

(A) that is placed on a computer by, or on behalf of, an Internet service provider, interactive computer service, or Internet website; and

(B) the sole function of which is to record information that can be read or recognized when the user of the computer subsequently accesses particular websites or online locations or services.

(5) **FIRST RETAIL SALE AND DELIVERY.**—The term “first retail sale and delivery” means the first sale, for a purpose other than resale, of a protected computer and the delivery of that computer to the purchaser or a recipient designated by the purchaser at the time of such first sale. For purposes of this paragraph, the lease of a computer shall be considered a sale of the computer for a purpose other than resale.

(6) **INSTALL.**—

(A) **IN GENERAL.**—The term “install” means—

(i) to write computer software to a computer’s persistent storage medium, such as the computer’s hard disk, in such a way that the computer software is retained on the computer after the computer is turned off and subsequently restarted; or

(ii) to write computer software to a computer’s temporary memory, such as random access memory, in such a way that the software is retained and continues to operate after the user of the computer turns off or exits the Internet service, interactive computer service, or Internet website from which the computer software was obtained.

(B) **EXCEPTION FOR TEMPORARY CACHE.**—The term “install” does not include the writing of software to an area of the persistent storage medium that is expressly reserved for the temporary retention of recently accessed or input data or information if the software retained in that area remains inoperative unless a user of the computer chooses to access that temporary retention area.

(7) **PERSON.**—The term “person” has the meaning given that term in section 3(32) of the Communications Act of 1934 (47 U.S.C. 153(32)).

(8) **PROTECTED COMPUTER.**—The term “protected computer” has the meaning given that term in section 1030(e)(2)(B) of title 18, United States Code.

(9) **SOFTWARE.**—The term “software” means any program designed to cause a computer to perform a desired function or functions. Such term does not include any cookie.

(10) **UNFAIR OR DECEPTIVE ACT OR PRACTICE.**—The term “unfair or deceptive act or practice” has the same meaning as when used in section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

(11) **UPGRADE.**—The term “upgrade”, when used with respect to a previously installed software program, means additional software that is issued by, or with the authorization of, the publisher or any successor to the publisher of the software program to improve, correct, repair, enhance, supplement, or otherwise modify the software program.

#### SEC. 14. EFFECTIVE DATE.

This Act shall take effect 180 days after the date of enactment of this Act.

#### SUBMITTED RESOLUTIONS

#### SENATE RESOLUTION 92—EX-PRESSING THE SENSE OF THE SENATE 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

Mr. CORNYN submitted the following resolution; which was referred to the Committee on the Judiciary.

S. RES. 92

Whereas the Declaration of Independence announced that one of the chief causes of the American Revolution was that King George had “combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws”;

Whereas the Supreme court has recently relied on the judgments, laws, or pronouncements of foreign institutions to support its interpretations of the laws of the United States, most recently in *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002), *Lawrence v. Texas*, 539 U.S. 558, 573 (2003), and *Roper v. Simmons*, 125 S. Ct. 1183, 1198–99 (2005);

Whereas the Supreme Court has stated previously in *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997), that “We think such comparative analysis inappropriate to the task of interpreting a constitution . . .”;

Whereas the ability of Americans to live their lives within clear legal boundaries is the foundation of the rule of law, and essential to freedom;

Whereas it is the appropriate judicial role to faithfully interpret the expression of the popular will through the Constitution and laws enacted by duly elected representatives of the American people and under our system of checks and balances;

Whereas Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations; and

Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States, the separation of powers, and the President’s and the Senate’s treaty-making authority: Now, therefore, be it

*Resolved*, That it is the sense of the Senate 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. CORNYN. Mr. President, I rise to express concern over a trend that some legal scholars and observers say may be developing in our courts—a trend regarding the potential influence of foreign governments and foreign courts in the application and enforcement of U.S. law.

