TO REQUIRE ANY FEDERAL OR STATE COURT TO RECOGNIZE ANY NOTARIZATION MADE BY A NOTARY PUBLIC LICENSED BY A STATE OTHER THAN THE STATE WHERE THE COURT IS LOCATED WHEN SUCH NOTARIZATION OCCURS IN OR AFFECTS INTERSTATE COMMERCE

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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ON

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THURSDAY, MARCH 9, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:07 a.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Subcommittee) presiding.

Mr. SMITH. The Committee on Courts, the Internet, and Intellectual Property will come to order.

I'm going to recognize Members for opening statements, and then we'll get to our witnesses' testimony as quickly as we can.

This morning the Subcommittee will venture into unchartered, but hopefully not shark-infested waters. Frankly, I cannot recall this Committee ever reviewing the Notary profession or how its members operate.

The reason is that notaries are licensed by the individual States, not the Federal Government. But our colleague and friend from Alabama, Representative Aderholt, introduced a bill that is the subject of our hearing.

His interest stems from a complaint registered by one of his constituents, who will testify as one of our witnesses today.

For the record, a Notary Public administers oaths and serves as an impartial witness when documents are signed. Many States require that certain documents, such as affidavits, deeds, and powers of attorney, be notarized before they become legally binding on parties.

In this respect, notaries are important participants in many legal and commercial transactions.

Since the point of legal notarization is to deter fraud, a notary must positively identify the signatory to a document and ensure that he or she signs the document knowingly and willingly.

A notary typically affixes his or her signature as well as an official seal to the document as further testament to its authenticity.

Most States require an individual wishing to become a notary to submit an application, pay a fee, and take an oath of office. Many States also require an applicant to enroll in an educational course, pass an examination, and obtain a notary bond.

So what does Congress have to do with notary operations?

Legal disputes, Federal as well as State, are not always confined to the geographic and judicial domains of a single State. Much of our country's litigation crosses State lines.

The reason we are reviewing H.R. 1458 is that lawfully notarized documents in one State may not always be acknowledged in another State.

The Subcommittee needs to investigate the extent to which this is a genuine problem that requires a Federal legislative response. We must also determine if it is appropriate to act given 10th Amendment sensitivities and the concern for States' Rights.

We have a good panel of witnesses today who can help the Subcommittee better understand the underlying subject matter and answer these questions.

That concludes my opening statement, and the gentleman from California, Mr. Berman, is recognized for his opening statement.

Mr. BERMAN. Thank you very much, Mr. Chairman. Although the topic of notary recognition between the States isn't necessarily the most exciting issue, it's an extremely practical one, and so I'm looking forward to hearing the witnesses' testimony.

Notaries are involved in many aspects of legal and commercial transactions, from trusts in the States to real estate.

Currently, each individual State creates its own laws to regulate the notary profession.

H.R. 1458 has been introduced in an attempt to unify and standardize the acceptance of out-of-State notarial acts by State and Federal courts. There have been past attempts at unifying the requirements for notarial acts; some made by the National Notary Association, others made by the National Conference of Commissioners on Uniform State Laws.

Over the course of 3 decades, legislators and notary regulating officials have borrowed from these models in reforming State and territorial notary laws on inconsistent basis.

In some cases, only a few sections were adopted into statute. In others, the model was virtually—was enacted virtually in its entirety.

Fourteen fifty eight would require each Federal or State court to recognize out-of-State notarial acts under the following two conditions: First, where such notarization occurs in or affects interstate commerce; and secondly, if a seal of the notary public's authority is used in the notarization; or in the case of an electronic record, the seal information is logically associated with the electronic record so as to render the record tamper resistant.

Does the bill raise any constitutional issues? For example, does the bill's language violate the 10th Amendment, which disallows the Federal Government's encroachment upon the States' reserve powers or would the concept of full faith and credit apply?

I look forward to hearing what specific situations the bill is trying to address, how prevalent the problem is out of out-of-State notarial recognition and how the witnesses will address the States'

Rights issues touched on by this bill, such as the relevance and applicability of the 10th Amendment and the full faith and credit clause. I yield back, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman. The gentleman from California, Mr. Issa, is recognized, and I want to point out that Mr. Issa, after the Chairman and the Ranking Member, has the best attendance record of any other Member of this Subcommittee. Mr. Issa?

Mr. ISSA. Thank you, Mr. Chairman. And I will thank you for holding this hearing today. Some people might think that this is not the most exciting issue. And they'd be right.

However, life experience leads me to realize this is an important issue. As somebody in business for more than 20 years, I discovered that one State asks for a seal, while another State doesn't recognize seals. If you happen to be in a State that doesn't have a seal and you go to another State, and they say, where's your corporate seal, you have to go make a corporate seal, even though your own State doesn't have them. That sort of inconsistency in commerce in this day and age is unbelievable. But more so, the idea that one State would not recognize a notary public's signature while, in fact, and I'll be brief, my own life experience shows that more than 25 years ago, when I had to prove that I was the grandson of a landowner in Lebanon, I simply had to get a notarized copy of the death certificate of my father and my birth certificate, go and have it certified by the county as notarized, and since I went to the county that I could do those both by going to two windows. I then went to a counsel general, who kept copies of all the signatures of all the counties' clerks to verify that that was within my State a proper signature, which allowed me to go to Lebanon and have my documents recognized.

If a quarter of a century ago, a miniscule country of less than 3 million people could have a system for recognizing the notary public in the county of Cuyahoga in the State of Ohio, it is unbelievable that among the 50 States we cannot have an equally effective system without congressional action. Since it's obvious that we can't, I look forward to this hearing and the passage of the bill.

I yield back.

Mr. SMITH. Thank you, Mr. Issa. That's a particularly interesting personal story that I hadn't heard before, so—and it—it does impact on the subject at hand, too.

I'd like to invite our witnesses to stand and be sworn in and then we'll get to your testimony.

If you'll raise your right hand.

[Witnesses sworn.]

Mr. SMITH. Please be seated.

Our first witness is Tim Reiniger, who is Vice President and Executive Director of the National Notary Association. Mr. Reiniger is an attorney who has litigated commercial disputes for more than 10 years. He is also a fellow public official, having served as an alderman in Manchester, New Hampshire.

Mr. Reiniger earned his bachelor's degree cum laude from Georgetown University and his law degree from the University of Michigan.

Our next witness is Malcolm Morris, Associate Dean and Professor of Law at Northern Illinois University. Professor Morris teaches Federal taxation, property and trusts, and estates. He has written numerous law review articles and practitioner-oriented works, including Notary Law and Practice: Cases and Materials.

Professor Morris earned his B.S. from Cornell University, a J.D. from the State University of New York at Buffalo, and an L.L.M. from Northwestern University.

Our third western—excuse me—third witness is Dean Googasian, a trial lawyer from Bloomfield Hills, Michigan.

Before entering private practice, Mr. Googasian clerked for a member of the Michigan Supreme Court and worked for the U.S. Department of Justice. He did his undergraduate work at the University of Michigan and later graduated first in his class from Wayne State University Law School.

Our final witness is Mike Turner, the owner of Freedom Court Reporting in Birmingham, Alabama, the largest reporting company in the State. He has 30 years of experience as a notary and court reporter and frequently travels out of State to conduct business.

Mr. Turner was educated at the University of Alabama at Birmingham and Lipper's Court Reporting College in Plainview, Texas. That gives you extra status today.

Welcome to you all. We have your entire statements and without objection, they will be made a part of the record. And, Mr. Reiniger, we'll begin with you.

TESTIMONY OF TIMOTHY S. REINIGER, ESQ., EXECUTIVE DIRECTOR, NATIONAL NOTARY ASSOCIATION

Mr. REINIGER. Thank you, Mr. Chairman, and honorable Representatives of the Committee.

I am honored to be here today on behalf of the National Notary Association, which is the largest professional association for notaries public in the United States, with 300,000 members. I'm also pleased to be here today with our Vice President of Notary Affairs and the nation's leading expert on notary matters and laws. That is Mr. Chuck Ferber, who's sitting behind me.

This is indeed on the surface what appears to be—kind of a dry subject that's not normally discussed, but, in fact, is becoming a matter of central importance, particularly with respect to evidence and admissibility of records in court.

Now, I do have written comments I will be submitting today, and I will submit those for the record. I'm going to address orally now just a few of the major points we see with respect to evidence.

And, in fact, last December, the 9th Circuit Bankruptcy Court Panel in the American Express case issued an opinion with respect to electronic records and their admissibility—now, in that case not specifically notarized records.

But it goes to the heart of our substitute language that we are submitting with respect to the electronic notary seals, and electronic documents. In the American Express case the electronic records were not authenticated. They were not allowed into evidence at all because of the lack of sufficient ability to prove their authenticity, their genuineness from the time they were created throughout the history of that record.

