its views on constitutional interpretation. It is particularly appropriate when the method under discussion has such dramatic implications.

Which brings me to my second point. The current predilection for using contemporary foreign law to interpret the U.S. Constitution necessarily entails a rejection of the quest for original meaning. Simply put, those who would cite contemporary foreign law necessarily embrace the notion of an evolving Constitution.

The notion of the Court updating the Constitution to reflect its own evolving view of good government is troubling enough, but the notion that this evolution may be brought about by changes in foreign law raises fundamental issues of democratic self-governance. This, I think, puts the finest point on what is really at stake here. When the Supreme Court declares that the Constitution evolves, and declares further that foreign law affects its evolution, it is declaring nothing less than the power of foreign governments to change the meaning of the United States Constitution.

Moreover, it might take only a single foreign country to tip the scales and create a consensus in the eyes of the courts. And there is no reason why a foreign country could not do this self-consciously. Indeed, France has expressly announced that one of its priorities is the abolition of capital punishment in the United States. Yet surely it would come as a shock to the American people to imagine the French Parliament deciding whether to abolish the death penalty not just in France, but also in America.

After all, foreign control over American law was a primary grievance of the Declaration of Independence. King George III had "subject[ed] us to a jurisdiction foreign to our constitution." This is exactly what is at stake here: foreign government control over the meaning of our Constitution. Any such control is inconsistent with basic principles of democratic self-governance, reflected both in the Declaration of Independence and in the Constitution itself.

The third point I wish to make is that while the resolution is limited to interpretation of the Constitution, courts often rely on foreign and international law in the interpretation of other federal law as well. Now, Professor Dinh has explained how foreign judgments may be relevant to the interpretation of treaties. A different question is whether international law may be relevant to the interpretation of Federal statutes.

Under current doctrine, courts regularly bend over backwards to construe Federal statutes to be consistent with international law, even when the text of the statute would perhaps be a different construction. Now, particularly in light of the dramatic expansion and metamorphosis of customary international law since World War II, Congress may want to consider whether it approves of this doctrine.

If it decides that the answer is no—that it would prefer for its statutes to be read according to their plain terms without reference to international law—then it might consider a subsequent resolution parallel to the present one, expressly rejecting the general use of international law in interpreting Federal statutes.

Indeed, while congressional mandates to foreign—Federal courts regarding constitutional interpretation may raise separation of powers concerns, congressional mandates regarding statutory interpretation generally do not. Thus Congress could, in fact, go further and enact a mandatory statute along the following lines: "Future acts of Congress shall not be interpreted by reference to foreign or international law unless they expressly reference and incorporate such bodies of law." I believe that such a statute is worthy of serious consideration.

In conclusion, House Resolution 97's nonbinding message to the courts does not violate separation of powers but, rather, reflects a healthy step toward interbranch constitutional dialogue. Moreover, the resolution rightly rejects the troubling notion that our Constitution can be made to evolve at the behest of foreign institutions. My only suggestion is that Congress next study this same issue as it applies in the context of statutory interpretation.

I applaud House Resolution 97, and I thank the Committee for the opportunity to endorse it.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Rosenkranz follows:]

PREPARED STATEMENT OF NICHOLAS QUINN ROSENKRANZ

House Judiciary Subcommittee on the Constitution Legislative Hearing: H. Res. 97 and the Appropriate Role of Foreign Judgments in the Interpretation of American Law

July 19, 2005

Prepared Statement of Nicholas Quinn Rosenkranz, Associate Professor of Law Georgetown University, Washington, DC

I thank the Committee for the opportunity to express my views on the appropriate role of foreign judgments in the interpretation of American law. I applaud House Resolution 97 and its declaration that:

> judicial interpretations regarding the meaning of the Constitution 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 inform an understanding of the original meaning of the Constitution of the United States.

There are many arguments in support of the Resolution, and I expect that Mr. Whelan and my colleague Professor Dinh will canvass them thoroughly. In addition, this Subcommittee held excellent hearings on this subject last year, and I largely agree with the learned testimony of Professors John O. McGinnis and Michael D. Ramsey at that hearing.[1] Without repeating what has already been said, I will limit myself to three basic comments. I hope to show, first, that the stakes are very high here, because the new trend of reliance on current foreign law undermines the bedrock principle of democratic self-governance. Second, I will discuss the separation of powers implications of directing a resolution regarding constitutional interpretation to the judiciary. And third, I will briefly explore whether Congress should also take up this same issue in the context of statutory interpretation.

I. Democratic Self-Governance

I begin with the last clause of the Resolution, which is a crucial exception to the rule. The Resolution declares that foreign sources should not be used to interpret the U.S. Constitution "unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States."

This clause implicitly endorses a particular theory of constitutional interpretation. It does so in two words: "original meaning." The Resolution reminds us that the project of interpreting the Constitution involves discerning what its text would have meant to a reasonable reader *at the time of its ratification*.

[1] *See Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 108th Cong. (2004).

As the Resolution recognizes, foreign sources may be relevant to that project. It may well be appropriate to look to Blackstone, or to pre-constitutional British statutes or judgments, because these sources may have been known to readers at the time of the ratification, and they may reflect the way in which legal terms of art were used at that time. The Resolution wisely allows this uncontroversial use of foreign sources, to inform the original meaning of the Constitution.

But the new and disturbing trend at the Court has nothing to do with original meaning. The Court has taken to citing not Blackstone or Coke but *contemporary* foreign law.[2] As a matter of logic, these bodies of law are irrelevant to the original meaning of our constitutional text, not merely because they are foreign, and not merely because they are written to construe entirely different legal texts, but also because they are contemporary.

And this brings me to my first point. The current predilection for using contemporary foreign law to interpret the U.S. Constitution necessarily entails a rejection of the quest for *original* meaning. Simply put, those who would cite contemporary foreign law necessarily embrace the notion of an *evolving* Constitution.[3] Justice O'Connor sees this connection and, unfortunately, she has sometimes exemplified this point. Just a few months ago, she announced: "Our Constitution is one that *evolves*."[4] And for this reason, she said, "of course we look at foreign law."[5]

The notion of the Court "updating" the Constitution to reflect its own "evolving" view of good government is troubling enough. But the notion that this "evolution" may be brought about by changes in foreign law raises fundamental issues of democratic self-governance. What this means, in effect, is that a change in foreign law can alter the meaning of the United States Constitution. And this, I think, puts the finest point on what is really at stake here. When the Supreme Court declares that the Constitution evolves, and declares further that foreign law effects its evolution,[6] it is declaring nothing less than *the power of foreign governments to change the meaning of the United States Constitution.*

---

[2] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572-73, 576-77 (2003); Roper v. Simmons, 125 S.Ct. 1183, 1194, 1198-1200 (2005).

[3] Conversely, however, even those who reject original meaning and accept the notion of an "evolving" Constitution need not—and should not—deem contemporary foreign law relevant to its evolution. *See* John O. McGinnis, *Foreign to Our Constitution*, 100 N.W. L. REV. __(2005) (forthcoming).

[4] *Candid Camera with Supreme Court Justices*, MSNBC, April 22, 2005, http://msnbc.msn.com/id/7598231/ (emphasis added).

[5] *Id.*

[6] We should presume that if foreign citations are present, the Court is relying on them at least in part. The Court has no business spending government money to print its thoughts in the United States Reports unless those thoughts are in service of an exercise of the judicial power. *See* Roper v. Simmons, 125 S.Ct. 1183, 1229 (2005) (Scalia, J., dissenting) "'Acknowledgment' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today."

Moreover, it might take only one foreign country to tip the scales and create a consensus. At the margin, a single country could make the difference. So in short, if constitutional interpretations are based even in part on foreign law, then under some circumstances, *a single foreign country would have the power to change the meaning of the United States Constitution.*[7]

And there is no reason why a foreign country could not do this self-consciously. Indeed, France has expressly announced that one of its priorities is the abolition of capital punishment *in the United States*.[8] Yet surely it would come as a shock to the American people to imagine the French Parliament deciding whether to abolish the death penalty—not just in France, but also in America.

After all, ending foreign control over American law was the primary reason given for the Revolution in the Declaration of Independence; as House Resolution 97 recites, the Declaration's most resonant protest was that King George III had "subject[ed] us to a jurisdiction foreign to our constitution."[9] After the Revolution, it was not supposed to be this way. "We the People *of the United States* … ordain[ed] and establish[ed] th[e] Constitution,"[10] and we included a mechanism by which *we* could change it if necessary.[11] There is no reason to believe that foreign governments were also granted a free-standing power to change the meaning of the United States Constitution.[12] As Chief Justice Marshall declared in another context:

> To impose on [the federal government] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might

---

[7] See, e.g., *Roper v. Simmons*, 125 S.Ct. 1183, 1199 (2005) ("The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins."). *But see id.* at 1228 (Scalia, J., dissenting) ("The Court has … long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War … a legal, political, and social culture quite different from our own.").

[8] *See* Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4-5.

[9] THE DECLARATION OF INDEPENDENCE (U.S. 1776). The Declaration protests further:

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.
> To prove this, let Facts be submitted to a candid world.
> He has refused his Assent to Laws, the most wholesome and necessary for the public good.
> He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Id.

[10] U.S. CONST. pmbl. (emphasis added).

[11] *See id.* art. V.

[12] *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1911 (2005).

> disappoint its most important designs, and is incompatible with the language of the constitution.[13]

This is what is at stake here: foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with basic principles of democratic self-governance reflected both in the Declaration of Independence and the Constitution itself. The issue is thus a very important one, and all the more important today with a Supreme Court nomination pending. The Committee is to be commended for addressing it here.

II. Separation of Powers and Interbranch Constitutional Dialogue

The Resolution focuses expressly on "judicial" interpretations. At a hearing before this committee last year concerning a similar Resolution, my colleague Professor Vicki Jackson suggested that "legislative directions to the courts on how to interpret the Constitution raise serious separation of powers questions."[14] She may well be right.[15] But the key point today is that House Resolution 97 does not give "directions" to the courts; it does not purport to bind them. It simply expresses the "sense of the House of Representatives" that judicial interpretations of the Constitution generally "should not" be based on foreign law. Because the Resolution does not purport to bind the judiciary, it cannot be objected to on separation-of-powers grounds.

Indeed, it should be applauded on these grounds. Each branch of government has an independent obligation to consider carefully the proper method for interpreting the United States Constitution. And it is entirely proper and commendable for one branch to inform another of its views on this topic. (One possible criticism of the Resolution as drafted is that it is *limited* to judicial interpretations; each branch of government is responsible for constitutional interpretation, and *none* of them should base its interpretation on foreign law.) This interbranch constitutional dialogue is eminently healthy for our system of separation of powers. If anything, I would urge Congress to let its opinions be known on such questions more often.