If this trend is real, then I fear that, bit by bit, case by case, the American people may be slowly losing control over the meaning of our laws and of

our Constitution. If this trend continues, foreign governments may even begin to dictate what our laws and our Constitution mean, and what our policies in America should be.

In a series of cases over the past few years, our courts have begun to tell us that our criminal laws and criminal policies are informed, not only by our Constitution and by the policy preferences and legislative enactments of the American people through their elected representatives, but also by the rulings of foreign courts.

It is hard to believe—but in a series of recent cases, the U.S. Supreme Court has actually rejected its own prior precedents, in part because of a foreign government or court has expressed its disagreement with those precedents.

With your indulgence, I will offer just a few of the most recent examples.

Until recently, the U.S. Supreme Court had long held that the death penalty may be imposed on individuals regardless of their I.Q. The Court had traditionally left that issue untouched, as a question for the American people, in each of their States, to decide. That was what the Court said in a case called *Penry v. Lynaugh* (1989). Yet because some foreign governments have frowned upon that ruling, the U.S. Supreme Court has now seen fit to take that issue away from the American people. In 2002, in a case called *Atkins v. Virginia*, the U.S. Supreme Court held that the Commonwealth of Virginia could no longer apply its criminal justice system and its death penalty to an individual who had been duly convicted of abduction, armed robbery, and capital murder, because of testimony that the defendant was “mildly mentally retarded.” The reason given for the complete reversal in the Court’s position? In part because the Court was concerned about “the world community” and the views of the European Union.

Take another example. The U.S. Supreme Court has long held that the American people, in each of their States, have the discretion to decide whether certain kinds of conduct that has been considered immoral under our longstanding legal traditions should or should not remain illegal. In *Bowers v. Hardwick* (1986), the Court held that it is up to the American people to decide whether criminal laws against sodomy should be continued or abandoned. Yet once again, because some foreign governments have frowned upon that ruling, the U.S. Supreme Court has seen fit to take that issue away from the American people. In 2003, in a case called *Lawrence v. Texas*, the U.S. Supreme Court held that the State of Texas could no longer decide whether its criminal justice system may fully reflect the moral values of the people of Texas. The reason given for the complete reversal? This time, the Court explained, it was in part because it was concerned about the European Court of Human Rights and the European Convention on Human Rights.

Here's yet another example, from just a few weeks ago. Until this month, the U.S. Supreme Court had always held that 16- and 17-year-olds—like John Lee Malvo, the 17-year-old who terrorized the Washington area in a sniper spree that left 10 people dead—may be subject to the death penalty, if that is indeed the will of the people. The Court said as much in a case called *Stanford v. Kentucky* (1989). Yet because some foreign governments have frowned upon that ruling as well, the U.S. Supreme Court, on March 1 of this year, saw fit yet again to take this issue away from the American people. In *Roper v. Simmons*, the U.S. Supreme Court held that the State of Missouri could no longer apply its death penalty to 16- and 17-year-olds convicted of murder, no matter how brutal and depraved the act, and no matter how unrepentant the criminal. The reason given for this most recent complete reversal? In part because of treaties the U.S. has never even ratified, like the United Nations Convention on the Rights of the Child, and because many foreign countries disagree with the people of Missouri.

The trend may be continuing. Next Monday, March 28, the U.S. Supreme Court will consider the question whether foreign nationals duly convicted of the most heinous crimes are nevertheless entitled to a new trial—for reasons that those individuals did not even bother to mention at their first trial. As in the previous examples, the Supreme Court has actually already answered this question. In *Breard v. Greene* (1998), the Court made clear that criminal defendants, like all parties in litigation, may not sit on their rights and then bring up those rights later to stall the imposition of their criminal sentences. That basic principle of our legal system, the Court explained, is not undermined just because the accused happens to be a foreign national subject to the Vienna Convention on Consular Relations. Even this basic principle of American law may soon be reversed, however. Many legal experts predict that, in the upcoming case of *Medellin v. Dretke*, the Court may overturn itself yet again, for no other reason than that the International Court of Justice happens to disagree with our longstanding laws and legal principles. That case involves the State of Texas, and I have filed an amicus brief asking the Court to respect its own precedents as well as the authority of the people of Texas to determine its criminal laws and policies consistent with our U.S. Constitution. There is a serious risk, however, that the Court will ignore Texas law, ignore U.S. law, and ignore the U.S. Constitution, and decide in effect that the decisions of the U.S. Supreme Court can be overruled by the International Court of Justice.