Notarization at its heart is a means of proving the authenticity and genuineness of a document. As you all mentioned, the signer intentionally adopts the contents of the document as his or her act before the independent accountable witness, which is the notary.

The seal is the physical evidence of the material act and the physical evidence proof of that individual's official character or status as a notary.

Now, how does the notarization establish or prove the document's authenticity? In two ways: the notary verifies the identity of the signer and also verifies the content integrity or completeness.

The rules of Federal evidence—of Federal Rules of Evidence and the most of the State rules of evidence also area based on this bedrock principle of authentication via the seal. However, these rules leave some gaps. They refer to seals on public documents, documents which have been acknowledged. And this has resulted in some uneven application in various States from our experience, including you will hear today from the State of Michigan, and that case concerning the affidavit.

This bill, for the current paper world, would help to address that problem, to create a uniform recognition and application of documents for the notary seal for the purpose of admissibility. It does not speak to or require that the court enforce the document, but a prerequisite to enforcing the document is that it first be admissible in court, so that is the hurdle that this bill is addressing and that is the key reason we are supporting it.

Now, this hurdle will become even more complicated, as I mentioned, with electronic documents, and how that authenticity is established.

In the paper world, the notary seal is physically affixed to the document. The States set those requirements. The States determine the form of the seal, whether it should be affixed with an embossment or with a stamp or the typewritten words "notary public."

This bill does not, in any way, interfere with the ability or how the States will determine how the seal is affixed to the document. It merely sets a minimum standard, however, as to how these documents will be treated by a court for admissibility purposes, so it addresses the legal effect of the document and no way interferes with State rules for affixing seals or even commissioning notaries.

A very key aspect is that, particularly for the electronic world, to preserve that same built-in test for authenticity that is given in the paper world by the seal, in the electronic. Because of the ease of making changes, alterations to the documents, it is essential that the notary seal be securely affixed to the document in such fashion that any changes are rendered detectable. This is absolutely essential for admissibility in court, to be able to test the authenticity of the document. This is a very important capability.

So, again, the reasons for our support for the substitute bill is that one, this will preserve the ability of the notarization system as it currently exists, to provide integrity to commerce, both in paper and electronic forms.

Mr. SMITH. Okay. Mr. Reiniger, can you conclude your testimony, and you'll be able I suspect cover some of those same subjects during the question and answer period.

Mr. REINIGER. Absolutely. And this bill will address the many current problems in the admissibility of notarized documents from State to State. Thank you.

[The prepared statement of Mr. Reiniger follows:]

PREPARED STATEMENT OF TIMOTHY S. REINIGER

The National Notary Association, a non-profit professional organization serving the 4.5 million notaries public of the United States, is strongly in favor of the Substitute to H.R. 1458.

This bill would require federal and state courts to admit into evidence any notarized document originating in another state, provided that document affects interstate commerce and the Notary's seal of office is affixed to it.

Notaries, of course, constitute one of the nation's critical front lines of defense against forgery and other identity crimes, protecting the titles to our homes and other valuable property, as well as our rights to due process under law. Notaries screen document signers for identity, volition and basic awareness, thereby daily preventing a multitude of fraudulent acts, including those that might be committed to fund and support terrorist activities.

'FULL FAITH AND CREDIT' DOCTRINE IGNORED

You may not be aware that, despite the "full faith and credit" provision of the U.S. Constitution's Article IV, Section 1, lawfully notarized documents are often rejected when sent across state lines. The reasons for these rejections typically concern form and not substance.

For example, a document notarized in State A may be rejected in State B because the acknowledgment certificate wording used in State A does not conform verbatim to that prescribed by statute or custom in State B, even though it conforms in substance.

Another example: A document notarized in State A may be rejected in State B because State A by law requires notaries to use inking seals and State B by statute or custom requires embossers.

Yet another example: A document notarized in State A may be rejected in State B because the latter state imposes special authentication rules beyond lawful notarization that State A may be unequipped to carry out.

In almost every case, the cause of these document rejections is cosmetic and does not pertain to the propriety or substance of the notarial act itself.

These frequent document rejections constitute a serious impediment to interstate commerce, and they impose appreciable costs on business and government.

MODEL AND UNIFORM LAWS DO NOT SOLVE PROBLEM

One way the National Notary Association has tried to solve the problem of these rejections is by creating, promulgating and updating a *Model Notary Act* for adoption by state legislatures, so that state notary laws across the nation might become more uniform. Although a number of states have enacted some or all of the provisions of the *Model Notary Act* in its updated forms—most recently Massachusetts, New Mexico and North Carolina—most states have not.

Over the years, uniform laws have been created and promulgated by the National Conference of Commissioners on Uniform State Laws to recognize notarial acts performed in other states and jurisdictions of the United States. These acts are: the *Uniform Acknowledgment Act* of 1939; the *Uniform Recognition of Acknowledgments Act* of 1968; and the *Uniform Law on Notarial Acts* of 1982, which was drafted to replace the two preceding acts.

However, these uniform laws have not solved the rejection problem for three reasons. First, not all states have adopted these uniform laws; for example, only 11 states have adopted the *Uniform Law on Notarial Acts* of 1982. Second, the oldest of these uniform laws applies only to recognition of acknowledgment notarizations, and not to other notarial acts such as jurats. And third, none of the uniform laws deals with admissibility issues and rules for the evidentiary use of the notary seal.

NOTARY SEALS DETER AND REVEAL FRAUD

The Substitute to H.R. 1458 would much more directly and effectively address the problem of notarized documents being rejected for form or technical reasons after crossing a state border. It would require federal and state courts to accept documents that have been lawfully notarized out of state, provided these documents involve interstate commerce and bear the seal of the notary.

The seal, of course, is not only the distinguishing symbol of the notary public office in both the paper and electronic world, but it is also an effective fraud-deterrent device that, when adroitly used, can deter or reveal fraudulent addition or replacement of the pages in a paper document. In the case of electronic documents—and as provided in the Substitute to H.B. 1458—any electronic seal must likewise render the electronic document tamper-resistant, with the capability of making evident any unauthorized, fraudulent attempts to alter the document.

THE FEDERAL RULES OF EVIDENCE

The notary public seal is critical when it comes to the admissibility of evidence. Authentication by seal is a bedrock evidentiary principle in the *Federal Rules of Evidence* (902 [1] and [2]) and in the many state laws they have inspired. These rules reflect the evidentiary principle of authentication by seal of a public officer as a condition precedent to that document's admissibility and entitlement to full faith and credit legal enforceability. It is recognized that the risk of forgery is reduced by the requirement of authentication by a public officer who possesses and affixes a seal. (See, Advisory Committee Note to FRE 902 [2].)

Under the many state laws that mirror the *Federal Rules of Evidence,* documents under the seal of a public officer are generally considered self-authenticating. It has long been established that a notary is a public officer. See, for example, Pierce v. Indseth, (106 US at 549; 1 SCt 418 [1883]), stating that notaries "are officers recognized by the commercial law of the world." As a public officer, a notary affixes a seal and signature to authenticate a document without the need for extrinsic evidence to prove the seal and signature's genuineness or to confirm the notary's capacity.

Seal use by notaries is near universal, with 44 out of 56 U.S. states and territorial jurisdictions by law requiring a physical imprint of an official seal—either an embosser, an inking stamp, or both. Eleven of the remaining 12 jurisdictions that do not impose a formal seal requirement nonetheless have a law such as New York's Executive Law (Section 137) requiring notaries to "print, typewrite, or stamp" such information as the notary's name, county, and commission expiration date on each document notarized—certainly a seal requirement in all but name.

NEW ERA OF ELECTRONIC DOCUMENTS

Increasingly, there is a significant interstate dimension to the notarial system in the United States, especially in this new era of notarized electronic documents, when digital instruments may be instantaneously sent coast to coast at the touch of a computer key.

In this new electronic era, Article IV, Section 1, of the U.S. Constitution has taken on a new significance when it says: "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Under our federal system, full faith and credit recognition by sister states and territories is obligatory, not discretionary, provided the public act, record, or judgment was lawful in the U.S. state or territory of origin. The official acts of all public officials—whether judges, county clerks, recorders of deeds, justices of the peace, or notaries—are entitled to interstate recognition.

This principle of full faith and credit was recognized in a noted 1912 case (Nicholson v. Eureka Lumber, 160 NC 33; 75 SE 730 [NC 1912]), when North Carolina accepted a notarization lawfully performed in Texas by a female notary, at a time when that state did not allow women to serve as notaries.