III. The Use of Foreign Sources in the Interpretation of Non-Constitutional Federal Law

Finally, it is worthy of note that the Resolution is limited to interpretation of the Constitution. Courts often rely on foreign and international law in the interpretation of other federal law as well, and it may be worth considering whether this is appropriate and when. Professor Dinh's testimony contends that foreign judgments are peculiarly

---

[13] McCulloch v. Maryland, 17 U.S. 316, 424 (1819).

[14] *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 108th Cong. 18 (2004); *See also id.* at 18 ("Efforts by the political branches to prescribe what precedents and authorities can and cannot be considered by the Court in interpreting the Constitution in cases properly before it would be inconsistent with our separation of powers system.").

[15] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 n.7 (2002).

relevant to the interpretation of treaties, and I generally agree with him. A different question is whether such judgments may be relevant to the interpretation of federal statutes. Some statutes are passed precisely to execute non-self-executing treaties,[16] and the text of such statutes often track the treaties verbatim. In such cases, just as a foreign judgment may be relevant to interpret the treaty, it may likewise be relevant to interpret the implementing statute.

On the other hand, courts rely on international law to interpret federal statutes much more often than that. Indeed, international law is used to interpret federal statutes far more often than foreign law is used to interpret the Constitution. The primary reason for this is the famous *Charming Betsy* canon, which provides: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[17] According to one scholar, "the interpretive role of international law, as reflected in the *Charming Betsy* canon, is arguably more important than its substantive role .... [C]ourts regularly rely on the *Charming Betsy* canon in interpreting domestic law."[18]

One of the primary rationales for the canon is that it reflects congressional intent—that Congress is extremely unlikely to wish to violate international law.[19] This was certainly a sound assumption in 1804, and it was probably a sound assumption for most of our nation's history. But one might ask whether this is still a sound assumption in light of "the radical changes in customary international law after World War II."[20] Customary international law now "can arise much more quickly,"[21] and it is also "less tied to state practice and consent."[22] And—perhaps the most "radical development in the whole history of international law"[23]—customary international law "increasingly regulates the ways in which nations treat their own citizens."[24]

Congress may wish to consider whether it still wishes to legislate against the background rule of the *Charming Betsy* canon, in light of this radical metamorphosis in customary international law.[25] If it decides that the answer is no—that it would prefer for its statutes to be read according to their plain terms without reference to international law—then it might consider a subsequent Resolution parallel to the present one, expressly rejecting the general use of international law in interpreting federal statutes.

---

[16] *Cf.* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).
[17] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
[18] Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482-83 (1998).
[19] *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, cmt. a ("[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law.")
[20] Bradley, *supra* note 18, at 512.
[21] *Id.*
[22] *Id.*
[23] John J. Humphrey, *The Revolution in the International Law of Human Rights*, 4 HUM. RTS. 205, 208 (1975).
[24] Bradley, *supra* note 18, at 512.
[25] *See id.* at 518-19 (offering "empirical evidence suggesting that compliance with international law is often not the political branches' paramount concern").

Indeed, while mandatory congressional instructions to federal courts regarding *constitutional* interpretation may raise separation-of-powers concerns,[26] mandatory congressional instructions regarding *statutory* interpretation generally do not.[27] Thus Congress could, in fact, go further if it wished and *require* the federal courts to abandon the *Charming Betsy* canon. A simple statute to this effect might read as follows: "Acts of Congress shall only be interpreted by reference to foreign or international law if they expressly reference and incorporate such bodies of law." I believe that such a statute is worthy of serious consideration.

Conclusion

In conclusion, the Resolution rightly endorses a jurisprudence of "original meaning" and rejects the troubling notion that our Constitution can be made to "evolve" at the behest of foreign institutions. Its precatory framing as a "Sense of the House of Representatives" about how the judiciary "should" approach constitutional analysis does not violate separation of powers principles, but rather reflects a healthy step toward interbranch constitutional dialogue. My only suggestion is that Congress next address this same issue as it applies in the context of statutory interpretation.

I applaud House Resolution 97 and I thank the Committee for the opportunity to endorse it.

---

[26] *See supra* notes 14-15.

[27] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

Mr. CHABOT. Our final witness this afternoon is Professor Cleveland. You are recognized for 5 minutes, Professor.

TESTIMONY OF SARAH CLEVELAND, PROFESSOR, UNIVERSITY OF TEXAS SCHOOL OF LAW

Ms. CLEVELAND. Thank you. I also thank the Committee for inviting me to address this important subject. Before I start, I should note I am speaking in my personal capacity. None of the views I state reflect the views of the University of Texas.

I oppose proposed Resolution 97, because the resolution is contrary to over 200 years of American constitutional tradition. Since the founding of this country, the Federal courts routinely have considered foreign sources of laws in resolving constitutional questions, and the recent cases such as *Lawrence* and *Roper* are fully consistent with this heritage. Indeed, it is the critics of the practice who are the innovators now.

Foreign sources have been employed by the most respected jurists this country has known, including Chief Justice John Marshall, Chief Justice Taney, Justices Story, Field, John Marshall Harlan, Cardozo, Sutherland, Jackson, Frankfurter, and Chief Justice Earl Warren.

At least seven members of the current Supreme Court have embraced the use of foreign authorities, including Chief Justice Rehnquist, who has supported having U.S. courts look to the decisions of other constitutional courts to aid in their own deliberative process.

The Court has employed constitutional—international legal materials in constitutional analysis for a variety of purposes. For example, courts often explain a domestic constitutional rule by distinguishing it from another country's practices. Judges, including Justice Scalia, have used foreign examples to test the likely result of a particular constitutional hypothesis. Yet even these modest uses of foreign authority could be considered contrary to House Resolution 97.

The Supreme Court has also recognized that our constitutional design invites consideration of foreign authorities in a variety of ways. I will offer six examples.

First, the one that has been mentioned already, Congress' power to define and punish offenses against the law of nations, requires the Court to consider international rules in construing the scope of Congress' authority.

Second, the Court has looked to international law to interpret constitutional terms that refer to concepts of international law such as "war" or "treaties." Constitutional war powers decisions in particular have drawn heavily from modern international law norms, not simply the international rules that existed at the time of the framing.

Third, in perhaps the most interesting set of cases, the courts have looked to international rules governing relations between sovereign nations and applied those rules to determine the scope of State authority within our Federal system. They have done this in the context of 14th amendment Due Process and the Full Faith and Credit Clause.

Fourth, in numerous cases involving Congress' power to regulate immigration, govern Indian tribes, govern territories, exercise the power of eminent domain, and to borrow money, the Court has looked to the powers of other sovereign governments to conclude that Congress should, in fact, have this power.

Fifth, the Court has also recognized that international law may create a compelling governmental interest in constitutional cases. The case of *Booz v. Berry* involved the question of whether or not a D.C. ordinance regulating protests outside of foreign embassies violated the first amendment. The Supreme Court recognized that U.S. international obligations could create a vital governmental interest, warranting regulation under some circumstances. The case indicates that in some context it would be difficult to interpret even the first amendment without considering modern international law.

Finally, to the extent that the Constitution's individual rights provisions incorporate assumptions about the basic rights of all human beings, the Court has recognized for over 100 years that foreign practices regarding shared common values are an appropriate sounding board for the scope and meaning of constitutional norms. This approach recognizes, as did the Declaration of Independence, that our constitutional heritage incorporates certain rights that are shared and "inalienable," not simply rights unique to the American tradition.

Moreover, the use of foreign sources of law is not a liberal versus conservative issue. The current Republican administration has relied heavily on modern international law rules in interpreting the President's powers to fight the war on terror, including the power to convene military tribunals and the power to detain enemy combatants.

My primary point in offering these examples is to underscore the extent to which reliance on international and foreign sources is fully part of the American constitutional heritage. An effort to eliminate reliance on foreign authorities in constitutional analysis therefore would pull the rug out from beneath many of our constitutional doctrines, including many of the established powers of this Congress.

Judicial consideration of foreign authority does not mean, however, that we are delegating control over our values to foreign governments or violating our own democratic traditions. It is our domestic Constitution, as interpreted by our own duly appointed judges, that determines the relevance of foreign authorities to our constitutional system in every case.

Thank you.

Mr. CHABOT. Thank you very much, Professor.

[The prepared statement of Ms. Cleveland follows:]

PREPARED STATEMENT OF SARAH H. CLEVELAND

Testimony of Sarah H. Cleveland
H. Res. 97 and the Appropriate Role of Foreign Judgments in the Interpretation of American Law
House Judiciary Subcommittee on the Constitution
July 19, 2005

Thank you for inviting me to address your subcommittee regarding proposed House Resolution 97 and the role of international and foreign judgments in constitutional interpretation. At the outset, I should note that the views I express are my own as a scholar of international law and the constitutional law of foreign relations, and do not reflect the views of either the University of Texas School of Law or Columbia Law School, where I am visiting for the 2005-06 academic year.

Proposed House Resolution 97 is contrary to over 200 years of American constitutional tradition. Throughout our nation's history, members of the federal judiciary routinely have considered international and foreign sources of law in the adjudication of constitutional questions.[1] The judges who have employed this practice include the most illustrious jurists this country has known, including Chief Justice John Marshall, Chief Justice Taney, Justices Story, Field, John Marshall Harlan, Cardozo, Sutherland, Jackson, and Frankfurter, and Chief Justice Earl Warren. At least seven members of the current Supreme Court have embraced the use of foreign authorities in their writings on and off the bench, including Chief Justice Rehnquist, who wrote in 1989 that he supported having U.S. courts look to "the decisions of other constitutional courts to aid in their own deliberative process."[2]

International and foreign sources of law have been employed for a variety of purposes, in a wide range of constitutional contexts. It is common, for example, for jurists to explain a domestic rule by distinguishing it from foreign practice or to use foreign or international examples for empirical purposes to test the likely results of a particular constitutional hypothesis, as Justice Scalia did in *Lawrence v. Texas*.[3] Even these uses of foreign authority in delineating constitutional meaning, however, may be contrary to House Resolution 97.

The Supreme Court also has recognized that our constitutional design and traditions invite consideration of international and foreign authorities a variety of ways.

In its strongest form, the Constitution expressly commands consideration of international rules, in the authorization in Article I, Section 8 for Congress to define and punish offenses against the law of nations. The Court has construed that clause in light of international law to uphold Congress' establishment of military tribunals[4] and laws regarding piracy[5] and counterfeiting,[6] among others.

