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The Honorable F. James Sensenbrenner, Jr.
Chair, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand that your committee soon will mark up H.Res.97, introduced by Rep. Tom Feeney, to express the sense of the House of Representatives regarding the appropriate use of foreign judgments, laws and pronouncements by the federal courts. While we certainly do not dispute the authority of Congress to adopt a non-binding resolution directed to another branch of government, we are steadfastly opposed to H.Res.97 because of the principles it espouses and because it unnecessarily strains interbranch relations.

The resolution assumes that the federal judiciary already has relied inappropriately on foreign judgments, specifically citing Lawrence v. Texas as a recent example. This misconstrues Lawrence. The Court's opinion used European judgments to clarify the mistaken historical premises relied upon by the Court in Bowers v. Hardwick, which Lawrence overruled. The opinion summarized foreign perspectives, not to reach a definitive historical judgment, but rather because such "considerations counsel against adopting the definitive conclusions upon which Bowers placed such reliance." Slip opinion, p. 7. Later, the opinion cited the practices of other European countries in the context of examining whether the unique conditions of our nation provide distinguishable reasons for our government to circumscribe personal choice. Lawrence used foreign law not as precedent but rather as a tool to contrast and analyze our own jurisprudence.

The resolution indirectly propounds a doctrine of constitutional construction that is itself highly controversial. The resolution states that judicial determinations should not rely on foreign judgments, laws or pronouncements of foreign institutions unless they "...otherwise inform an understanding of the *original meaning* [emphasis added] of the laws of the United States." The debate over whether interpretation should always be limited to an inquiry into the original meaning of a text, or whether meanings may evolve over time to reflect a changing society, is as old as the Constitution and still unresolved. Our concern is that this incorporated jurisprudence

of original intent is presented as the normative mode of constitutional interpretation and therefore not a focus of discussion and debate.

The resolution also elevates one essential function of the federal judiciary over all others – that of “faithfully interpreting the popular will,” expressed “through laws enacted... and our system of checks and balances.” The founders devised a system whereby the federal judiciary was made an independent, coequal branch of government precisely so that it could withstand the “tyranny of the majority” in order to protect the rights of individuals against possible overreaching by the political branches. The federal courts not only have the obligation to faithfully interpret the laws popularly enacted, but also to strike them down if they run afoul of the U.S. Constitution.

While specific clauses of the resolution provoke concern, our overriding objection to H.Res.97 is that it unnecessarily intrudes on the independence of a co-equal branch of government and of the judges that the political branches have nominated and confirmed. The provisions of H.Res.97 demonstrate a disregard for the need for mutual respect and restraint in a system of government that gives each separate but co-equal branch power to hold the other accountable, yet requires cooperation and communication among the branches in order to accomplish the business of government. Respect for separation of powers suggests that Congress should refrain from telling the federal courts how they should perform their core adjudicatory functions

We realize that the issues raised by H.Res.97 are complex and that its cosponsors are concerned about preserving the supremacy of the U.S Constitution and protecting the sovereignty of the United States. However, the central issue addressed in this resolution -- the appropriate use of foreign sources by our federal courts -- is an evolving issue, and it has implications for many other issues such as the pitfalls and advantages of consulting other legal traditions, whether our courts should engage in comparative constitutional analysis, the effect of globalization on the types of cases that our courts are asked to settle, and the impact on foreign policy of the judgments of our courts. The debate is occurring not only in the halls of Congress but throughout academia, bar associations and judicial organizations. As evidenced by comments of several of our Supreme Court Justices and others on the federal bench, our judges are fully engaged in the discussion and fully aware of what is at stake. In time, as with so many important issues of the day, after ample discussion and debate, a consensus over the relevant issues and guiding principles may emerge.

We believe that there are better ways for Congress to participate in this debate than to propose or endorse this or similar resolutions. We urge you to reject this resolution and to pursue different avenues so that there can be a genuine, respectful exchange of ideas and concerns between Congress and the courts.

Sincerely,



Robert D. Evans

cc. Members of the Committee on the Judiciary