ONE EXAMPLE OF AN IMPEDIMENT TO COMMERCE

In the experience of the National Notary Association, many of the 4.5 million notaries of the United States are veterans of what have been described as frustrating and time-consuming "coast-to-coast document ping-pong matches." In these interstate exchanges, a document notarized, let's say, in California may be sent for filing in Alabama, but an attorney or clerk in Alabama will then tear off the California notarial form, attach a blank Alabama form, and send it back to California with the note, "Use this certificate." The notary, however, receiving the document a second time, will write a note back saying that California law obliges him or her to use only the notary form dictated by California statute. In this fashion, such a document may make three or four transcontinental trips, with accompanying phone calls and a hurried search for a new notary who will be less scrupulous about the wording of the certificates he or she notarizes.

Indeed, in the early 1990s, the volume of such disruptive interstate standoffs caused the California Legislature to enact a law (Civil Code 1189[c]) stating that California notaries may use out-of-state acknowledgment forms on documents to be

filed out of state, but must use only California's statutory acknowledgment on documents filed in California.

The Substitute to H.R. 1458 will lessen the need for such state laws, which should be seen as discomfiting evidence that the "full faith and credit" provision of our Constitution could use some help when it comes to interstate recognition of notarial acts.

ADDITIONAL PROPOSED AMENDMENTS

To perfect this legislation, the National Notary Association does recommend several technical amendments. First, we recommend that the bill specify that only "lawful" notarizations be recognized by the federal or state courts. Second we recommend that the bill reflect the fact that while some states may "license" their notaries, as is the current term used in the bill, others may instead "commission" or "appoint" them.

(Accordingly, the following changes, underlined, to the Substitute to H.R. 1458 would result:

> Each Federal court shall recognize any *lawful* notarization made by a notary public *commissioned, appointed, or* licensed under the laws of a State other than the State where the Federal court is located. . . .
>
> Each court that operates under the jurisdiction of a State shall appoint any *lawful* notarization made by a notary public *commissioned, appointed, or licensed under the laws of a State other than the State where the court is located. . . .)*

CONCLUSION

In conclusion, I urge your support of the Substitute to H.R. 1458 as a major step in removing the serious impediment to interstate commerce caused by the frequent rejection of properly notarized documents for form or technical reasons—rejection that imposes appreciable delays and costs on business and government.

Mr. SMITH. Okay. Thank you, Mr. Reiniger. Mr. Morris?

TESTIMONY OF MALCOLM L. MORRIS, ESQ., PROFESSOR AND ASSOCIATE DEAN, COLLEGE OF LAW, NORTHERN ILLINOIS UNIVERSITY

Mr. MORRIS. Thank you, Mr. Chairman and distinguished Committee Members, for allowing me to be here today to lend my support to H.R. 1458 and explain why it will prove valuable in promoting interstate commerce.

The bill puts in place a simple principle: an official act, properly performed in one State deserves recognition it its sister States. I think that somewhat addresses the full faith and credit issues, which are in my written testimony.

I am going to stay more on text, because to allow a professor to free wheel, we'll get nothing done in 5 minutes. So please bear with me.

My support is based upon my view that this bill will help eliminate unnecessary impediments in handling the everyday transactions of individuals and businesses. Many documents executed and notarized in one State, either by design or happenstance, find their way into neighboring or more distant States.

If ultimately needed in any one of the latter jurisdictions to support or defend the claim in court that document should not be refused admission solely on the ground it was not notarized in the State where the court sits. The bill seeks to ensure this would not happen.

Significantly, H.R. 1458 includes electronic notarizations in its recognition regime. Doing so should be applauded. Congress enacted the Electronic Signatures and Global and National Commerce Act, E-sign, with an understanding of the important role electronic

transactions were to play in both worldwide and national commerce. E-sign gave many electronic documents equal footing with their paper-based counterparts. It also recognized that electronic documents could be notarized. Parties using electronic documents generally do not anticipate face-to-face meetings with other parties in the transaction.

Consequently, the need to have properly authenticated electronic documents is acute. Notaries public are armed with new technology to perform electronic notarizations equipped to meet this demand.

This bill would provide that electronic notarizations receive the same interstate recognition it seeks to accord paper-based ones.

Since many electronic documents travel over State borders, requiring that an electronic notarization be recognized irrespective of the State in which it was performed will help promote electronically based interstate commerce.

Failure to do so could undercut important goals advanced by E-sign.

Two items in the bill that I think might be considered for additional changes are as follows: One, in the first paragraph of both sections 1 and 2, the word—I recommend the word "lawful" be added immediately before "notarizations." We can—I can explain this in more depth during the question and answer period, but I feel by doing so, this would ensure State sovereignty insofar as notarial activities are concerned, which seems to be an issue that one of the gentlemen raised.

I also suggest that the first paragraph of both sections 1 and 2 have a housekeeping change in that in addition to the word "license," the words—the word "commissioned" is added, since many States actually commission Notaries Publics and do not license them.

Importantly, nothing in this bill, with the changes that I have suggested, would attempt to regulate Notaries Public or in any way detract from the individual States' authority to do so. The power to commission and sanction Notaries Public remains within the exclusive province of the State. The bill seeks only to give cross-border recognition to notarizations executed by those persons who have been conferred the authority to perform them under the States of their—under the statutes of their commissioning States.

In sum, the bill addresses, with my recommended change, only the recognition of the notarial act and does not speak to the underlying authority that gives rise to that act.

For the above reasons, I am pleased to add my support to this legislative initiative. The bill recognizes society has become more mobile. The number of people traveling from State to State has increased.

Additionally, advances in computer systems and technology have made it easy for many businesses to operate in more than one State.

Consequently, more and more documents are working their way into interstate commerce. People and businesses relying on notarized documents deserve assurances that the documents will be respected and the legal rights created by them properly protected. By mandating recognition of notarial acts performed in non-forum States, this bill takes a giant step toward that end.

Thank you
[The prepared statement of Mr. Morris follows:]

PREPARED STATEMENT OF MALCOLM L. MORRIS

It is my pleasure to be here today to add my voice in support of the substitute amendment to H.R. 1458 (dated 12/1/05). My understanding is that this Bill requires Federal and State courts to recognize notarial acts performed in the United States but outside of the courts' jurisdictional borders. More specifically, the Bill would require a Federal court to recognize a notarization performed in a State that was not within the territorial limits of the district or circuit in which that court sits. It also would require a State court to recognize a notarization performed in another State.

My support is based upon my view that this Bill will help eliminate unnecessary impediments in handling the everyday transactions of individuals and businesses. Many documents executed and notarized in one State, either by design or happenstance, find their way into neighboring or more distant States. If ultimately needed in any one of the latter jurisdictions to support or defend a claim in court, that document should not be refused admission solely on the ground it was not notarized in the State where the court sits. This Bill seeks to ensure this would not happen.

H.R. 1458 is quite sensible given what it seeks to accomplish. A notarization in and of itself neither validates a document nor speaks to the truthfulness or accuracy of its contents. The notarization serves a different function, *viz,* verifying that a document signer is who he or she purports to be and has willingly signed the document. Thus, it can be said that the notary public authenticates the document. By executing the notarial certificate, the notary public, as a disinterested party to the transaction, informs all other parties relying on or using the document that it is the act of the person who signed it. The presence of the official seal gives notice that the notary public acted under authority conferred to him or her by the State. Consistent with the vital significance of the notarial act, this Bill provides courts must accept the authenticity of the document even though the notarization was performed in a State other than where the forum is located.

Significantly, H.R. 1458 includes electronic notarizations in its "recognition" regime. Doing so should be applauded. Congress enacted the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7006) ("E-Sign") with an understanding of the import role electronic transactions were to play in both worldwide and national commerce. E-Sign gave electronic documents equal footing with their paper-based counterparts. It, also, recognized that electronic documents could be notarized. Parties using electronic documents generally do not anticipate face-to-face meetings with others involved in the transaction. Consequently, the need to have properly authenticated electronic documents is acute. Notaries public armed with new technology to perform electronic notarizations are equipped to meet this demand. H.R. 1458 would provide that electronic notarizations receive the same interstate recognition it seeks to accord traditional, paper-based ones. As a result, an electronic document requiring a notarization could not be ignored solely on the basis it was not notarized in the jurisdiction where it is presented. Since many electronic documents travel over State borders, requiring that an electronic notarization be recognized irrespective of the State in which it was performed will help promote electronically-based interstate commerce. Failure to do so could undercut important commercial goals advanced by E-Sign.

It could be suggested that H.R. 1458 is unnecessary because out-of-state notarizations should receive recognition under the United States Constitution Article IV, Section I, often referred to as the "Full Faith and Credit" Clause. The underlying rationale for this position is that notaries public are authorized by the State to perform "public" acts, which, by the specific language of the Clause, are entitled to "full faith and credit" and thus should be recognized throughout the States. Although they may deserve such recognition under the aegis of the Clause, current practice does not suggest that is happening. This Bill steps in and ensures the recognition when interstate commerce is involved, and obviates the need for parties to press constitutional arguments in order to achieve the desired result.