Other constitutional provisions refer to concepts of international law such as "war" or "treaties." Such provisions appear to invite consideration of international rules, and the Court has

---

[1] My testimony is based in part on my forthcoming article "Our International Constitution" in the *Yale Journal of International Law*.
[2] William H. Rehnquist, Constitutional Courts – Comparative Remarks (1989), reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993).
[3] 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (pointing to Canadian practice); see also Printz v. United States, 521 U.S. 898, 977 (Breyer, J., dissenting).
[4] E.g., Ex parte Quirin, 317 U.S. 1, 28 (1942); Application of Yamashita, 327 U.S. 1, 7 (1946).
[5] United States v. Smith, 18 U.S. (5 Wheat.) 153, 157 (1820).
[6] U.S. v. Arjona, 120 U.S. 479, 487 (1887).

interpreted them in light of international rules and foreign practice to promote comity and respect for U.S. relations with other nations. Constitutional war powers decisions accordingly have drawn heavily from contemporary international law norms.[7] As early as the War of 1812, Chief Justice Marshall opined with respect to the Declare War clause that "[i]n expounding [the] constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere."[8]

The Supreme Court also has looked to international and foreign sources to address structural questions in relations between the states. In the first year law school classic *Pennoyer v. Neff,* for example, the Court analogized to international rules governing the territorial jurisdiction of sovereign nations to conclude that Fourteenth Amendment due process barred state courts from exercising jurisdiction over out of state defendants.[9] The Court has employed a similar approach in cases involving the Full Faith and Credit Clause and state powers of taxation.[10]

In numerous cases involving the government's power to regulate immigration,[11] to govern Indian tribes,[12] to acquire and govern new territories[13] to exercise the power of eminent domain[14] and to borrow money,[15] the Court has interpreted the powers of Congress to be consistent with sovereign powers enjoyed by other foreign governments. Accordingly, in *Fong Yue Ting v. United States,* the Court upheld Congress' power to expel Chinese immigrants based on powers over aliens recognized under international law.[16]

Finally, to the extent that the Constitution's individual rights provisions incorporate assumptions about the basic rights of all human beings, the Court has recognized that international rules regarding basic human rights and shared common societal values are an appropriate sounding board for the scope and meaning of constitutional norms. This practice long predated the decisions in *Lawrence v. Texas* and *Roper v. Simmons*, and recognizes, as did the Declaration of Independence, that our constitutional tradition incorporates principles of common "inalienable rights." Thus, general concepts of individual rights such as "liberty" and "cruel and unusual punishments" that the drafters incorporated into the Constitution reasonably invoke the shared fundamental values of the global community.

In the context of Fifth and Fourteenth Amendment due process, the Court has looked to shared community values to determine what provisions in the Bill of Rights are sufficiently fundamental to "principles of ordered liberty" to warrant incorporation against the states or to otherwise prohibit government intrusion. Over a century ago, *Hurtado v. California*[17] expressly recognized the relevance of foreign practices to this constitutional inquiry:

> The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of

---

[7] E.g., The Prize Cases, 67 U.S. (2 Black) 635, 666 (1863); Ex Parte Quirin, 317 U.S. 1, 27-28 (1942); Application of Yamashita, 327 U.S. 1, 12 (1946).
[8] Brown v. United States, 12 U.S. (8 Cranch) 110, 124 (1814).
[9] Pennoyer v. Neff, 95 U.S. 714, 722 (1877).
[10] Haddock v. Haddock, 201 U.S. 562 (1906); Pullmans Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).
[11] Chae Chan Ping v. United States, 130 U.S. 581, 603-606 (1889).
[12] United States v. Kagama, 118 U.S. 375, 380-82 (1886); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-80 (1955).
[13] Jones v. United States, 137 U.S. 202, 212–13 (1890); Dorr v. United States, 195 U.S. 138, 140, 142, 146 (1904).
[14] Kohl v. United States, 91 U.S. 367, 371 (1875).
[15] Julliard v. Greenman, 110 U.S. 421, 447 (1884).
[16] 149 U.S. 698, 706-711 (1893).
[17] 110 U.S. 516 (1884) (murder prosecution by information did not violate due process).

> many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in Magna Carta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age. . .[18]

Likewise, for nearly a century, the Supreme Court has recognized that the "cruel and unusual punishments" clause was not limited to eighteenth-century conceptions of cruelty, but "may be . . . progressive, and . . . acquire meaning as public opinion becomes enlightened by a humane justice."[19] Chief Justice Warren's plurality opinion in *Trop v. Dulles* accordingly asserted that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[20] In *Trop*, the plurality relied almost entirely on the practices of other nations to conclude that loss of citizenship was an improper punishment for a crime.[21] Although the dissent disagreed with the plurality's interpretation of international opinion, it appears that at least eight of the nine Justices in *Trop* agreed that international opinion was relevant to the constitutional analysis before the Court. Judicial support for the relevance of foreign sources to the definition of cruel and unusual punishment now has a lengthy pedigree in decisions such as *Coker v. Georgia,*[22] *Enmund v. Florida,*[23] *Thompson v. Oklahoma,*[24] and *Atkins v. Virginia*.[25] Although Justice Scalia opposes the use of foreign authority to interpret constitutional meaning, even he has acknowledged that "[t]he practices of foreign nations . . . can be relevant to determining whether a practice uniform among our people is . . . so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well."[26]

The citations to foreign sources of law in the recent decisions in *Lawrence v. Texas* and *Roper v. Simmons* were fully consistent with this constitutional tradition. The Court's opinion in *Lawrence* cited British and European authorities largely to rebut the assertion in *Bowers v. Hardwick* that homosexual sodomy was universally condemned by western civilization.[27] In *Roper v. Simmons*, the Court first found an evolving national consensus prohibiting the execution of persons who were under the age of 18 at the time of the crime. Six members of the Court separately agreed that international law was relevant to confirm the determination of "society's evolving standards of decency" under the Eighth Amendment.[28]

In most of the contexts I have mentioned, international law and foreign practice is considered merely for its persuasive force as reflecting the rules and considered judgment of the society of nations. The Court's use of foreign sources, however, has not been restricted to the original understanding of

---

[18] *Id.* at 530-31 (emphasis added). See discussion in Gerald Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L. L. 82, 83 (2004).
[19] Weems v. United States, 217 U.S. 349, 373, 378 (1910).
[20] 356 U.S. 86, 100-101 (1958) (plurality opinion).
[21] *Id.* at 102-103 & nn. 37, 38.
[22] 433 U.S. 548, 592 n. 4, 596 n. 10 (1977) (plurality opinion).
[23] 458 U.S. 782, 796-97 n. 22 (1982).
[24] 487 U.S. 815, 830-31 & nn. 31, 34 (1988) (plurality opinion); *id.* at 851 (O'Connor, J.).
[25] 536 U.S. 304, 316 n. 21 (2002).
[26] Thompson v. Oklahoma, 487 U.S. 815, 869 n. 4 (1988).
[27] *Id.* at 2481; see Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring). The Texas appellate court in *Lawrence* likewise had justified its reaffirmation of *Bowers* with references to Roman law and Blackstone. Lawrence v. State, 41 S.W.3d 349, 361 (2001).
[28] Although Justice O'Connor disagreed with the majority's identification of a national consensus prohibiting the execution of juveniles, she agreed that international law was relevant to Eighth Amendment analysis.

the drafters of the Constitution. Instead, the Court has employed many of the ordinary modes of constitutional analysis–text, structure, history, doctrine, and pragmatism–to support resort to foreign authority, and the Court generally has viewed contemporary foreign practice and international rules as the appropriate normative reference.

In *Boos v. Barry*,[29] for example, the Supreme Court addressed the constitutionality, under the First Amendment, of a District of Columbia ordinance that prohibited certain protests outside of foreign embassies. The United States government argued that the ordinance should be presumed constitutional because international treaties and customary international law regarding the treatment of diplomats gave the government a compelling interest in regulating protests outside of embassies. The Supreme Court recognized that current U.S. obligations under treaties and customary international law gave the United States a "vital national interest" in protecting the "dignity" of foreign embassies.[30] Although the Court ultimately resolved the case on other grounds, the case makes clear that in some contexts it would be difficult to conduct even First Amendment analysis without considering contemporary international law.

Despite how the question has been portrayed in recent debates, the use of international and foreign sources of law is not an issue of liberal versus conservative or Democrat versus Republican. The current administration has relied heavily on international law in arguing for broad constitutional authority for the President to wage the war on terror, whether by detaining enemy combatants or establishing military tribunals. In *Hamdi v. Rumsfeld*,[31] lawyers for the government argued that the President's constitutional power to detain enemy combatants derived from the international laws of war, and Justice O'Connor's plurality opinion invoked international law to uphold a qualified power of the President to detain enemy combatants.[32]

My primary point in offering these examples is to underscore the extent to which reliance on international and foreign sources is fully part of the American constitutional heritage. The cases I have discussed largely remain the operative legal doctrines, with the result that foreclosing consideration of foreign authority in constitutional analysis would pull the rug from beneath many of our core constitutional values, including the doctrines delineating many of the powers of this Congress.

Judicial consideration of foreign authority does not mean, moreover, that consideration of foreign authority either delegates control over our constitutional values to foreign governments, or is contrary to our democratic traditions. Ultimately, it is our own domestic Constitution, interpreted by our own duly appointed judges, that determines the relevance of foreign authorities to its operation, and any particular constitutional provision may pose a barrier to consideration of foreign sources, whether through text, structure, history, or doctrine.

Sensitivity to the constitutional design is particularly important under the U.S. Constitution given the mixed attitude of the Framers themselves toward prevailing international norms. The drafters of the Constitution were well versed in foreign law. They had carefully studied other democratic and federal systems, and they intended for the United States to take its place among the community of nations by adhering to international law. Thomas Jefferson considered the law of nations "an integral part . . . of the laws of the land," and John Jay, one of the authors of the Federalist Papers and the first chief justice of the United States, proclaimed that "the United States had, by taking a place among the

---

[29] 485 U.S. 312 (1988).

[30] 485 U.S. at 322-23.

[31] 124 S.Ct. 2633 (2004).

[32] Id. at 2641 ("longstanding law-of-war principles" included the right to prevent enemy combatants from returning to the battlefield during an armed conflict.)

nations of the earth, become amenable to the laws of nations."[33] Indeed, compliance with international law was critical to help protect the fledgling nation from retaliation by powerful foreign states, and it would be surprising if the founders expected the government's powers to be construed isolation from international rules.

On the other hand, it is also true that the Constitution was deliberately designed to reject some customary international practices–rules that had developed through the practices of authoritarian states. Traditional powers of sovereign prerogative such as warmaking were constitutionally limited and distributed, and the right to jury trial rejected European inquisitorial systems. Certain provisions of the Bill of Rights, such as the First Amendment's free speech provisions and the Third Amendment's prohibition against quartering of soldiers, were intended to impose limits on governmental authority that were uncommon, or even unknown, in the era. Any effort to determine the appropriate relationship between foreign legal sources and the Constitution accordingly must recognize that our founding document both received and rejected contemporary international rules and practices.

