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Hearing on
Foreign Judgments in the Interpretation of American Law
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
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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.

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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.”