Additionally, one could suggest the Bill is unwarranted because local law should control matters relating to recognition of acts in the local courts. Clearly each State could develop its own rule for recognizing notarizations from foreign jurisdictions. The weakness of this position lies in the lack of uniformity that can result. Whereas this may not prove to be a problem for strictly local issues, *e.g.,* whether or not to admit a will to probate to govern in-state property, it can be quite troublesome for transactions that touch more than one State. People and businesses who execute documents that make their way into interstate commerce need the assurance of hav-

ing them accepted wherever commerce takes them. Allowing individual States to establish their own notarial recognition rules cannot guarantee that result. Consequently, the otherwise routine performance of some interstate transactions could be impeded. This Bill will ensure that notarizations authenticating documents affecting interstate commerce will receive proper recognition in every court in which they are presented. This will both facilitate interstate commerce and make sure its participants' access to the judicial system is not hampered by the unexpected peculiarities of local rules.

As the Committee Members no doubt are aware, statutes need proper wording to avoid unwanted results that can be caused by unanticipated interpretations of their language. To prevent such problems from arising, the current form of H.R. 1458 might benefit from some slight language changes. These are noted below.

1) In the first paragraphs of both Section 1 and Section 2, the word "lawful" should be added immediately before "notarization". The present language mandates recognition of ". . . any notarization made by a notary public licensed under the laws of a State other than the State where the court is located . . ." Generally, a notary public is authorized to perform notarizations only in the jurisdiction in which his or her commission or license is issued. One could read the current Bill language to suggest that recognition must be accorded notarizations executed by notaries outside of their jurisdictions even though those acts are unlawful. For example, a notary public from State X, authorized to perform notarizations only in State X, notarizes a document in State Y. Even though that notarization is not "lawful" (it exceeds the notary public's authority), under the Bill it could receive recognition as "any notarization" made in a State other than the State where the court sits. Limiting mandatory recognition only to "lawful" notarizations will clarify the legislative intent and preclude any interpretations suggesting the Bill seeks to override the limitations imposed by State-granted notarial authority.

2) The first paragraphs of both Sections 1 and 2 reference notaries public "licensed" by a State. In many jurisdictions, notaries public are "commissioned" by the State. Adding the words "or commissioned" after the word "licensed" as it appears in each Section will ensure that notarizations of notaries public in all jurisdictions will be covered by the Bill.

Importantly, nothing in this Bill attempts to regulate notaries public or in any way detract from the individual States' authority to do so. The power to commission and sanction notaries public remains within the exclusive province of the States. The Bill seeks only to give nation-wide recognition to notarizations executed by those persons who have been conferred the authority to perform them under the statutes of their commissioning States. In sum, the Bill addresses only the recognition of the notarial act, and does not speak to the underlying authority that gives rise to the act.

For the above reasons, I am pleased to add my support to this legislative initiative. The Bill recognizes that society has become more mobile. The number of people traveling from State to State has increased. Additionally, advances in computer systems and technology has made it easy for many businesses to operate in more than one State. Consequently, more and more documents are working their way into interstate commerce. People and businesses relying on notarized documents deserve assurances that the documents will be respected and the legal rights created by them properly protected. By mandating recognition of notarial acts performed in non-forum States, this Bill takes a giant step toward that end.

Mr. SMITH. Thank you, Mr. Morris. Mr. Googasian?

TESTIMONY OF DEAN M. GOOGASIAN, ESQ., GOOGASIAN FIRM, P.C.

Mr. GOOGASIAN. Thank you, Mr. Chairman, Ranking Member Berman, and Members of the Committee.

I am pleased to appear today to provide testimony in support of H.R. 1458, as well as the proposed amendment, which would add electronic notarization, because the bill would improve the efficiency of our State and Federal courts and promote justice.

Mr. Chairman, as you mentioned during your introduction, my law practice is devoted to civil litigation on behalf of individuals and corporations. We deal with affidavits in our practice every day.

Notarized affidavits are required in many cases to support the claims and defenses that are made in court, and in other situations

are used as an efficient and inexpensive method of providing necessary testimony to a court of law. Affidavits are frequently used to support and oppose motions, including motions for summary judgment, whose purpose it is to weed out cases that—where there's no issue to be decided at trial.

H.R. 1458 would remedy the very real problem that arises when one State refuses to recognize documents notarized in another State. In my home State of Michigan, for example, an appeals court ruled last year, incorrectly I believe, that Michigan should follow a statute enacted in 1879 and refuse to recognize affidavits notarized outside of Michigan unless those notarizations are certified.

Certification under the Michigan statute requires that a Government official certify that the notary was duly authorized and that the notary's signature was genuine.

But the court also ruled that the affidavit had to be certified by a particular Government official, the clerk of the court in the county in which the affidavit was notarized.

Michigan, in effect, has told every other State that that State must have a particular person certify the affidavit or Michigan will refuse to recognize it.

In addition to the inefficiency that is required by certification in the area of litigation, where time is frequently of the essence, this refusal to recognize out-of-State affidavits raises a great danger of injustice.

In 7 of the 13 States whose Representatives appear on this Subcommittee, including California, Florida, Massachusetts, New York, Tennessee, Utah, and Wisconsin, certification by the clerk of the local court is simply not available. In those States, the laws have been changed since 1879 to provide certification by a Secretary of State or perhaps another local official, but not specifically by the clerk of the court.

As a result, Michigan courts may refuse to recognize valid certified affidavits from these States and others where the local clerk of the court does not provide certification. This creates a very real problem for businesses inside and outside of litigation and individuals as well.

One troubling situation in our State confronts creditors. Michigan has a streamlined statutory process for litigating creditor disputes. Credit card companies, retail creditors, home stores, and auto companies are required in our State every year to file thousands of lawsuits to collect millions of dollars owed to them by debtors.

Michigan's streamlined process requires an affidavit be filed with the complaint stating the amount of the debt owed. If such an affidavit is filed within 10 days of its signing, the creditor is entitled to summary judgment if the complaint is not disputed.

Certification in those States where it's available frequently can take 10 days or more by the time the affidavit is sent to the local public official and returned.

But this problem is not limited, of course, to creditors. It applies to any corporation having offices outside a particular State or even employees who are located outside a particular State, and creates a very real risk that they will either not have their affidavit recog-

nized or be forced to go to the cost and expense of travel, either to Michigan or to another State where the affidavit is recognized.

In my own practice, it affects where we can look for particular experts and on behalf of the corporations we represent, it makes it more difficult for them to become effectively involved in Michigan's courts.

I thank you for the opportunity to appear and testify in support of this legislation. Thank you.

[The prepared statement of Mr. Googasian follows:]

United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, the Internet and Intellectual Property

A Hearing on H.R. 1458,
A Bill To Enhance Interstate Recognition of Notarized Documents

Hearing date:	**March 9, 2006**
Time:	**10:00 a.m.**
Location:	**Room 2141**
	Rayburn House Office Building

Prepared Testimony of:

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Prepared Testimony of Dean M. Googasian, Esq.

INTRODUCTION AND BACKGROUND INFORMATION

I am pleased to appear and provide the following testimony before the subcommittee on Courts, the Internet, and Intellectual property in support of H.R. 1458 which would provide enhanced recognition of affidavits and other notarized documents. I appreciate the opportunity to testify today in support of legislation which would require recognition of notarized documents from state to state because, from my perspective and experience as a practicing attorney, this is an important issue that needs attention.

My law practice is located in Bloomfield Hills, Michigan, which is a suburb of Detroit. I have had the pleasure during my career to practice in several different legal areas, from clerking on the Michigan Supreme Court, to serving as Special Assistant to the Assistant Attorney General for the Criminal Division of the United States Department of Justice, to practicing commercial and other litigation. My current practice at The Googasian Firm is entirely in litigation, and I represent corporations and individuals in civil law suits. I am not a notary public, but I deal with and rely on notarized documents in my practice. In fact, notarized documents, and the recognition of notarized documents in courts in my state, are an integral part of my practice. Legislation requiring recognition of affidavits from other states is needed badly, and I am pleased the panel is considering this legislation.