Determining when it is appropriate to consider international sources and what role they should play in relation to a constitutional structure raises difficult questions in any constitutional system. But this interpretive determination is a quintessential matter for judicial expertise, and our two centuries of experience demonstrate that it must be addressed discretely on a case-by-case basis. It is not a question appropriate for resolution by Congress through blanket disapproval of judicial consideration of foreign and international law.

---

[33] See Harold H. Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L. L. 44 & n.3 (2004) (discussing resort to international authority in the founding era).

Mr. CHABOT. Now the Members of the panel up here will have 5 minutes each to ask questions. I will begin with myself.

Last year it was suggested by some that this topic was really much ado about nothing. Since then, we have witnessed the courts becoming more public and unapologetic about the need to rely on the international community to give them a better understanding of our own Constitution or to help them in deciding cases in this country.

How real is the threat that reliance on foreign opinions, especially those that are consistent with the judges' own moral or social policy judgment, will become standard practice? What are the implications of such selective interpretations, such as that used in *Roper,* and, prior to that in *Lawrence,* if Congress does nothing?

I would invite any of the members of the panel to respond if they would like to do so, in any order that you would like to, if anybody wants to jump in at the bit.

Mr. Whelan.

Mr. WHELAN. I think it's an excellent question. I think that reliance on foreign law, as I described, is another engine of lawless judicial activism. No Justice has been able to explain when it would be proper to do so, when it wouldn't, in terms of construing the meaning of the Constitution. I think most of the examples we have heard—I agree with the point Mr. Feeney made. Most of the examples that Professor Cleveland raised are examples to which we would have no objections. They are not examples that come at the core of construing the meaning of the Constitution. But more than that, even if one can find sporadic examples in the past where this may have been done, what we are facing right now is a concerted effort internationally to try to impose international norms and laws on the American people to detract from their sovereignty, their ability to govern themselves.

This is a real threat that is multifaceted. The Justices will be feeding that threat if they continue to invoke foreign law in the unprincipled manner in which they have been doing.

Mr. CHABOT. Thank you. Any other witnesses like to answer that? I have got more questions if not. But, Professor Cleveland.

Ms. CLEVELAND. Well, I would simply observe that my comments go to the fact that this has been standard practice for two centuries in certain constitutional contexts, and that indeed the process is a very modest one. That in the *Lawrence* case, all the Supreme Court did was note that contrary to Chief Justice Berger's opinion in *Bowers v. Hardwick,* the European Court of Human Rights had prohibited homosexual sodomy 5 years before the *Bowers v. Hardwick* decision. He [Justice Kennedy] was simply correcting an error that had been made by the prior court.

Likewise in *Roper,* the Court found a national consensus prohibiting the execution of juveniles and concluded that because of—for developmental reasons, juveniles were inappropriate for the death penalty—before they ever considered international practice—and then they only did so as one element in a very complex eighth amendment analysis.

Mr. CHABOT. Thank you. Professor Whelan.

Mr. WHELAN. There is a game going on here where those who invoke foreign law always pretend that it doesn't matter. Let's take

the words of the Supreme Court seriously in the *Roper* case. The Court said that foreign law, international opinion, was providing confirmation for its holding. Now, you can say, "Oh well, perhaps it appears it would have reached the same conclusion no matter what." Perhaps it might have.

You know what these Justices are telling us is, "Don't worry, it's not controlling." That gives no comfort at all. When they say it is not controlling, they are not denying the fact that it is a factor that will be given weight, and that weight could prove in any particular case to be dispositive—but we will never know when. More than that, the fact that it is not controlling is simply an illustration of the fact that this is lawless judicial activism. They come up with no principle—they will not be bound by it.

I am not worried about any Justices saying, "I am going to be bound by foreign law in these areas." They are not going to commit themselves to that because they want to select foreign decisions in a very opportunistic manner in order to support whatever decision they want to reach. That is why——

Mr. CHABOT. Thank you. My time is just about up here. What I am going to do is recognize Mr. Nadler here for his 5 minutes. We have some votes on the floor, but I think we can fit in one set of 5 minutes here before we vote, so Mr. Nadler is recognized for 5 minutes.

Mr. NADLER. Thank you. Part of this debate concerns the question of original intent. With respect to the *Roper* decision, which was the death penalty for juveniles decision, some have argued that the majority should not have considered evolving standards of decency; that they should only look to the original intent of the Framers at the time of the adoption of the Constitution.

The resolution—some of the testimony today seems to take that position as does Justice Scalia. As Justice O'Connor pointed out in her dissent, that would mean interpreting the Constitution to permit the execution of 7-year-olds, which was apparently the understanding 20 years ago. Should the Court hold as permitted any punishment meted out at the time of their eradication of the eighth amendment? Is that where we are at, Professor Dinh?

Mr. DINH. What a wonderful question not only in this context but in the context of the Constitution interpretation in general. As you know the eighth amendment prohibition is against cruel and unusual punishment. So, just like the concept of reasonableness, I think, the Founders had put into constitutional language some temporal give to allow judges——

Mr. NADLER. By the use of the world "unusual" as opposed to simply "cruel."

Mr. DINH. Exactly.

Mr. NADLER. Because what is cruel now is cruel 200 years from now. But what is unusual—but what is not usual now may be unusual 200 years from now?

Mr. DINH. I think that by and large, that is correct. Where I think where we would part company is where the Supreme Court has held that this language depends upon, quote, "the evolving standards of decency" that mark the progress of a maturing society in 1958. Whether or not that is a correct standard, that is the ap-

plicable standard that the Court was applying in *Roper v. Simmons.*

My testimony here, I want to stress, does not depend upon the adoption of any particular interpretive methods. Indeed, the need to eschew foreign law holds across the spectrum of interpretive theories.

Mr. NADLER. I hear that. But let me go further, because I only have a few minutes. Taking your point, taking your point that the cruel and unusual could evolve over time, because there is a give in that phrase, in *Bowers*—I am sorry, in *Lawrence*—as Professor Cleveland pointed out—the opinions citing British and—cited British and European authorities basically to rebut the assumption in *Bowers v. Hardwick* that homosexual sodomy was universally condemned by Western civilization, to say, no, maybe it was once, but it isn't now. Is that a misuse of the power given what you have just said?

Mr. DINH. I think it is, because it is—it is an abandonment of any anchoring of an expansive interpretive theory, especially if your interpretive theory is not anchored on text, history, and structure of the Constitution. You have to find your legitimacy somewhere, but taken out of your own jurisdiction——

Mr. NADLER. Professor Cleveland, could you answer my question?

Mr. DINH. —in terms of the legitimacy of the Court.

Ms. CLEVELAND. Well, the question is what does fundamental liberty protect? In the *Bowers* decision, the Justices, or at least Chief Justice Burger, had looked out at what he thought was Western civilization and said, uniformly, Western civilization prohibits this, when in fact homosexual sodomy could not be criminalized within the 50 states of the Council of Europe. That was the point that Justice Kennedy was making. I think it's a very important one.

Mr. NADLER. So in other words, Justice Burger used—cited the practice internationally to justify the Bowers decision by saying this is condemned everywhere; and in the *Lawrence* decision, they cited international decisions to say that is simply, factually, incorrect as to what the foreigners do, because it was cited originally by Berger.

Ms. CLEVELAND. Precisely.

Mr. NADLER. Is there nothing wrong with that in either way? Assuming that Berger had not been wrong factually, was it wrong for him to cite the foreign consideration; was it wrong for the Court 20 years later to cite it also?

Ms. CLEVELAND. I don't believe so. If Burger had been correct, then one consideration in deciding what fundamental liberties are protected under the Due Process clause would be what our Western civilization historically has allowed or prohibited.

Mr. NADLER. Thank you.

Let me ask Mr. Whelan and Professor Rosenkranz, do you think that Chief Justice Burger was wrong in *Bowers* to cite the universal condemnations, as he put it, of homosexuality and to cite foreign courts and foreign practice?

Mr. WHELAN. Sir, I believe you are dealing with an opinion of Justice White's. Perhaps I am mistaken, but Justice White wrote the lead opinion in *Bowers.* I am sorry, *Lawrence—Bowers,* excuse me.

Mr. NADLER. *Bowers,* yes.

Mr. WHELAN. I am confused now. I haven't read that opinion recently. I don't know whether he was responding to one of many arguments that was made. I would, though, if you would permit me to respond to your question about the common—the understanding of the eighth amendment at the time of the founding. With all due respect, I believe your question betrays a fundamental distrust of the American people.

The fact that the American people might have a power to enact unjust laws no more means that power shouldn't exist than the fact that they might have power to say that if you cross Constitution Avenue you should be wearing yellow pajamas and hopping on one foot, There is no reason to think that——

Mr. NADLER. Wait a minute. What has that got to do with what I have said? I am completely lost.

Mr. CHABOT. The gentleman's time has expired.

Mr. NADLER. Could I ask unanimous consent for 1 additional minute?

Mr. CHABOT. How about 30 seconds, because we need to be on the floor in about 5 minutes.

Mr. NADLER. Let me just say I believe the Congress has the power to enact anything delegated to it, including the Necessary and Proper clause interpreted in *McCall v. Maryland* and its progeny, up to where it's limited by the Bill of Rights.

Let me just take 30 seconds, Mr. Chairman, to note the presence in this hearing room of the distinguished judge of the highest State court of New York, the Court of Appeals, Robert Smith.

Mr. CHABOT. Excellent. We appreciate your appearance here today.

I might note that there is probably only about 5 minutes left on the vote on the floor. We have five votes. I would encourage the Members to come back immediately after the fifth vote. We will take up the hearing from there. These are the last votes of the day, so I am not sure how many Members will come back. But I know these Members are probably the most hardworking Members in the whole Committee, so I think they will be back.

We will see you back here. It will probably be about 45 minutes because we do have five votes on the floor. So we are in recess.

[Recess.]

Mr. CHABOT. The Committee will come back to order. The gentleman from Indiana, Mr. Hostettler, is recognized for 5 minutes.

Mr. HOSTETTLER. I thank the Chairman, and I thank the Chairman for holding this very important hearing.

As we look at cases recently and in the past that the Supreme Court has ruled on, I come to the conclusion, as was stated by some of the witnesses, that basically the Court uses whatever they want to use to determine what they believe to be, what they feel is their own interpretation or application of the Constitution for any particular situation: the use of international law; as they see fit, the use of congressional intent or noncongressional intent; a consensus of community values, community views.

And I would like the witnesses just to kind of maybe put a finer point on, maybe—or a blunt point would be better—in responding to the notion that someone, a layman looking at, which I am, look-

ing at the views of the Court, would conclude that based on what the Court wants to do with a particular issue, particular case, they find an excuse or reason, a rationale to come up with their viewpoints.