There are still other examples, other decisions, where we see Supreme Court justices citing legal opinions from foreign courts all across the globe—from

India, Jamaica, Zimbabwe—the list goes on and on.

I am concerned about this trend. Step by step, with every case, the American people may be losing their ability to determine what their criminal laws shall be—losing control to the control of foreign courts and foreign governments. And if this can happen with criminal law, it can also spread to other areas of our government and of sovereignty. How about economic policy? Or foreign policy? Or our decisions about security and military strategy?

I think most Americans would be disturbed if we gave foreign governments the power to tell us what our Constitution means. Our Founding Fathers fought the Revolutionary War precisely to stop foreign governments from telling us what our laws say. In fact, ending foreign control over American law was one of the very reasons given for the Revolutionary War. The Declaration of Independence specifically complains that the American Revolution is justified because King George, and I quote, “has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws.” After a long and bloody revolution, we earned at last the right to be free of such foreign control. It was “We the People of the United States” who then ordained and established a Constitution of the United States, and our predecessors specifically included a mechanism by which only “We the People of the United States” could change it if necessary. And of course, every Federal judge and justice swears an oath to “faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States. So help me God.”

I am concerned about this trend. I am concerned that this trend may reflect a growing distrust amongst legal elites—not only a distrust of our constitutional democracy, but a distrust of America itself.

First, it reflects distrust of our constitutional democracy.

As every high school civics student learns, the job of a judge is pretty straightforward. Judges are supposed to follow the law, not rewrite it. Judges are supposed to enforce and apply political decisions, not make them. The job of a judge is to read and obey the words that are contained in our laws and in our judicial precedents—not the laws and precedents of foreign governments, which have no sovereign authority over our Nation.

I fear, though, that some judges simply don't like our laws, and they don't like the political decisions that are being made by the American people, through their elected representatives, about what our laws should be. So perhaps they would rather rewrite the law from the bench. What's especially disconcerting is that some judges today may be departing so far from American law, from American principles, and

from American traditions, that the only way they can justify their rulings from the bench is to cite the law of foreign countries, foreign governments, and foreign cultures—because there is nothing in this country left for them to cite for support.

Moreover, citing foreign law in order to overrule U.S. policy offends democracy, because foreign lawmaking is in no way accountable to the American people.

There is an important role for international law to play in our system here in the United States, to be sure. But it is a role that belongs to the American people, through the political branches of the United States—to the Congress and to the President, to decide what role international law shall play in our legal system. It is emphatically not a role that is given to our courts. Article I of the Constitution gives Congress, not the courts, the authority to enact laws punishing “Offenses against the Law of Nations.” And Article II of the Constitution gives the President the power to ratify treaties, subject to the advice and consent and the approval of two-thirds of the Senate. Yet our courts are overruling U.S. law by citing foreign law decisions in which the U.S. Congress has had no role, and citing treaties that the U.S. President and the U.S. Senate have refused to approve.

To those who might say there is nothing wrong with simply trying to bring U.S. law into consistency with other nations, I say this: This is not a good faith effort to bring U.S. law into global harmony. I fear that this is simply an effort to further a particular ideological agenda. Because the record suggest that this sudden interest in foreign law is political, not legal; it seems selective, not principled. U.S. courts are following foreign law inconsistently—only when needed to achieve a particular outcome that a judge or justice happens to desire, but that is flatly inconsistent with U.S. law and precedent. Many countries, for example, provide no exclusionary rule to suppress evidence that is otherwise useful and necessary to convict criminal defendants—yet our courts have not abandoned our constitutional rule on that topic. Very few countries provide for abortion on demand—yet our courts have not abandoned our Nation's constitutional jurisprudence on that subject. Four justices of the Supreme Court believe that school choice programs to benefit poor urban communities are unconstitutional if parochial schools are eligible, even though many other countries directly fund religious schools.