THE NEED FOR LEGISLATION ENHANCING INTERSTATE RECOGNITION OF NOTARIZED DOCUMENTS

Many documents require notarization, including the affidavits that I and countless other lawyers rely on for a myriad of reasons in our daily practice. Black's Law Dictionary defines an affidavit as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to

administer oaths, such as a notary public." Black's Law Dictionary, 8th Ed, 2004. An affidavit becomes notarized when the notary public before whom the affidavit is sworn confirms on the face of the affidavit that the person signing the affidavit is actually the person identified by name in the affidavit. Affidavits and other notarized documents are used for numerous purposes in everyday business transactions, personal and real estate transactions, and in court proceedings as well. In court cases, affidavits are used at every stage of litigation as a means of putting sworn testimony before a court without the necessity of calling witnesses physically to appear and testify. Affidavits are required to support certain types of claims and defenses, as well as to support and oppose motions for summary judgment seeking to dismiss cases. *Id.* Affidavits are an efficient and expedient way to provide the factual testimony needed in many court proceedings and serve to reduce the cost of litigation and use of court time. The legislation under consideration by the committee would modernize and streamline the use of affidavits in state and federal courts.

Streamlining the use of affidavits and other notarized documents from state to state is important because we live in an age of national and global competition where speed is increasingly essential to success in business and litigation. The difference between accomplishing a goal or failing, closing a deal or letting it slip away, winning a customer or client or losing it to the competition, or prevailing in litigation is often determined by speed and efficiency. The advanced technology we enjoy and use in our professions, including our wireless phones, the internet, our pda's and other mobile handheld devices and laptop computers, is in large measure a result of this relentless demand for speed and efficiency.

We live in an electronic age and many of the transactions that we engage in on a daily basis are completed electronically. Today, the business, organization or government office without a website seems

the exception, rather than the rule. Consumers every year make an ever increasing portion of their annual purchases with their credit cards over the internet. The U.S. Census Bureau has reported that e-commerce for the fourth quarter of 2005 was $22.9 billion, an increase of 23% from the same period the year before. [1] Total e-commerce sales for 2005 were estimated to be more than $86 billion, an increase of more than 24% from the year before. *Id.*

No longer satisfied with dial-up internet access, which struck many users with awe and wonder when it first appeared, more and more Americans and others from around the world are now insisting on, and paying for, broadband high speed internet access. The Federal Communications Commission reported in December 2004 that the number of high speed internet lines was increasing at a rate of 38% per year.[2]

Speed and efficiency are the hallmark of effective business in 2006. In his book, Business @ The Speed of Thought, author Bill Gates wrote:

> If the 1980s were about quality and the 1990s were about reengineering, then the 2000s will be about velocity. About how quickly the nature of business will change. About how quickly business itself will be transacted. About how information access will alter the lifestyle of consumers and their expectations of business. Quality improvements and business process improvements will occur far faster.[3]

The ease and speed of technology in general and the internet in particular in this electronic age permeate every aspect of the government as well as the private sector. Twenty years ago if a constituent wanted to

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[1]U.S. Census Bureau Quarterly Retail E-Commerce Sales, 4th Quarter 2005, available at www.census.gov/mrts.www/ecomm.html.

[2]High-Speed Services for Internet Access: Status as of June 2004, FCC Industry Analysis and Technology Division, Wireline Competition Bureau, December 2004, available at www.fcc.gov/wcb/stats.

[3]www.microsoft.com/billgates/speedofthought/looking/chapter.asp.

find a particular government document she would write her representative and request it and a copy might be sent by mail or she might be able to obtain it by traveling to her local library. Today, that same constituent can obtain the document instantly and inexpensively, as I did in preparation for my testimony today, by simply accessing it through a high-speed internet connection.

In addition to its efforts to provide information electronically, our federal government has also put e-commerce to work in its own transactions. Effective October 10, 2000, federal legislation instructs that "[t]he head of each executive agency . . . shall establish, maintain, and use, to the maximum extent that is practicable and cost-effective, procedures and processes that employ electronic commerce in the conduct and administration of its procurement system." 41 U.S.C. 426.

Just as legislation exists that requires the heads of executive agencies to use e-commerce, many other laws on the federal and state level have been changed to keep up with velocity of electronic transactions. Congress has taken steps to ensure that advances in the speed of business aren't hindered by outdated laws. The Electronic Signatures in Global and National Commerce Act, located at 15 U.S.C. 7001, for example, sets forth certain principles to "promote the acceptance and . . . use of electronic signatures." 15 U.S.C. 7031. The first principle is to "remove paper-based obstacles to electronic transactions," to "[p]ermit parties to a transaction to have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid." In short, the act instructs that the secretary of commerce shall promote the ability to engage in electronic transactions and to have those transactions recognized and enforced in a court of law. *Id.*

The act also provides that a "a signature, contract or other record relating to [any transaction in or affecting interstate or foreign commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form." 15 U.S.C. 7001. My home state of Michigan, along with approximately 40 other states, has adopted the Uniform Electronic Transactions Act. This important legislation provides, among other things, that an electronic signature is as good as a written signature, and that a record or signature shall not be denied legal effect simply because it is in electronic form.

Consistent with Mr. Gates' writings, state and federal courts have heeded the need for modernization and the efficiency offered by the digital age. Electronic filing is now in place in federal courts across the country. In the Eastern District of Michigan, where my practice is located, the federal court now accepts electronic filings, only, with limited exception. Michigan's state courts are rolling out electronic filing as well.

But with all the recognition and encouragement of e-commerce and the willingness of business, consumer, courts, and government alike to recognize and accept the validity of electronic transactions, and despite all of these technological advances and the changes in federal and state laws that have become necessary in order not to hamper business in the 21st Century, there is at least one area where we are still stuck in the 19th century. It is in the area of recognition of out of state notaries where some states are, sadly, 140 or 150 years behind the times.

Michigan is a prime example of why legislation that enhances the recognition of affidavits from other states is essential. In Michigan, a law written in 1879 governs the recognition of affidavits from other states. This post-civil war law has been held to provide that an affidavit notarized outside the state of

Michigan cannot be considered by a judge or admitted into evidence unless it has been " certified by the clerk of any court of record in the county where such affidavit shall be taken, under seal of said court." Mich. Comp. Laws § 600.2102. The "certification" required consists of an examination of an affidavit or other notarized document by a government official and confirmation by that official that the notary is a licensed, qualified notary and that the signature on the document is, in fact, that of a notary. In order to obtain certification, an affidavit must be taken or sent to the certifying official who must review it and make the certification, and the certified document returned. Depending on the identity of the government official, the backlog of documents awaiting certification, and the location of the government official, certifying an affidavit can take days or weeks to complete, making it very inefficient by today's technologically advanced standards.

Over the years organizations like the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the National Notary Association have recognized the need for modernizing and unifying state laws governing the recognition of affidavits and other notarized documents from other states. These groups have urged states to unify their laws to provide for the recognition of documents notarized outside the state without special certification or authentication of the type required by Michigan's 1879 statute. One of those efforts was the Uniform Recognition of Acknowledgments Act ("URAA"), which was proposed during the 1960's. In its prefatory note to the URAA, the NCCUSL explained the need for uniform legislation on recognition of notarial acts performed outside a particular state:

> Need for Uniformity. The major need for uniformity is the need of notaries and persons outside the enacting state who have been asked to notarize a document for use in the enacting state. . . [a] major use outside the enacting state is by personnel of the Armed

> Forces of the United States who are asked by persons connected with the Armed Forces installation to perform a notarial act for use elsewhere.
>
> A uniform act on the subject of recognition of acknowledgments is becoming increasingly more imperative as more and more citizens of the United States are employed by the federal government and American industry away from their state of origin or property management. [Uniform legislation] would substantially help . . . . citizens and residents conduct affairs having significance in [one] state at places wherever they happen to be at the time the notarial act is performed.

The need for uniformity today is significantly greater than it was 40 years ago when the URAA was proposed because today, more of our citizens choose to locate or do business away from their home states and business is increasingly conducted outside state lines.

In 1969, Michigan adopted the URAA which provided that an affidavit notarized outside Michigan is valid and is to be recognized without further proof of the notary's authority if it was properly notarized in the state in which it was signed. MCL 565.262-263. Until recently, it was widely believed that the URAA had done away with any requirement that affidavits from other states required any authentication before they could be admitted into a Michigan court. In June of last year, however, the Michigan Court of Appeals ruled, despite the URAA, that Michigan's 1879 law controlled and that Michigan courts would not recognize affidavits from other states that have not been authenticated by the clerk of the court of the county in which the affidavit was notarized.[4]

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[4]Copies of the opinions from Michigan Court of Appeals are attached as Exhibits 1 and 2. Numerous groups submitted legal briefs urging that these decisions were erroneous. The witness briefed this issue on behalf of the State Bar of Michigan as well as the National Notary Association, urging the Court to rule that the affidavits were valid under the URAA.

Prepared Testimony of Dean M. Googasian, Esq.