I would like to, before I ask you to respond to that, visit for the record, to try to correct the perception that might have been created earlier about the notion that Justice Kennedy spoke to what was decided by in *Bowers* and commented on by Chief Justice Burger with regard to the use of international law.

Actually, later on in his decision, he actually says, quote, "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere," end quote. And it goes on to cite the European court of human rights in a case, 2001; *Modinos v. Cyprus,* 1993; *Norris v. Ireland,* 1988.

So the Court was not merely looking. Kennedy was not—Justice Kennedy was not merely looking at what had happened prior to *Bowers.* But he also extrapolated and went forward to and suggested that this decision should come down relative to international norms as found in international proceedings.

But am I wrong in a layman's reading of Court decisions that suggest that if the Court wants to rely on congressional intent, deciding something in the majority, if it does and if it doesn't; and if it wants to rely on international law or other tribunals to come down on a decision that—in a way that it—in science we refer to it as dry-labbing. And that is, you know the answer to the question; you just now have to create the hypothesis and the experiment to be fashioned around the response that you want or that you know that you are going to get out of the experiment.

Are we basically dry-labbing when it comes to Supreme Court decisions in many cases?

Mr. DINH. I will start. I hope you are wrong. And I hope that the debate here is only one of form. But it is a very important one of form, especially if you are wrong. That is that judges are actually making honest, faithful decisions, rather than dry-labbing or predetermining the result and then making up the reasoning in order to justify it. Because that truly would be a subversion, not only of the democratic process, but the rule of law that the judges are sworn and ordered to protect.

Perhaps that would be a violation of article VII that Mr. Feeney was looking for elusively earlier. So I do hope that you are wrong.

In all the evidence that I look at, I would give the benefit of the doubt certainly to the Justices of the Supreme Court. But because these are very close cases and they are cases that divide society, in which the Supreme Court and judges hold great sway, I think it is incumbent upon the judges to rely upon not only appropriate, but truly legitimate sources of interpretation so that the power of the robe, which is the legitimacy of their word and of their interpretive techniques, survives the inevitable political and social controversy that would attend to any one of these very close calls of a decision.

Mr. CHABOT. The gentleman's time has expired. Did the gentleman wish to get response from the others?

Mr. HOSTETTLER. Unanimous consent to respond for the others.

Mr. CHABOT. Absolutely. The others Members can respond.

Mr. WHELAN. Mr. Hostettler, what you so well described about Justices just making it up and looking for whatever arguments support their conclusions is exactly the case for six Justices on the Supreme Court.

They use the label "the living Constitution," and they get all sorts of support from left-wing academics and also the camouflage from the media. But that is exactly what they are up to. There is no benefit of the doubt left to be accorded. We have been seeing it for several decades now. And that is why we need to have Justices who recognize that they themselves are constrained by principles outside them in the manner that they construe the Constitution and other Federal laws.

Mr. ROSENKRANZ. I think it is a terrific question. I think the hyper-realist critic of the Court is that the result comes first and that we can always find reasoning for whatever result we prefer.

I, like Professor Dinh, like to think that this is a caricature. Perhaps there is some truth to it, but surely it is an exaggeration. And the main constraint on the judiciary is that they have to write down their reasons, and for that reason, we do some good when we rule some rationales off the table.

We say, you can write down a number of different kinds of reasons, but reasoning from current international law is illegitimate. We rule that off the table. We make it harder to reach certain results. We constrain judges to appropriate methods of constitutional interpretation. It doesn't make it impossible to do results-oriented judging, but it does make it harder. So I think we move the ball down the field when we engage in this exercise.

Ms. CLEVELAND. I would agree with Professor Rosenkranz that the hyper-realist view is, we all hope, a characterization, and there are very real constraints on what decisions judges can reach. They are bound by the text of the Constitution. They are bound by the structure. They are bound by precedent. They are bound by history. They are bound by what society will tolerate.

And Justice O'Connor, among other Justices, has observed that the Supreme Court never strays too far to the left or the right of the society in which it is currently operating.

None of those constraints would prohibit any particular individual from reaching a particular conclusion, but collectively within the dynamic of the Court, they actually play a very real role, as we all saw as law clerks, in confining the range of movement that the judges have available to them.

Mr. HOSTETTLER. Thank you.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. And I hope the sponsors of the amendment won't be offended if I don't agree with the idea that we ought to rely on the original intent of the Constitution. Insofar as if we kept the original intent, I would only have three-fifths of a vote on this Committee and not a full vote.

Mr. HOSTETTLER. Will the gentleman yield on that.

Mr. SCOTT. I will yield.

Mr. HOSTETTLER. And that is an excellent point in that that was changed by amendment—amending the Constitution. But the notion of obtaining the consensus of the American people outside of an article V process is, I think, not legitimate as far as the Constitution is concerned.

And I thank the gentleman for yielding.

Mr. SCOTT. Reclaiming my time, let's kind of quick put this in context.

If this resolution passes and the chief sponsor of the resolution says, this will prevent judges from ruling in such a way—Professor Cleveland, if this resolution passes, will it have any effect on the judiciary?

Ms. CLEVELAND. It won't have any effect on the judiciary in the sense that——

Mr. SCOTT. Will it have any legal effect?

Ms. CLEVELAND. It won't have any legal effect on the Federal judiciary. It could have a chilling effect on what judges have been—are willing to do.

Mr. SCOTT. We have been trying to chill the judges, but this won't be doing anything more than anything else we have been doing up here.

Let's—if we deny that, will we have phrases like "cruel and unusual"? Who do you think decides what is cruel and unusual without taking a global view on it?

Why shouldn't—Professor Cleveland, why shouldn't the courts take into consideration that in putting juveniles to death we are the only ones in the world doing it? Doesn't that kind of inform us as to what is cruel and unusual?

Ms. CLEVELAND. If the United States is the only country in the world imposing the punishment, I would submit to you that that is truly unusual.

Mr. SCOTT. If we waited for judges—if we waited for legislatures to change the rules rather than letting activist judges change the rules, could *Brown v. Board of Education* ever have been decided? Could we have eliminated segregated public schools by waiting for the legislative branch and State legislatures to change the results?

Ms. CLEVELAND. It would have taken a long time given the limitss on African-Americans voting in southern States and elsewhere.

Mr. CHABOT. Will the gentleman yield? That was reversed in bad previous court decisions.

Mr. SCOTT. You are absolutely right. Activist judges overturned properly enacted State laws requiring segregated schools.

Mr. SCOTT. Since the Committee is so fixated on marriages, let's try *Loving v. Virginia.* If we had to wait for Virginia to change the law on mixed marriages, would we still be waiting.

Professor Cleveland, do you see any evidence that Virginia anywhere along—since the 1960's, would have actually changed the law?

Ms. CLEVELAND. Again——

Mr. SCOTT. I served on the legislature for 15 years. I can tell you there is a lot of stuff that we thank the judicial branch for deciding for us because we never would have gotten around——

Ms. CLEVELAND. Well, in the same way, in the *Lawrence* case, the Texas homosexual sodomy statute had not been enforced by the Texas government for years. And, in fact, it had become almost impossible to challenge it because the State of Texas was unwilling to enforce it. But the legislature wouldn't have repealed it.

Mr. SCOTT. I guess we just want to keep this in context that whether we pass this or not won't have any effect on the—will have no legal effect on whatever we do. So I will yield back the time.

Mr. CHABOT. The gentleman yields back his time.

The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you. Thank you, Mr. Chairman. And I do appreciate the testimony on the part of the witnesses.

And so sometimes it is a little hard to keep a little flow of continuity here when we run off to vote, but a number of things in the previous testimony occur to me and one is that a number of you have been clerks for Supreme Court Justices and you have got a sense of how things flow inside those chambers. And so, you know, I am watching more and more cases being decided—or I will say, considered—that reference and cite foreign law. And it seems to me that the incidence of the citing of foreign law is growing significantly and dramatically.

And so I start my first question with Mr. Dinh.

I understand you clerked for Justice Scalia. And I know that you do a lot of the research and the clerks do a lot of the research. But since this incidence of foreign law is coming up consistently more, is there a reason for that? Are you digging back into foreign law books? Are there people that are staff people that are designated to do this type of research?

For me, it wouldn't occur to me to look at Chinese law or United Kingdom law or Somali law or Zimbabwean law as a resource. Who is creative enough to even go look at that law before it is cited?

Mr. DINH. Thank you very much for that question, sir.

I did not work for Justice Scalia. I clerked for Justice O'Connor. Otherwise, I would not have been looking at foreign law sources. But I think your question is a very good one.

The Courts, in the words of Justice Scalia—then Judge Scalia—are not roving boards of inquiry. They are not there in order to find and solve all the problems of the world according to their own life and doing their own research on the Internet or in Zimbabwe or elsewhere, but rather depend upon the research and the arguments presented to them by the lawyers.

And I frankly go into the third point of my opening statement. I frankly do not have very much faith—aside from all of the jurisprudential and democratic objections, I do not have very much faith in the ability of domestic judges and lawyers to get foreign law right, because at the end of the day, we are not steeped in those cultural and legal traditions and we end up cherry-picking the ones that support our predelictions.

Mr. KING. I did hear that part of your testimony—although I was not attentive when you were introduced, I did not hear that, Mr. Dinh. I apologize.

Mr. Whelan, Mr. Dinh has testified that he believes that material comes from the attorneys. Would you speculate as to whether that is fully the case, or do you believe that there is some research

that is done from inside the Supreme Court chambers as with regard to foreign law? Are all of these citings, can we index those back to briefs that have been presented to the Court in these particular cases?

Mr. WHELAN. Well, I would only be speculating and certainly wouldn't want to speak to anything that I witnessed, though, of course, being a clerk for Justice Scalia, I did not witness any of that.

I think what you see now is a dynamic where the Court, six Justices at least, have signaled their strong interest in foreign law as a potential resource. So lawyers, in turn, will be looking to provide those selective foreign legal authorities that support their positions, and Justices who want to cite those materials will do so. And I think you have a downward spiral as a result.

Mr. KING. Thank you.

And Mr. Rosenkranz.

Mr. ROSENKRANZ. I would just add to that that the research into foreign law is an extremely elaborate and time-consuming process, which is another great cost of this trend. So as has been pointed out, these sources are found by lawyers, and it takes them hours of billable time.

And the question is, is this a good use of social resources? I think probably not.

Mr. KING. I am watching the clock tick down. I would be very interested in Professor Cleveland's answer.

And I have something I need to do in the last minute, and that is—this is the foreign travel over the last 6 years of the Justices. And in this notebook here—the bookmark is the Constitution, by the way—is a spread sheet and a chart of the Justices' foreign travel and a list of where they have gone and who has paid for the trips.

