2005

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, House Committee on the Judiciary, 109th Cong., July 19, 2005 (Statement of Viet D. Dinh, Prof. of Law, Geo. U. L. Center)

Viet D. Dinh
Georgetown University Law Center, dinhv@law.georgetown.edu

CIS-No.: 2005-H521-48

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

WITNESSES

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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