Michigan's refusal to recognize affidavits from other states without certification creates both inefficiency and injustice. Certification is inefficient because it adds delay and expense to everyday transactions. Instead of being able to submit an affidavit directly, the affidavit must be sent to the certifying official. This entails first determining the identity of the certifying official which can be a difficult task in and of itself. Next, delay is caused while the document is sent to the official and certification is completed. Certification can be costly, particularly where delay is unacceptable and there is a need to expedite the certification process. And certification serves little, if any purpose.

But outdated state laws that refuse to accept affidavits and other notarized documents from other states may cause injustice as well. The literal language of Michigan's statute, for example, requires not just certification, but certification by a particular government official – the clerk of the court of the county in which the affidavit was notarized – from whom certification may not be available. This law was enacted in the late 19th century when, apparently, the clerks of local courts actually provided certification. In many states today, the clerk of the county court no longer authenticates affidavits. Today, authentication is in some states performed by the Secretary of State and in others is performed at the local level, but not by the clerk of a court. As a result, Michigan may refuse to recognize valid affidavits from many sister states.[5]

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[5]In 1981, the United States joined the Hague Convention and agreed, among other things, to recognize affidavits from other Hague Convention countries. Those countries joining the Hague Convention agreed to do away with the old system of requiring "legalization" of documents, and instead, to accept documents that had been authenticated by a certain public official and bear the "apostille." There are those who would argue that under current Michigan law even authentication from the highest levels of another states government – an apostille – may not be admissible in Michigan. This creates the potential and illogical situation that an affidavit from Florida that must be recognized by the governments of such far-flung countries as Armenia, Botswana, Figi, Serbia and Montenegro, Malta, and Tonga may be refused recognition in the state of Michigan. See www.state.gov/m/a/auth/c1267.htm and

Prepared Testimony of Dean M. Googasian, Esq.

A review of the U.S. Notary Reference Manual, published by the National Notary Association, reveals that in seven of the thirteen states whose representatives appear on this subcommittee, including California, Florida, Wisconsin, Massachusetts, Utah, Tennessee and New York, certification by the clerk of the local court is not available. As a result, Michigan may refuse to recognize valid affidavits from these states

The refusal of a state to recognize documents notarized out of state creates real world problems for lawyers, businesses, and individuals as well as the very real threat of injustice. A few examples may be helpful to illuminate just what problems may be caused:

Example #1: A troubling situation confronts creditors. Each year, retail creditors including large department stores, home centers, auto companies, and credit card companies are required to file thousands of lawsuits to collect millions owed to them. These businesses have extended credit to Michigan's consumers and need to enforce their accounts. The individual accounts are relatively small, but the total amount owed by these individual debtors to out of state creditors collectively is large. Lawyers for these creditors use Michigan's streamlined statutory scheme for collections by creditors which requires the submission of an affidavit verifying the debt owed. Mich. Comp. Laws § 600.2145. This affidavit must be filed within 10 days of its signing in order to create a statutory presumption that permits the entry of a default judgment. *Id.* Many creditors, including auto companies located in Michigan, have their credit

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www.state.gov/m/a/auth/c1268.htm.

[6]In response to arguments from the various organizations submitting briefs in support of recognition of out-of-state affidavits, the Michigan Court of Appeals indicated that the issue whether recognition of affidavits from states where the clerk of the court does not certify affidavits was a problem for the legislature to fix, not the courts.

operations in other states, and the employees who possess the knowledge necessary to sign the affidavit verifying the debt are located outside Michigan. Creditors now face the difficult, expensive, and inefficient task of obtaining authentication for each and every affidavit submitted to collect on a debt. The delay caused by obtaining authentication – which usually involves receiving the affidavit by mail, forwarding the affidavit by mail to the appropriate authenticating official, waiting for the official to receive and process the affidavit, then waiting for the affidavit to return by mail before it can be filed – may result in the affidavits being filed more than 10 days after their signing. This, in turn, may make Michigan's streamlined debt collection process unavailable to creditors and subject them to costly and inefficient litigation.

Example #2: A corporation located in California is sued in a Michigan state court based upon a belief that the corporation is the parent corporation of a local business with a similar name. The California corporation has no connection with the local business being sued and seeks to file a motion for summary judgment, supported by an affidavit from its CEO that there is no relation between the two corporations. Certification is not available from the court clerk in California, and the CEO may be forced to fly to Michigan (or another state where certification can be obtained from the court clerk) in order to execute an affidavit admissible in a Michigan court.

Example #3: A world renowned forensic expert is located within the state of New York, and a local county prosecutor in Michigan wants to retain that expert to provide an opinion on the validity of an audio recording. By statute in New York, authentication is no longer performed by the clerk of the local court, but instead by the Secretary of State, and the expert may therefore be unable to submit in a Michigan court an affidavit notarized in New York. The prosecutor may face the choice of either incurring the

expense of having the expert travel to Michigan to execute an affidavit or simply foregoing the use of the expert.

Example #4: A mother relocates to Florida with her children following a divorce. She and her ex-husband become involved in a custody dispute and the ex-husband files a motion in the Michigan court that granted the divorce seeking a change in custody. By Florida statute, authentication can only be performed by the Florida Secretary of State and the clerk of the court is no longer permitted to certify affidavits. Fla. Stat. Ann. § 117.103. The mother needs to provide evidence to the Court in order to preserve her parental rights, but the Michigan court may not recognize the affidavit she wishes to submit because she cannot obtain court-clerk authentication of her Florida affidavit.

Other examples of the problems caused by the refusal of states to recognize notarizations from other states are as innumerable as the situations where those documents are required.

CONCLUSION

Legislation like H.R. 1458 and the alternative that has been offered would greatly increase the efficiency of our courts and aid businesses and individuals alike. As a practicing lawyer, I encourage the subcommittee to further this legislation and strongly support its passage. I would again like to thank the committee for its attention today.

Respectfully submitted,

THE GOOGASIAN FIRM, P.C.

By _____
Dean M. Googasian
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Dated: March 6, 2006

Mr. SMITH. Thank you, Mr. Googasian. Mr. Turner?

TESTIMONY OF MICHAEL FRANK TURNER, OWNER, FREEDOM COURT REPORTING, INC.

Mr. TURNER. Thank you for letting me come here. This is quite an honor, and it's a long way from rural Alabama and even Plainview, Texas to Washington, D.C., and as a matter of fact I was asked if I was from Texas this morning in a cab on the way over here, Mr. Chairman, so know that I talk like I'm from Texas.

But it's an honor to be here and to be among these people here and, you know, I'm in a different realm. I'm a court reporter for—and I've submitted my testimony already for you guys, and been doing this 30 years; and have been ever since the get go of coming out of Plainview, Texas and going to work in Alabama as court reporter been on the road taking depositions, and that's my function in this judicial system here in the United States, and have been administering oaths all over the U.S. by agreement. We have to get an agreement when we're taking a deposition.

And it's just been a constant thing over the years, and I had one of my staff people pull the records, and it's attached to my affidavit of what just our little firm covered in January and February out-of-State depositions of this year, and it was 170. And there are much bigger firms than ours across the country that are doing the same thing, and it just would make things a lot easier on us and not have that technical question of whether or not the deposition is going to be admitted when the time comes.

Again, it's just an honor to be here, and that's—I hope that y'all will see fit to pass the bill, and like I said, I don't see it takes away from anybody in any capacity. It just further extends the territory and scope of those of us who've already passed the test I'll call it to become a notary in our local States.

[The prepared statement of Mr. Turner follows:]

PREPARED STATEMENT OF MICHAEL FRANK TURNER

March 6th, 2006

The purpose of this bill is to enable notary publics to swear witnesses country-wide rather than just in their own states. Court reporters constantly travel throughout the US taking depositions and are required to place witnesses under oath. Usually an agreement is entered into by the attorneys present that the court reporter, even though he or she is from another state, can administer an oath to the witness.

The requirements to become a notary are met on a local level across the United States and since the local community usually has detailed knowledge of the individual applying, if notary status is granted, it should attest to the character of the person nationally.

Deposition testimony is an important part of the Judicial process here in the US and this bill would allow easier scheduling of depositions without the worry of whether or not the testimony will be allowed because of a non-local notary public issuing the oath.

Members of The Bar often prefer to take their local court reporters with them on out of town depositions to insure the accuracy as well as the timely delivery of the transcript to them. Often the depositions are of expert witnesses and very important witnesses that require a high skill level and familiarity on the part of the court reporter. This helps ensure minimal delay in the discovery process as far as out of town depositions are concerned.

I, personally have been taking depositions all over the US for almost 30 years as a court reporter. I have administered oaths from Los Angeles, to New York City, to Miami and know that I, as well the attorneys and witnesses, would be appreciative if the process of swearing a witness by a court reporter/notary public was made to include national coverage, rather than just specific to the State in which the Notary Public was issued.