And then—I haven't done a proper analysis to make a presentation before this Committee, but I can point out that in, for example, June of 2000, Justice Kennedy went to China; and in June and July of 2001, Justice Breyer went to China; and in October of 2001, Justice Kennedy went back to China; and in September of 2002, Justice O'Connor went to China; and then in the *Roper* case in March 1, 2005, all of them cited Chinese law. That is one example.

And I think history is replete with this. And so it may not be that—it may be that the research that is presented is presented by attorneys and in the briefs, but it might also be that their respect for this foreign law is cultivated on foreign trips, paid for by foreign entities. And that is the point I hoped to make.

I thank you, and I yield back the balance of my time.

Mr. CHABOT. The gentleman yields back his time.

The gentleman from Florida, the principal sponsor of the bill, along with Congressman Goodlatte, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman. I thank all the witnesses. I think this is a fascinating discussion. I refer to it as a national civics lesson about the appropriate role of judges in our system of Government. And my friend from Virginia suggested that all we could really hope for with the resolution is to chill certain activities from the bench; and I have to admit that that is entirely what some of us intend to do with this.

We would like to chill the Justices right out of article I legislative powers and back into article III. We would like to chill the article II, importing treaties; that we refused to sign, like the 37th article, for example, in the *Roper* case.

We would like to chill them into respecting a Republican form of government in article IV. We would like to chill them out of amending the Constitution other than article V. And we would like to chill them back into the Supremacy Clause.

So this is entirely designed to chill certain behavior and activity.

I have a one-word question and am asking for a one-word answer from each of you so we can get to a couple of things very quick.

Dean Koh has referred to the six-member majority, including Justice O'Connor, who intends to retire, as the "transnationalist Justices." and if that is a fair description—and I buy it—of the majority, do we have a term for the three Justices that are remaining fixed on the Constitution without reference to foreign law?

And I will give each panelist, you know, a second or two to come up with one. Why don't we start with Mr. Dinh?

Mr. DINH. Traditionalist.

Mr. WHELAN. Two words, American originalist.

Mr. ROSENKRANZ. Textualist.

Ms. CLEVELAND. Professor Koh uses "nationalist."

Mr. FEENEY. And you adopt that term, Professor?

Ms. CLEVELAND. It is a possible term.

Mr. FEENEY. One of the things I am very interested in is that Justice Ginsburg, off the bench, has tried to ragsize the use of references to foreign law in interpreting basic constitutional rights among other things.

And she refers us to the Declaration, and she talks about how the Founding Fathers started out with a decent respect for the opinions of mankind. But everywhere she gives that talk, she refuses to include the rest of the sentence, which was that because of our respect for the opinions of mankind, we are required to, quote, "declare the causes which impel them," meaning the States and colonies and people, "to separation."

So our respect was limited to the notion that we owed people a discussion, an explanation, of exactly why we were separating ourselves from reliance on foreign law. And I think it is really disingenuous of her to continue to repeat that phrase as justification for what she is doing.

I want to ask a theoretical question, and I would like the three folks that sort of agree that Feeney-Goodlatte House Resolution 97 is an appropriate message to Federal Justices.

Given the fact that in the *Atkins* decision we overturned American laws given to us by legislators based on, among other things, the Zimbabwe approach to folks with mental disabilities and the death penalty, given the fact that in *Lawrence* we referred to the European courts human rights attitudes toward sodomy to again overturn not only elected representatives but their own precedent; and of course the *Roper* decision, where the U.N. Convention on the Rights of Children, which we have not adopted, which was essentially adopted and ratified for us by the Court.

Supposing that I were an activist judge who was pro-life, and supposing this approach is appropriate, could I now justify over-

turning the precedent established in *Roe v. Wade,* in part, largely due to the fact that the attitudes through much of the globe do not permit abortion on demand, which is, to some extent, what *Roe* requires of us?

If this approach is legitimate jurisprudence—we start with Mr. Dinh—do you think it would be inappropriate judicial activity for a judge offended by the decision in *Roe* to look at global attitudes of abortion on demand?

Mr. DINH. It is a very big "if," but if the "if" holds, then I agree with you. And, yes, activism works both ways. And once you open up the Pandora's box of illegitimate sources of law, then it does not stop it one way or the other.

Mr. WHELAN. I have a two-part answer.

First, *Roe* is wrong no matter what. You don't need to look to foreign law to find arguments for that. All Americans ought to recognize that it is time that the American people be restored their power to determine what abortion policy ought to be in the States.

Second, again, though, if you grant your premise, a Justice would recognize that the abortion regime that has been imposed on this country is a regime more radical than that that exists in any virtually any country in the world. We don't need to look to parts of the world where abortion itself is not lawful generally. Even in Europe, as Mary Ann Glendon has pointed out, the laws there are far more moderate than the radical regime we have in this country.

Mr. FEENEY. Mr. Rosenkranz.

Mr. ROSENKRANZ. Sir, you are quite right. And I believe that it brings us back to Congressman Hostettler's question in which we are left with the distinct impression that the Court is not doing this systematically, but is doing it selectively to achieve the results that they want to achieve.

Mr. FEENEY. Professor?

Ms. CLEVELAND. In the 198Os, the Reagan administration argued to the Court that the right to choose should be limited based on foreign precedents. And I think that is an argument that is available to attorneys before the Court.

Mr. FEENEY. Should Justices use it? I am not asking what lawyers can argue; they ought to argue anything that can win if it is ethical. But should Justices use it?

Ms. CLEVELAND. In all of these contexts, the question is part of a much broader package of issues that the Court has to consider regarding the particular constitutional norm that is presented.

So in answering that question, I would say that the Court would have to look at what the law that it was confronted with was. What it was—how it was being urged to modify *Roe,* how significantly that contradicted our established doctrine and precedent; and all of these things would go into the consideration of the decision.

Mr. FEENEY. I thank the panelists and yield to the Chairman.

Mr. CHABOT. Thank you. The gentleman's time has expired.

We are not going to another round, but the gentleman from New York has asked to ask one additional question, and we have granted that right.

Mr. NADLER. Thank you. I appreciate the indulgence of the Chair. I just want to ask Mr. Whelan a question. That remark you made just a moment ago raised in my mind—you talk about *Roe*

v. Wade and you say it is it is obvious *Roe v. Wade* is wrong, all Americans should acknowledge that *Roe* is wrongly cited and that it was wrong that the American people presumed because their legislatures ought to decide on the legality of abortions in the States. Is that what you said, essentially?

Mr. WHELAN. That is essentially correct.

Mr. NADLER. My question is the following: Many people think that the real goal of certain legislation such as the—what was the bill? I forgot what we call it, the title of the bill to recognize that two separate crimes, an assault on a pregnant woman with a fetus?

Mr. CHABOT. Will the gentleman yield? The Unborn Victims of Violence Act?

Mr. NADLER. The Unborn Victims of Violence Act, yes.

That the real goal of that is to establish the fetus' personhood and that if you establish the fetus' personhood under the 14th amendment, then under the 14th amendment you cannot deprive a person of life, liberty or property without due process of law; and that if we were to establish that a person is a—I'm sorry, that a fetus is a person under the 14th amendment, then if *Roe* were to be overturned, the rationale might not be that it is simply wrong.

In deciding that, therefore, the implication is that State legislatures can do what they want one way or the other, but that a fetus is a person under the 14th amendment. Therefore, you cannot deprive a person of life, liberty or property without due process of law; and therefore, no State legislature nor Congress may permit abortion under any circumstances because that would be a violation of the 14th amendment.

Are you saying that you would regard that as wrong reasoning, or you just didn't think of it when you said that getting rid of *Roe* would enable the States to do what they want?

Mr. WHELAN. Well, I certainly follow that. I think the reasoning that you attribute to people is clearly not the correct reasoning.

I don't think those who support the Laci Peterson bill are interested in some grand concoction of what the word "person" means in the 14th amendment, nor do I think that anything this Congress does statutorily to protect unborn human beings—beings that are, after all, members of the species *Homo sapiens* from the moment of conception—would have any impact on the word "person" in the 14th amendment.

I have testified as to my position that unborn human beings are not persons within the meaning of the 14th amendment. And, you know, the so-called "conservative" approach to the abortion issue, those who oppose *Roe,* recognize merely that the issue ought to be restored to the people to decide.

I think, frankly, with all respect, the rest is scare-mongering.

Mr. NADLER. I don't know if it is scare-mongering. It just scares me.

Thank you very much.

Mr. CHABOT. The gentleman yields back.

In follow-up to the gentleman's point, if I could make one point, I think many people believe that all the acrimony that has gone on for years relative to the abortion debate, much of it could have been avoided had it not been the Supreme Court that acted on its own. If this had occurred because the elected representatives of the

people made this decision one way or the other thing, then I think——

Mr. NADLER. Different States.

Mr. CHABOT. —it would have been much less acrimonious, and people would not have felt that the decision was just handed down and forced upon us, and that the people had no real input on such an important decision in this country.

So I think that the Supreme Court—and I obviously think *Roe* was wrong and would like to see it overturned; I have never made any secret of that I am strongly pro-life, but nonetheless, I think that decision was most unfortunate, not because of so many lives that——

The gentleman from Iowa is recognized. I was starting to ramble there anyway, so perhaps Mr. King got me off the hook. The gentleman from Iowa.

Mr. KING. I thank the Chairman. I will try not to belabor this point. I appreciate the privilege of making a quick point.

It is a question of curiosity, that I would very much like to present to Professor Cleveland particularly, because I didn't get to you. But it is not the same question, and it is a point that I think is a central point here that has not been made.

And that is, the Constitution is a contract that was ratified by the several States in roughly 1789 when most of the consensus—and that contract is a clearly defined document that says, we have an agreement amongst the States, and every State that enters the Union signs on to that contract. It is an irrevocable contract; and that was resolved by the Civil War when Lincoln took that stand.

And yet today, we have come so far away from the text of the Constitution that I would defy any modern-day legal scholar, let alone some future historian-archaeologist to try to divine the Constitution by reading through whatever mass of case law is out there. It seems to me to be impossible, even for a strict constructionist court, to work their way back to the Constitution given this mass of case law that we have out here.

What is the meaning of the Constitution now, today? Has it just been a transitional document that got us to this point in history where the judges now run society? Is it an artifact of history, Professor Cleveland?

Ms. CLEVELAND. I think that is a bigger question than can be answered right here. But I think it is important to recognize that the Constitution is very sparsely drafted. It uses some very general language, deliberately, because it was intended to survive through the centuries.

So the cruel and unusual punishments clause, you know, we were talking about the *Roper* case. The Court is trying to figure out how you decide what is "cruel" and what is "unusual." One way you decide what is "unusual" is to look at what is an uncommon punishment. I don't think that their decision in *Roper* strayed significantly from that text at all. I think it was quite honest to it.