Even more disconcerting than this distrust of our constitutional democracy is the distrust of America itself.

I would hope that no American would ever believe that the citizens of foreign countries are always right, and that Americans are always wrong. Yet I worry that some judges may become more and more interested in impressing foreign governments, and less and

less interested in simply following American law. Indeed, at least one Supreme Court justice has stated publicly that following foreign rulings, rather than U.S. rulings, and I quote, “may create that all important good impression,” and therefore, and I quote, “over time we will rely increasingly . . . on international and foreign courts in examining domestic issues.”

This attitude is especially disturbing today. The brave men and women of our Armed Forces are putting their lives on the line in order to champion freedom and democracy not just for the American people, but for people all around the world. America today is the world’s leading champion of freedom and democracy. Meanwhile, the United Nations is rife with corruption, and the United Nations Human Rights Commission is chaired by Libya.

I am disturbed by this trend, and I hope that the American people will have a chance to speak out. I believe that the American people do not want their courts to make political decisions; they want their courts to follow and apply the law as it is written. The American people do not want their courts to follow the precedents of foreign courts; they want their courts to follow U.S. law and the precedents of U.S. courts. The American people do not want their laws controlled by foreign governments; they want their laws controlled by the American government, which serves the American people. The American people do not want to see American law and American policy outsourced to foreign governments and foreign courts.

So today, I submit a sense of the Senate resolution, to give this body the opportunity to state for the record that this trend in our courts is wrong, and that American law should never be reversed or rejected simply because a foreign government or foreign court may disagree with it. This resolution is nearly identical to one that has been introduced by my colleague in the House of Representatives, Congressman TOM FEENEY. I applaud his leadership and his efforts in this area, and I hope that both the House and the Senate will come together and follow in the footsteps of our Founding Fathers, to once again defend our right as Americans to dictate the policies of our government—informed, but never dictated, by the preferences of any foreign government or tribunal. And I ask that the text of the resolution be included at the appropriate place in the RECORD.

SENATE CONCURRENT RESOLUTION 23—PROVIDING FOR A CONDITIONAL ADJOURNMENT OR RECESS OF THE SENATE, AND A CONDITIONAL ADJOURNMENT OF THE HOUSE OF REPRESENTATIVES

Mr. FRIST (for himself and Mr. REID) submitted the following concurrent resolution; which was considered and agreed to:

S. CON. RES. 23

*Resolved by the Senate (the House of Representatives concurring),* That when the Senate recesses or adjourns on any day from Sunday, March 20, 2005, through Sunday, April 3, 2005, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it stand recessed or adjourned until noon on Monday, April 4, 2005, or until such other time as may be specified by the Majority Leader or his designee in the motion to recess or adjourn, or until the time of any reassembly pursuant to section 2 of this concurrent resolution, whichever occurs first; and that when the House adjourns on any day from Sunday, March 20, 2005, through Monday, April 4, 2005, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it stand adjourned until 2 p.m. on Tuesday, April 5, 2005, or until the time of any reassembly pursuant to section 2 of this concurrent resolution, whichever occurs first.

SEC. 2. The Majority Leader of the Senate and the Speaker of the House, or their respective designees, acting jointly after consultation with the Minority Leader of the Senate and the Minority Leader of the House, shall notify the Members of the Senate and House, respectively, to reassemble at such place and time as they may designate whenever, in their opinion, the public interest shall warrant it.