The following is a list of the out of state depositions that our firm covered in January and February of this year.

Aventura, FL (1)	1
Aiken, SC (1)	1
Albany, GA (1)	1
Alpharetta, GA (5)	5
Annapolis, MD (1)	1
Atlanta, GA (12)	12
Baltimore, MD (1)	1
Baton Rouge, LA (2)	2
Boston, MA (2)	2
Carillon Beach, FL (1)	1
Castleton, NY (1)	1
Chicago, IL (1)	1
Columbus, GA (6)	7
Columbus, MS (3)	3
Dallas, TX (3)	4
Decatur, GA (1)	1
Denver, CO (3)	3
Detroit, MI (3)	3
Emeryville, CA (2)	2
Fayetteville, TN (1)	1
Franklin, TN (3)	3
Fredericksburg, FL (1)	1
Ft. Lauderdale, Fl (2)	2
Greenville, SC (1)	1
Hardeeville, SC (2)	2
Hazelhurst, MS (1)	1
Houston, TX (9)	10

Jacksonville, FL (1)	1
Kansas City, MO (2)	2
Lafayette, LA (2)	2
Little Rock, AR (4)	6
Los Angeles, CA (2)	2
Macon, GA (1)	1
Maitland, FL (1)	1
Manchester, NH (4)	4
Marietta, GA (1)	1
Miami, FL (1)	1
Nashville, TN (3)	4
New York, NY (27)	27
Norcross, GA (1)	1
Norman, OK (2)	2
Oxford, MS (1)	1
Palm Beach Gardens, FL (1)	1
Peachtree City, GA (1)	1
Pleasantville, NY (4)	4
Rockville, MD (1)	1
Rome, GA (1)	1
San Jose, CA (1)	1
Santa Monica, CA (1)	1
Savannah, GA (1)	1
Scottsdale, AZ (2)	2
Seattle, WA (10)	10
Spartanburg, SC (1)	1
Springdale, AR (1)	1
St. Louis, MO (2)	2
Tallahassee, FL (2)	2
Tampa, FL (1)	1
Tempe, AZ (1)	1
Topeka, KS (1)	1
Tullahoma, TN (1)	1
Waco, TX (1)	1
Washington, DC (2)	2
West Hills, CA (2)	2
Woodland Hills, CA (3)	3
TOTAL	170

Thank you for consideration and time.

Sincerely,

Mike Turner
Freedom Court Reporting
367 Valley Avenue
Birmingham, AL. 35209

Mr. SMITH. Okay.

Mr. TURNER. Okay.

Mr. SMITH. Thank you, Mr. Turner.

Let me address my first question to Mr. Reiniger and Mr. Morris, and this goes to something that I mentioned in my opening statement. We have the 10th Amendment, States' Rights.

Does this bill present any constitutional questions that we need to be concerned with because of the 10th Amendment?

Mr. REINIGER. Thank you, Mr. Chairman. We do not believe that there is a 10th Amendment problem with this bill. We are fully aware—our national association deals with the 50 commissioning officials and the 50 States or generally the Secretaries of State, and the States do regulate the notaries. They set all the commissioning requirements. They determine, as I mentioned earlier, the forms of the seals to use and that does vary, whether it's an embosser or a stamp.

Every State but one does require some form of evidence of the official status of the individual as a notary, which we refer to as the seal or the seal information.

This bill deals with the legal effects of documents that have been notarized, so we do not—we see it as a totally different issue, the legal effect of the document, admissibility versus rules of procedures for notaries.

Mr. SMITH. Okay. Thank you. Mr. Morris, do you have any constitutional concerns here?

Mr. MORRIS. No, unless we—you know without the word "lawful," if you're just looking for at or recognizing the lawful act of a notary in State X to be recognized in State Y, I don't see any constitutional issues.

Mr. SMITH. Okay.

Mr. MORRIS. If you are going to have the bill go forward as is, I could see someone raise the argument that by allowing any notarization performed anywhere in the country even though the notary is performing it in a jurisdiction in which he is not licensed, that that could be an extension of authority to give notaries to act beyond their own jurisdictional borders.

Mr. SMITH. Okay. At first glance, your suggestions of inserting those words "lawful" and "commissioned" in those particular places I think is a good one. We'll double check it, but that may well help the bill.

A question I had for you, though, Mr. Morris, was we heard Mr. Googasian mention a while ago the problems that have been created by Michigan requiring the certification out of State, and, Mr. Googasian, you mentioned a half a dozen States, including California, where that certification is apparently impractical or not existent, and so there are problems there. But do you know of any other problems that have been created by the current system that would be solved by this particular piece of legislation?

Mr. MORRIS. Not specifically other than the inclusion of the electronic section would make clear that electronic documents would be given the same accord.

Mr. SMITH. Okay. And you anticipated a later question as far as the electronic notarization, so I appreciate your comments on that.

Mr. Googasian, as I said, you mentioned the problems created by Michigan saying that they had to be certified if they were out of State. There was something in your testimony that made me want to ask you about the experience perhaps of other countries. I don't know that you mentioned the European Union, but do we have anything to learn from the experiences of other countries as far as the bill goes?

Mr. GOOGASIAN. With respect to other countries, I guess what I would point to Mr. Chairman is the Hague Convention and the requirement among the countries who are party to the Hague Convention that the documents be recognized with a particular certification, an apostille I believe is what is required, a particular document from a particular Government official.

The current stance in Michigan raises a very real question about whether even a document that would be acceptable in a foreign country, coming, for example, from California, would be admitted into a court in Michigan, so you have the sort of irony that one of the sister States wouldn't recognize something that would be admissible in any of the many——

Mr. SMITH. Okay.

Mr. GOOGASIAN [continuing]. Hague Convention countries.

Mr. SMITH. Thank you. As I say, you've mentioned some specific problems with the current system that would be addressed by this legislation, and that's why that's particularly helpful.

Mr. Turner, I wanted to ask you a question, and that is that assuming that we address the constitutional problems and assuming that the problems that we are hearing about are real and I think that they are, I'm looking for who might be opposed to this legislation. Do you think that there would be out-of-State notaries who would be opposed to the bill because frankly it would—they would be in competition with others from out of State and lose some business or is that a—do you know of anyone who would be adversely impacted by this legislation, particularly out-of-State notaries?

Mr. TURNER. I don't. I mean I thought of that, you know, when we were talking about this, and for sake——

Mr. SMITH. I mean presumably there are a lot of out-of-State notaries who are losing business because of the need to either get a document notarized again within that State's boundaries, and they would—but you haven't heard of any problems in that regard?

Mr. TURNER. No, and our experience has been, Mr. Chairman that when we show—when we go—in our particular instance, where we're taking depositions, for us to try to hire a local notary to come notarize a deposition is it's generally not worth their time for what they charge to come do that. And I——

Mr. SMITH. Okay.

Mr. TURNER [continuing]. So I don't see that as a problem.

Mr. SMITH. Okay. May I—just a real quick personal question, although my time is up. What does it take to become a notary in Texas today? Do you know?

Mr. TURNER. I do not know in Texas.

Mr. SMITH. Okay. Thank you, Mr. Turner. It used to be so easy I worried about, to tell you the truth.

Thank you. The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Probably an obligation to support the Republican Party.

Obligation to support the Republican Party, if you want to given note. It is a patronage position in Texas.

Given that notaries may have to follow different rules in different States when performing a notarial act, maybe this is for Professor Morris, if one State requires notaries to inquire into whether the principal shows a demeanor such that he or she cannot appreciate the consequences of the act or if there is evidence to suggest compulsion, should the State that requires inquiry into these matters have to accept documents acknowledged or witnessed by a notary in the State that does not? In other words, one State is silent on it. The neighboring State says you can't notarize a signature unless you've established this person knows the consequences of what he's signing or isn't doing it under compulsion, does the State that makes that requirement have to accept notaries from States that don't?

Mr. MORRIS. Well, I—Congressman, I don't think they have to accept notaries. I think they're accepting the document for what it purports to be. That would not preclude any party to that document to go into court and challenge the efficacy of the document itself. Wills are a perfect example.

Mr. BERMAN. I have evidence that this guy—there was a third person in the room who had a gun to the guy's head and——

Mr. MORRIS. That's what will contests are all about. Due formality has been met.

Mr. BERMAN. Okay.

Mr. MORRIS. But all this is saying is you can't throw it out just because in State X we don't require that inquiry. It's still available. The parties who are challenging the document would not precluded from that action.

Mr. BERMAN. A notary—the fact of the seal doesn't prevent the——

Mr. MORRIS. I would not——

Mr. BERMAN [continuing]. Challenge to the——

Mr. MORRIS. I think notarized documents are challenged all the time.