"Due process," similarly, is a concept that is general; it changes over time with conceptions of right and wrong. And the drafters of the Constitution deliberately wrote a document that would have the flexibility to tolerate change in human existence.

Mr. KING. Let's take an easy one. Let's talk about *Kelo* where they struck the word "for public use" from the fifth amendment. That one should be an easy one for us to get some consensus on.

Would you agree that that was a sharp amendment to the Constitution that took place with impunity by the Supreme Court?

Ms. CLEVELAND. I haven't read the case. I would prefer not to comment on it.

Mr. KING. Thank you.

Mr. CHABOT. We will make this the last response if we can, Mr. King. We won't be having a second or third round here.

Mr. WHELAN. *Kelo* is a great example of how the left on the Court ignores rights that are in the Constitution and makes up rights that aren't.

Mr. KING. Thank you, Mr. Chairman, and thank you minority party. I yield back.

Mr. CHABOT. We want to thank all the Members for being here today. We want to thank especially our panel for their excellent testimony in helping us to consider this very important issue.

So if there is no further business to come before the Committee, we are adjourned. Thank you.

[Whereupon, at 6:20 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE TOM FEENEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Six U.S. Supreme Court Justices—approvingly described as "transationalists" by Yale Law Dean Harold Koh—have increasingly expressed disappointment in the Constitution we inherited from the Framers and disdain for certain laws enacted by democratically elected representatives.

With disturbing frequency, these Justices have simply imported law from foreign jurisdictions, looking for more agreeable laws or judgments in the approximately 191 recognized countries in the world.

They champion this practice and fancy themselves participants in some international scene of jurisprudential thought. In recent speeches, several Justices have referred to the "globalization of human rights" and assumed a "comparative analysis" when interpreting our constitution.

Mr. Goodlatte, I, and others on this Committee hope to start a great civics debate on the constitutionally appropriate role of judges in this Republic. This is why we asked Chairman Chabot to conduct hearings on this subject.

If Americans believe that the laws of another nation are superior to ours, they bring that idea to the attention of their elected representatives and move that policy through the legislative process. But if foreign laws are imposed on Americans by five unelected Justices, then rule by "philosopher kings" has replaced rule by "We the People." And we will have forgotten a reason for our nation's birth. For in the Declaration of Independence's list of grievances against King George III, is: "He has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws."

Despite our country's fierce protection of its sovereignty for over 200 years, judges at the highest levels of the federal judiciary cannot resist rationalizing otherwise baseless interpretations of American law by reference and incorporation of international law. The latest example is *Roper v. Simmons,* where the Supreme Court used foreign law to determine whether the death penalty for a 17 year old murderer violated the Eighth Amendment.

Justice Kennedy's majority opinion included an extended discussion of the relevance of foreign law to interpreting the Eighth Amendment. Not limiting himself to international law, Justice Kennedy went further to cite *international political opinion* opposing the death penalty. Never mind that back in America, a majority of states with the death penalty subject 17 year old murderers to it. Or in my home state of Florida, 70% of our voters favored a state constitutional amendment to permit such an application of this penalty.

To support overturning decades of precedent, the Supreme Court found it necessary to cite the *International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child.* Yet it ignored that the United States has specifically reserved the question of the execution of juveniles in signing and ratifying the former and has not ratified the latter.

I've reintroduced the Reaffirmation of American Independence Resolution to again stress the sense of the House that international influence should be removed from judicial interpretation of our Constitution. This resolution states:

That it is the sense of the House of Representatives that judicial interpretations regarding the meaning of the Constitution 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 inform an understanding of the original meaning of the Constitution of the United States.

Despite their high rhetoric, transnationalists are results-oriented judges who cherry pick through foreign law and precedent to find reasons to overturn the democrat-

ically expressed views of their fellow citizens. As Judge Posner has noted, this unrestricted citation of non-United States law "would mean that any judge wanting a supporting citation has only to troll deeply enough in the world's Corpus Juris to find it."

In a telling irony, a consistent application of such jurisprudence would result in strict limitations on abortion and free speech—anathemas to most if not all transnationalists. Should America rely on national laws of say Ireland in determining whether there is a constitutional right to abortion? Or follow the lead of Zimbabwe where journalists must be licensed by the government?

Ultimately, transnationalists fundamentally misunderstand their country's origins. The American people founded and then repeatedly defended this sovereign republic to ensure that they and not some outside entity—be it King George III, the European Court of Human Rights, or the United Nations—controlled their destiny. Yes, we borrowed from other nations' legal traditions, especially the Anglo-Saxon rule of law. But we always did so through the democratic process found in our Constitution. Other countries are free to pursue their notions of "justice." That's why so many of our ancestors fled those lands to come here.

The Reaffirmation of American Independence Resolution simply confirms that tradition and our nation's sovereignty.

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, thank you for holding this important hearing.

As you know, recently there has been a deeply disturbing trend in American jurisprudence. The Supreme Court, the highest court in the land, has begun to look abroad to international law instead of our own Constitution as the basis for its decisions.

Supreme Court Justice Sandra Day O'Connor made a troubling prediction last fall that the Supreme Court will rely "increasingly on international and foreign courts in examining domestic issues . . . ," as opposed to our Constitution, as the basis for its rulings.

Several western nations have begun to rely upon international conventions and U.N. treaties when interpreting their own constitutions, which is a frightening prospect, given that most of these materials are crafted by bureaucrats and non-governmental organizations with virtually no democratic input. The new Supreme Court trend to cite these types of foreign authorities is a threat to both our nation's sovereignty and the democratic underpinnings of our system of government. Our nation's founders were well aware of this danger when they drafted the Declaration of Independence, which declares that King George had "combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws."

The Supreme Court's trend is particularly troubling because it comes at a time when the Court is deciding such fundamental issues as the very wording of the Pledge of Allegiance, the meaning of the First Amendment, and other issues that are uniquely American. Our nation's judges, and Supreme Court justices, took an oath to defend and uphold the U.S. Constitution—and it is time that Congress remind these unelected officials of their sworn duties.

That is why I joined with my friend and colleague, Congressman Tom Feeney, to introduce the Feeney/Goodlatte resolution, which expresses the sense of Congress that the Supreme Court should not cite foreign authorities when interpreting the U.S. Constitution.

This resolution sends a clear message that the Congress is not willing to simply stand idly by and see our nation's sovereignty weakened.

I believe the judicial branch is guaranteed a very high level of independence when it operates within the boundaries of the U.S. Constitution. However, when judges and justices begin to operate outside of those boundaries, Congress must respond. We must be steadfast guardians of the freedoms that are protected in the Constitution of the United States of America.

Thank you again, Mr. Chairman, for holding this important hearing.

PREPARED STATEMENT OF PUBLIC CITIZEN'S GLOBAL TRADE WATCH

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

Testimony of Public Citizen's Global Trade Watch

For Hearing on the Appropriate Role of Foreign Judgments in the Interpretation of U.S. Law

For the House Judiciary Committee's Subcommittee on the Constitution
July 19, 2005

The introduction of H. Res. 97 by Rep. Tom Feeney (R-FL) and dozens of co-sponsors has focused needed attention on the impact of judgments, laws, or pronouncements of foreign institutions on U.S. law and policy. Often ignored in this debate, however, is the impact of international trade agreements and tribunals on U.S. laws and regulations, which are arguably already having a greater impact on the United States. This short brief summarizes some of the main implications that international trade agreements and tribunals have for U.S. sovereignty, focusing on the Central America Free Trade Agreement (CAFTA) now being debated by the House. For more information on CAFTA, or on the implications of other trade agreements for U.S. sovereignty, do not hesitate to contact Public Citizen's Global Trade Watch at www.tradewatch.org.

CAFTA & Sovereignty

1. Supporters of CAFTA, including the Office of the U.S. Trade Representative (USTR), say the agreement merely creates a level playing field for U.S. businesses by granting U.S. exports the same duty-free treatment now enjoyed by CAFTA imports to the United States under the Caribbean Basin Initiative (CBI), arguing that the agreement also protects the federal system of shared power.

- If CAFTA only created a level playing field for U.S. businesses by granting U.S. exports the same duty-free treatment granted to CAFTA nation's imports under the CBI, CAFTA would be a one-sentence pact: "tariff treatment for United States and Central American goods shall be on a reciprocal basis," plus a few pages of tariff schedule adjustments.
- Instead, CAFTA contains 1,000 pages of international law imposing:

a) obligations about how foreign service sector firms operating *within* U.S. territory may be regulated (Ch. 11),
b) property rights not set forth in the U.S. Constitution that would affect U.S. land-use policy (Ch. 10),
c) structures on how our federal and state tax dollars may be spent (Ch. 9).

CAFTA puts Members of Congress interested in reducing tariff barriers in the unacceptable position of having to choose between U.S. sovereignty and "free trade."

2. CAFTA explicitly requires the United States Executive Branch and Governors and Congress, state legislatures and local authorities to conform all existing and future federal, state and local laws to over 1,000 pages of CAFTA-established international law that goes far beyond trade matters (such as cutting tariffs and removing quotas) and extends far beyond ensuring laws are nondiscriminatory (i.e. obligations to treat domestic and foreign goods alike). CAFTA contains numerous absolute requirements that express policies countries may or may not maintain regardless if they treat domestic and foreign players alike. And, CAFTA threatens our system of federalism by requiring that Congress and the federal Executive Branch impose CAFTA's obligations on states:

- "*The parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state governments.*" (CAFTA Art. 1.4)

Accepting an **obligation for the federal government to pre-empt state policies** that do not conform to CAFTA's policies is in contradiction to the federalist system supported by Members of this Committee.

- U.S. laws that other CAFTA nations believe violate CAFTA's dictates are subject to challenge in a new international tribunal that CAFTA would establish. The United States would face trade sanctions until laws deemed "CAFTA-illegal" by this tribunal were changed or eliminated. (CAFTA Art. 20.16)
- Bizarrely, CAFTA's new Chapter 20 international tribunal is designed so as to always include two "judges" from other CAFTA nations, but only one U.S. "judge." (CAFTA Art. 20.9)
- NAFTA's similar international tribunal ruled against U.S. restrictions on Mexican-domiciled trucks' access to U.S. roads. The Bush administration sought to weaken U.S. safety and environmental standards to comply with NAFTA's tribunal. Congress passed a law to stop implementation of the NAFTA ruling. The administration successfully overturned Congress in U.S. court and passed new regulations to allow in the Mexican trucks. Mexico refused to meet new regulations requiring truck inspections and is now threatening trade sanctions because the United States failed to meet the NAFTA tribunal's orders.

Requiring U.S. domestic law to conform to the extensive non-trade provisions in CAFTA is in contradiction to the sovereign rights of the elected representatives of the U.S. federal, state and local governments.