SENATE CONCURRENT RESOLUTION 24—EXPRESSING THE GRAVE CONCERN OF CONGRESS REGARDING THE RECENT PASSAGE OF THE ANTI-SECESSION LAW BY THE NATIONAL PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA

Mr. GRAHAM (for himself, Mr. ALLEN, Mr. JOHNSON, Mr. CHAMBLISS, Mr. KYL, Mr. BOND, Mr. INHOFE, Mr. COBURN, Mr. DORGAN, and Mr. SCHUMER) submitted the following concurrent resolution; which was referred to the Committee on Foreign Relations:

S. CON. RES. 24

Whereas, on December 9, 2003, President George W. Bush stated it is the policy of the United States to “oppose any unilateral decision, by either China or Taiwan, to change the status quo” in the region;

Whereas, in the past few years, the United States Government has urged both Taiwan and the People’s Republic of China to maintain restraint;

Whereas the National People’s Congress of the People’s Republic of China passed an anti-secession law on March 14, 2005, which constitutes a unilateral change to the status quo in the Taiwan Strait;

Whereas the passage of China’s anti-secession law escalates tensions between Taiwan and the People’s Republic of China and is an impediment to cross-strait dialogue;

Whereas the purpose of China’s anti-secession law is to create a legal framework for possible use of force against Taiwan and mandates Chinese military action under certain circumstances, including when “possibilities for a peaceful reunification should be completely exhausted”;

Whereas the Department of Defense’s Report on the Military Power of the People’s Republic of China for Fiscal Year 2004 documents that, as of 2003, the Government of the People’s Republic of China had deployed approximately 500 short-range ballistic missiles against Taiwan;

Whereas the escalating arms buildup of missiles and other offensive weapons by the

People’s Republic of China in areas adjacent to the Taiwan Strait is a threat to the peace and security of the Western Pacific area;

Whereas, given the recent positive developments in cross-strait relations, including the Lunar New Year charter flights and new proposals for cross-strait exchanges, it is particularly unfortunate that the National People’s Congress adopted this legislation;

Whereas, since its enactment in 1979, the Taiwan Relations Act (22 U.S.C. 3301 et seq.), which codified in law the basis for continued commercial, cultural, and other relations between the people of the United States and the people of Taiwan, has been instrumental in maintaining peace, security, and stability in the Taiwan Strait;

Whereas section 2(b)(2) of the Taiwan Relations Act declares that “peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern”;

Whereas, at the time the Taiwan Relations Act was enacted into law, section 2(b)(3) of such Act made clear that the United States decision to establish diplomatic relations with the People’s Republic of China rested upon the expectation that the future of Taiwan would be determined by peaceful means;

Whereas section 2(b)(4) of the Taiwan Relations Act declares it the policy of the United States “to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States”;

Whereas section 2(b)(6) of the Taiwan Relations Act declares it the policy of the United States “to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan”;

Whereas any attempt to determine Taiwan’s future by other than peaceful means and other than with the express consent of the people of Taiwan would be considered of grave concern to the United States: Now, therefore, be it

*Resolved by the Senate (the House of Representatives concurring),*

(1) the anti-secession law of the People’s Republic of China provides a legal justification for the use of force against Taiwan, altering the status quo in the region, and thus is of grave concern to the United States;

(2) the President should direct all appropriate officials of the United States Government to convey to their counterpart officials in the Government of the People’s Republic of China the grave concern with which the United States views the passage of China’s anti-secession law in particular, and the growing Chinese military threats to Taiwan in general;

(3) the United States Government should reaffirm its policy that the future of Taiwan should be resolved by peaceful means and with the consent of the people of Taiwan; and

(4) the United States Government should continue to encourage dialogue between Taiwan and the People’s Republic of China.

ORDERS FOR MONDAY, MARCH 21, 2005

Mr. FRIST. Mr. President, I ask unanimous consent that when the Senate completes its business today, the Senate stand in adjournment until 9:30 a.m. on Monday, March 21, unless the House adopts S. Con. Res. 23, at which time the Senate will then be in adjournment under the provisions of the