Mr. BERMAN. You've stated in your testimony that the purpose of this bill—well, does anybody disagree with that?

Mr. REINIGER. Representative Berman, I would just add that we are concerned about this very question that you have about the lawfulness of the notarization and its varying requirements around the country, particularly in the area of electronic documents, which is just now emerging, the whole area of electronic notarization.

California, for example, requires an electronic image of the seal to be placed on the document. The Commonwealth of Pennsylvania just recently issued rules, the Secretary of the Commonwealth, that sets up a requirement that every notary use a digital certificate, because that State is viewing notarization as a security procedure for the document.

Colorado has yet a different system of security, which involves the issuance of authentication numbers from the Secretary of State to individual notaries. I was telling Mr. Googasian that Michigan and Texas have authorized electronic notarization, but with no

clear standards at all. It could be any type of click button or seal. So it will raise the concern that how will one State recognize the documents coming in from another, like, for instance, the Commonwealth of Pennsylvania is saying there needs to be a high level of security to the document that's notarized. Do they need to accept documents coming in from Michigan or elsewhere that have no security procedures connected to the notarization?

Mr. BERMAN. Well, that problem exists right now.

Mr. REINIGER. Right.

Mr. BERMAN. Now, this bill passes, and it says that if it's—if it's—if the notarization occurs or it affects interstate commerce in the case of an electronic record, Federal courts must recognize a notarization if the seal information is securely attached to or logically associated with the electronic record so as to render the record tamper resistant.

Does the California law meet that requirement?

Mr. REINIGERMORRIS. Not completely in its current form. It is an attempt at a level of security.

Mr. BERMAN. So, then, if this bill were to become law, this bill doesn't require Federal courts to accept—it doesn't require them to recognize that notarization from the other State? Where the Federal court is located, it doesn't require them to accept out-of-State notarizations, and we're in a situation where the law is right now?

Mr. REINIGER. Well, it would address the issue of self-authentication, so in other words, the notarial acts could be enforced, but it would be a matter of acquiring extrinsic evidence, perhaps a certification of the notarial act of California, unless it meets the minimum security requirement. So that's—it goes to the issue of self-authentication without requiring additional evidence.

Mr. MORRIS. Mr.—Congressman, if I may, but if you think your argument through and this bill passed——

Mr. BERMAN. One thing I can assure is I haven't.

Mr. MORRIS. I'm sure you have.

Mr. BERMAN. No. I'm not sure I haven't.

Mr. MORRIS. Oh. Is that would encourage States to meet the test to put into place procedures that would be satisfactory, consistent with this statute, and then there wouldn't be any problems. And really E-sign was an example of that, where Congress stepped forward and told the States, look, you have to start thinking about interstate electronic transactions and here's the rule. And you can opt out of the Federal rule by adopting UETA or a similar statute because that provides what we want. And I think that——

Mr. BERMAN. Yeah. It's like——

Mr. MORRIS [continuing]. Worked very nicely.

Mr. BERMAN [continuing]. Like a Federal law that says you want any Federal money for your law school, you accept recruiters from the military on your campus. It encourages people—local law schools and State law schools to accept military recruiters, which is all right with me, but it's——

Mr. MORRIS. I think there—I think we could draw a difference between promoting commerce and, you know, political issues that are raised with the military——

Mr. BERMAN. No. No.

Mr. MORRIS [continuing]. But you're right. It's the same concept. This promotes—promoting a goal. Absolutely.

Mr. BERMAN. The only question here is do we want to create that dynamics with the passage of a Federal law that gets States to change what they would otherwise do. And——

Mr. MORRIS. I would say to get them to change to do something they're not doing, which the rest of the world is. And I think they may have maybe——

Mr. BERMAN. Well, I'm fine with using Federal power to do that. The Republicans used to be concerned about that, but they aren't anymore. So.

Mr. MORRIS. Well, I want to leave this room safely, so I'll make no comment.

Mr. BERMAN. Thank you.

Mr. SMITH. Thank you, Mr. Berman. Mr. Berman's last question reminded me of a question I didn't ask that I'd like to now. And it had to do with the reform, and, Mr. Reiniger, you may be the best one to answer this. What—there was a reform effort made to change the notary statutes in a number of States, but only about a dozen States have adopted those particular reforms that would answer some of the questions that have been raised today and respond to some of the problems that have mentioned. Why is that more States have not adopted the model notary statutes?

Mr. REINIGER. Via the States have—they all, like I have mentioned, 50 different approaches to the notary laws. A lot of them are served by history, cultural influences.

The—and we have seen trends from the New England States that from the colonial traditions, which tend to have more barebones laws, and as you head to the West, greater regulation. So the State of California has probably the most outstanding set of laws and regulations to protect the public; the strongest educational requirements on notaries, for example. So there's a wide variety, and in every State certainly we advocate for the Model Notary Act, which we put together with a committee of law professors in 2002, not the latest version, a lot of States culturally don't necessarily see the need for education, so there is—we run into that issue quite a bit.

Mr. SMITH. Okay. Well, in that case, why impose a national standard on them that might be uncomfortable to them culturally to use your word?

Mr. REINIGER. Well, in this case, we like this bill, because it's talking about a standard for the legal effects of the material act, the admissibility of it, not at all interfering with the State requirements for education, regulation of the notaries themselves.

We believe that this minimum standard, which would be very beneficial to consumers and business commerce, would also have the effect of helping our efforts to professionalize notaries, to raise their standards.

Mr. SMITH. Are you aware of any States—notary organizations who would oppose legislation like this?

Mr. REINIGER. We are absolutely not.

Mr. SMITH. Okay.

Mr. REINIGER. We're not aware of any opposition to this proposal.

Mr. SMITH. Okay. All right. That answers my question. I thank you all, and, Mr. Turner, thank you for you coming the greatest distance, and we appreciate your testimony as well as the testimony of everyone here.

I'm not sure what the next step will be, but it sounds to me like there is near consensus of support for this legislation, so it may well be that we will look for an opportunity to move it along and hopefully that will prevent some of the problems that we heard about today, specifically those problems mentioned by Mr. Googasian and also, as you said, Mr. Reiniger, help promote trade and commerce as a result of passing this legislation as well.

So we appreciate Mr. Aderholt's coming to me months ago and telling me about the problems that he had seen firsthand and probably heard about firsthand from you, Mr. Turner. So thank you again for being here and for your testimony, and we stand adjourned.

[Whereupon, at 10:53 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman,

Thank you for scheduling this hearing on H.R. 1458, which requires recognition of out of state notarizations by Federal and State courts. Although the topic of notary recognition between the states is not the most exciting issue—it is an extremely practical one.

Notaries are involved in many aspects of legal and commercial transactions from trusts and estates to real estate. Currently, each individual state creates its own laws to regulate the notary profession. H.R. 1458 has been introduced in an attempt to unify and standardize the acceptance of out-of-state notarial acts by state and federal courts. There have been past attempts at unifying the requirements for notarial acts: some made by the National Notary Association through the Uniform Notary Act of 1973 and its successors, the Model Notary Acts of 1984 and 2002; and others made by the National Conference of Commissioners on Uniform State Laws when it enacted the Uniform Acknowledgement Act of 1939, the Uniform Recognition of Acknowledgements Act of 1968, and then finally the Uniform Law on Notarial Acts in 1982. Over the course of three decades, legislators and notary-regulating officials have borrowed from these models in reforming state and territorial notary laws on inconsistent bases. In some cases, only a few sections were adopted into statute; in others, the model was enacted virtually in totality.

H.R. 1458 would require each Federal or State court to recognize out of state notarial acts under the following 2 conditions: (1) where such notarization occurs in or affects interstate commerce; and (2) if a seal of the notary public's authority is used in the notarization; or in the case of an electronic record, the seal information is logically associated with the electronic record so as to render the record tamper-resistant.

I hope the witnesses can delve into the constitutional issues presented by this bill. For example, does the bill's language violate the Tenth Amendment, which disallows the federal government's encroachment upon the States' "reserved powers" or would the concept of Full Faith and Credit apply?

Additionally, given that notaries may have to follow different rules in different states when performing a notarial act, if one state requires notaries to inquire into whether the principal shows a demeanor such that he or she cannot appreciate the consequences of the act or if there is evidence to suggest compulsion, should the state that requires inquiry into these matters have to accept a document acknowledged or witnessed by a notary in a state that does not?

Again, I look forward to learning what specific situations the bill is trying to address, how prevalent the problem is of out-of-state notarial recognition, and how the witnesses will address the states' rights issues touched on by this bill, such as the relevance and applicability of the 10th Amendment and the Full Faith and Credit Clause.

I yield back the balance of my time.