3. Other provisions of CAFTA also submit the United States to the jurisdiction of international tribunals established under the auspices of the United Nations (UN) or World Bank. (CAFTA Art. 10.16.3)

- These UN and World Bank tribunals would be empowered to order the payment of U.S. tax dollars to foreign investors who claim the United States is not meeting the new protections CAFTA would grant to foreign investors. (CAFTA Art. 10.17)
- This aspect of CAFTA, called "investor-state dispute resolution," shifts decisions over the payment of U.S. tax dollars away from Congress and outside of the Constitutionally-established Art. III federal court system (or even U.S. state system) and into the authority of international tribunals.

4. The standard of review for these UN and World Bank tribunals is not U.S. law but rather international law set out in CAFTA.

- CAFTA Art. 10-22 "… *when a claim is submitted…the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*"
- This includes a minimum standard of treatment for foreign investors set forth by ***"customary international law"*** (CAFTA Art. 10.5.1, Annex 10-B) and established in ***"principal legal systems of the world."*** (CAFTA Art. 10.5.2(a))
- These international tribunals judge whether foreign investors operating *within* the United States are being provided the proper property rights protections.
- The standard for property rights protection that is the basis for the tribunals' decisions and award of U.S. tax dollars are not property rights established by the U.S. Constitution as interpreted by the U.S. Supreme Court, but rather international property rights standards set forth in CAFTA, as interpreted by an international tribunal.
- **H.Res. 97 would exclude from U.S. courts the jurisprudence and standards of foreign court systems. CAFTA would subject the United States to judgment under international, not U.S. legal standards, and would do so in international tribunals.**

- USTR has noted that no *existing* state or local laws would have to be changed to implement CAFTA. This is a very careful, but not very honest, use of language. First, while such laws would not have to be *immediately* changed, if they were successfully challenged either in a CAFTA Chapter 20 tribunal or before the UN or World Bank, the United States would face trade sanctions until a law successfully challenged under Chapter 20 was conformed with CAFTA or would be required to pay a foreign investor damages for a successful Chapter 10 challenge. Second, CAFTA includes two Annexes containing lists of laws that can violate certain *specific* CAFTA rules. Annex I-14 grandfathers in *existing* state and local laws that violate some CAFTA rules. However, any changes to these laws or new laws in these areas must conform to CAFTA. Plus, such existing laws are only excepted from having to meet *certain* listed CAFTA rules, while other CAFTA obligations still must be met. Annex II lists areas of state and local law service sector regulation in which future policies would also be allowed to violate CAFTA rules. However, U.S. Annex II only covers the areas that are excluded from the WTO's General Agreement on Trade in Services (GATS). Yet, in GATS, important areas of state and local regulation – such as freedom to set zoning laws regarding retail services (stores) and the right to ban gambling – are not protected. Thus, CAFTA newly would expose these areas of state and local regulation to a Chapter 10 foreign investor challenge at the UN and World Bank tribunals.

5. CAFTA establishes a double standard – greater rights are given to foreign investors operating within the United States than are provided by the U.S. Constitution for U.S. citizens and businesses.

- The foreign investor protection provisions contained in CAFTA's Chapter 10 and the establishment of a separate "court" system available only to foreign investors form the core of this double standard.
- NAFTA contains similar extraordinary foreign investor rights and access to the UN and World Bank tribunals. **Under NAFTA's similar system, the U.S. lost one case on the merits, faces 14 more cases, and has spent over $3 million defending a single case.**
- The Loewen v. United States NAFTA case demonstrates the threat to U.S. sovereignty that the expansion of this system via CAFTA would entail. In that case, Loewen, a Canadian funeral home conglomerate, challenged a Mississippi state court ruling. The state court had ruled against Loewen in a private contract dispute with a Biloxi funeral home. The only government action in question was the normal function of a state court in a private business dispute. The Canadian company claimed that having to follow the standard rules of U.S. civil procedure – such as the posting of a bond for appeal – violated their NAFTA foreign investor rights. The World Bank tribunal in the case ruled that the state court's normal operation was a "government action" regulated by NAFTA's terms and that the court's conduct violated the Canadian firm's special NAFTA-granted investor rights.
- USTR has tried to counter concerns about future CAFTA Chapter 10 cases by arguing that no U.S. laws have been subject to successful NAFTA cases. USTR claims that the Loewen case is not relevant because it was "dismissed." In fact, the World Bank tribunal issued a 100-page ruling on this case. All that was dismissed was the Canadian firm's right to collect the hundreds of millions it claimed in damages. The United States only dodged this huge financial liability because of an error by one of the Canadian firm's lawyers. While Loewen's trade lawyer had won the NAFTA case, the firm's bankruptcy lawyer reincorporated the failing firm as a U.S. corporation. This terminated Loewen's "foreign" investor status and thus it could not collect - even though it won on the merits.
- <u>But the substantive legal precedent has been established under NAFTA and would be expanded under CAFTA</u>. **Foreign investors do not have to follow the standard rules of U.S. civil procedure or accept as adequate the normal functions of domestic court system while U.S. citizens and companies must.**
- This experience caused U.S. legal scholars and state and local officials to oppose the "investor-state" system's grant of property rights in trade pacts that extend beyond U.S. law. Critics include the Conference of State Supreme Court Chief Justices and the National Association of Attorneys General.

6. Congress was so concerned about this problem that it specifically included language in the 2002 Fast Track legislation to prevent its recurrence.

- The legislation requires that future trade pacts grant to foreign investors "*no greater substantive rights with respect to investment protections than U.S. investors in the United States*" (19 USCA § 3801(3)) and that, future agreements should establish "*standards for expropriation and compensation for expropriation,* ***consistent with United States legal principles and practice***" and "*fair and equitable treatment [standards]* ***consistent with United States legal principles and practice****...*"
- Yet, although some words included in NAFTA's investor protection system were changed relative to CAFTA's provisions, CAFTA clearly fails Congress' test. In turn, the Conference of State Supreme Court Chief Justices, the National Association of State Attorneys General and the National Conference of State Legislators have written Congress expressing continuing concern about CAFTA's expansion of this unacceptable attack on U.S. property rights standards.
- Instead of basing foreign investors' property rights on U.S. law, as Congress required, CAFTA provides for foreign investor operating within the United States: a "minimum standard of treatment" set forth by *"customary international law"* (CAFTA Art. 10.5.1, Annex 10-B) and established in *"principal legal systems of the world."* (CAFTA Art. 10.5.2(a)) CAFTA also allows compensation for regulatory takings – called "indirect expropriation" in CAFTA (Art. 10, Annex 10-C (4)) – which is not allowed under U.S. law.

7. The serious sovereignty threats identified in NAFTA's foreign investor protection regime not only **were not fixed in CAFTA**, but new problems were created because CAFTA expands on what sorts of U.S. domestic decisions and actions are subject to compensation claims in the international tribunals under international law.

- For instance, CAFTA **goes beyond NAFTA** to subject investment agreements "*between a national authority... and an investor of another Party that grants the covered investment or investor rights with respect to natural resources or other assets that a national authority controls.*"(CAFTA Art. 10.28)
- This means that when U.S. companies obtain mining, logging or other concessions on U.S. federal lands their rights under U.S. law and their contracts are determined in **domestic courts** while foreign investors with the identical contracts would be able to take their disputes with the U.S. government to the **UN and World Bank tribunals**.
- This not only creates an unacceptable **double standard**, it cedes control of federal lands policy to international tribunals.
- Under NAFTA's similar foreign investor rights, 41 challenges to domestic regulatory policy have been filed, with eleven completed cases and five cases where foreign investors forced payment totaling over $35 million over zoning laws, construction permits, toxics bans and more. Only one NAFTA investor case had to do with expropriation of an investor's property. The others were attacks on regulations.

8. U.S. state procurement rules also threatened under CAFTA.

- **Governors from numerous states withdrew from having to comply with CAFTA procurement rules because they forbid anti-offshoring and other key procurement laws.**
- CAFTA's Chapter 9 strictly limits what criteria procuring entities may use in describing goods and services sought and qualification for bidders in ways that undermine many existing procurement laws, including "Buy America" or "Buy Local" laws.
- In response to these criticisms, the Bush administration has sought to talk around that fact by listing certain exceptions to that general rule. What are rules limiting domestic procurement policy doing in a *trade* agreement?

9. Bush administration's counter-arguments miss the point.

USTR has argued that: "CAFTA does not automatically preempt or invalidate laws in the United States. CAFTA does not in any way preempt or invalidate federal, state, or local laws that may be inconsistent with the agreement. This is because, while the United States has committed itself to adhere to the rules set out in CAFTA, those rules do not automatically override any domestic laws. CAFTA dispute panels cannot overturn or change U.S federal, state or local laws. CAFTA dispute settlement panels have no authority to change U.S. law or to require the United States or any state or local government to change its laws or decisions. Only the federal or state governments can change a federal or state law. If, ultimately, the United States cannot reach an agreed settlement with the country that brings a dispute settlement claim under CAFTA, that country may withdraw trade benefits of equivalent effect. However, under trade agreement rules, the United States retains complete sovereignty in its decision of how to respond to any panel decision against it."

But USTR does not mention that CAFTA would subject the United States to trade sanctions until we change or eliminate domestic laws deemed "CAFTA-illegal" by CAFTA's international tribunal.

- Members of Congress concerned about CAFTA's affect on U.S. sovereignty do not claim CAFTA would "*automatically* preempt or invalidate" or "overturn" U.S. law. USTR has created a strawman and then answered a question that no one asked. The real issue is that CAFTA would subject U.S. federal, state and local laws to review in a new international court that CAFTA's Chapter 20 would establish. CAFTA would empower that tribunal to judge whether U.S. laws conform with CAFTA's 1,000 pages of international law and then order the United States to change laws that do not conform. CAFTA would authorize imposition of trade sanctions against the United States *until* the federal, state or local law was brought into conformity with CAFTA. Thus, while CAFTA does not *automatically* change U.S. laws that violate CAFTA obligations, it creates a system under which the Congress and local officials must act to do so, or U.S. businesses and consumers would suffer perpetual trade sanctions. USTR calls this situation "retain[ing] complete sovereignty." However, the United States would retain only one sovereign choice: decide between changing the law as ordered or to face perpetual trade sanctions.

- Both Democratic and Republican Administrations have complied with similar rulings from similar WTO and NAFTA tribunals. For instance, the long process that resulted in the 2004 corporate tax bill was initiated to implement a WTO ruling against the U.S. FSC tax policy. That legislation changed our FSC corporate policy as the WTO ordered and then also became a vehicle for other tax policy changes.

- Under CAFTA, the U.S. federal government would be required to take all constitutionally-available actions to force state and local government to conform to the CAFTA tribunal rulings.