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Before the Subcommittee on Commercial and Administrative Law
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I am Professor Linda Silberman, and I am the Martin Lipton Professor of Law at New York University School of Law, where I have been teaching and writing about Civil Procedure, Conflict of Laws, Comparative Civil Procedure, and Private International Law for over 35 years. With respect to the particular issue of the recognition of foreign country judgments on which this hearing focuses, I was Co-Reporter, along with my colleague Professor Andreas Lowenfeld, of the recently completed (in 2006) American Law Institute Project entitled "Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute", which offers a comprehensive proposal for a federal statute governing the recognition and enforcement of foreign country judgments. The ALI Project represents the position of the American Law Institute, but this written testimony and my statements today represent only my own views and not those of the Institute or of any group.

Before turning to the particular problem of "libel tourism", I think it is useful to say a word about the law in the United States relating to the recognition and enforcement of foreign country judgments. Interestingly, the United States has no bilateral or multinational treaty dealing with the recognition or enforcement of foreign judgments. And unlike the full faith and credit obligation which is owed to domestic sister state judgments, foreign country judgments are not subject to the constitutional or statutory

full faith and credit obligation. Even more curious, I think, is the fact that the subject of recognition and enforcement of foreign country judgments in the United States has been treated as a matter of state law. As a result, the judgment of an English or German or Japanese court might be recognized and enforced in Texas, but not in Arkansas, in Pennsylvania but not in New York. In my view, and in the only case in which the Supreme Court of the United States has addressed the subject,[1] a foreign country judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy involves the rights of private parties. Accordingly, recognition and enforcement of foreign judgments is and ought to be a matter of national federal concern. However, a curious history has left the law of recognition and enforcement of foreign country judgments in the hands of the states,[2] and while a number of (but not all) states have adopted the Uniform Foreign Money-Judgments Recognition Act, even the adoptions are not uniform.[3] For example, some states have included a requirement of reciprocity – that is, the requirement that if a foreign country judgment is to be recognized and enforced in the United States, the foreign country must also respect a United States judgment in similar circumstances. Other states have no such requirement.

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[1] See Hilton v. Guyot, 159 U.S. 113 (1895).

[2] For a more extensive explanation of how state law became the source of law for the recognition and enforcement of foreign country judgments with a critique of why the question should be viewed as a matter of federal law and national concern, see American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute 1-6 (2006)(Hereinafter "ALI Proposed Federal Statute").

[3] As of 2008, the 1962 version of the Uniform Act – the Uniform Foreign Money-Judgments Recognition Act—is in effect in 30 states and territories of the United States. See Uniform Foreign Money-Judgments Recognition Act (1962), 13 Uniform Laws Annotated Part II (2002 ed. and 2008 Supp.). In 2005, the National Conference of Commissioners of Uniform State Law (NCCUSL) promulgated a revised Act – the Uniform Foreign-Country Money Judgments Recognition Act – that made slight changes to the earlier Act. See 13 Uniform Laws Annotated Part II (2008 Supp). The 2005 Act replaced the earlier 1962 Act in four states (California, Colorado, Idaho, and Michigan) and was adopted by another (Nevada). See http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp. A number of other states have introduced bills to adopt the Revised Act.

Moreover, the highest court of each state is the final interpreter of the provisions of its Act, and as a result the Uniform Act is not uniform. These differences in state laws create a situation where a foreign country judgment may be enforced in one state and not in another. Thus, there is no single, uniform American law to govern the recognition and enforcement of foreign judgments.

I applaud the Committee for addressing the subject of recognition and enforcement of foreign country judgments at the national level. Ideally, Congress would identify the principles that guide recognition and enforcement of foreign country judgments and would legislate a national solution in the form of a coherent federal statute. That is indeed the proposal of the American Law Institute Project, which offers a framework for a comprehensive federal statute on the subject of recognition and enforcement of foreign country judgments, and a proposal to which I would urge this Committee to give serious consideration.

Let me now turn to the particular problem of foreign libel judgments in which a foreign court applies a law that is less protective of speech than would be required under United States law, in particular, the First Amendment. The issue may become a matter for the courts of the United States in one of two ways. The successful plaintiff may seek to enforce the foreign judgment in the United States.[4] Or, as several recent cases have illustrated, the defendant against whom the foreign judgment is rendered may seek a declaration in a U.S. court that the judgment should not be recognized, at least in the

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[4] The prevailing judgment plaintiff attempted to enforce an English libel judgment in the United States in Telnikoff v. Matusevitch, 347 Md. 561, 792 A.2d 230 (Md. Ct. App. 1997)(on certified question from D.C. Circuit).

United States.[5] Under existing law in every state of the United States --- and indeed under principles adopted by almost every country[6] – a foreign country judgment may be refused recognition on grounds that the judgment is repugnant to the public policy of the state asked to recognize or enforce the judgment.[7] And under existing state law, courts in the United States have refused to recognize foreign libel judgments when they believe First Amendment principles have been violated. Therefore, H.R. 6146, which provides that a domestic court "shall not recognize or enforce a foreign judgment for defamation that is based upon a publication concerning a public figure or a matter of public concern unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States" does not really change existing law. The provision in H.R. 6146 is more precise than the general "public policy" exception, and it does make clear that as a *national* matter First Amendment concerns trump the more general policy of recognizing and enforcing foreign country judgments. But courts in the United States already consistently invoke First Amendment values in determining whether to deny recognition and enforcement of foreign judgments on grounds of public

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[5] This was the situation in Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199 (9th Cir. 2006)(en banc) and Ehrenfeld v. Bin Mahfouz, 518 F.3d 102 (2d Cir. 2008). In both cases, the actions for declaratory judgment were dismissed. In *Yahoo*, a combination of lack of ripeness and lack of jurisdiction led to the dismissal. In *Ehrenfeld*, the case was dismissed for lack of jurisdiction over the foreign judgment plaintiff.

[6] See Linda J. Silberman, Some Judgements on Judgments: A View from America, [2008] 19 King's Law Journal 235, 244-48.

[7] There can be different formulations of the "public policy" defense. For example, the 1962 Uniform Act (§ 4(b)(3)) provides that a judgment need not be recognized if the "cause of action"[claim for relief] on which the judgment is based is repugnant to the public policy of this state." The 2005 Revised Act reads slightly different; it provides that a foreign-county judgment need not be recognized if "the *judgment* or the [cause of action][claim for relief] on which the judgment is based is repugnant to the *public policy of this state or of the United States*." (Emphasis added). The ALI Proposed Federal Statute provides that "a foreign judgment shall not be enforced in a court in the United States if the party resisting recognition or enforcement establishes that . . . *the judgment or the claim on which the judgment is based* is repugnant to the *public policy of the United States*, or to the *public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law*." (Emphasis added).

policy. [8] Indeed, courts have invoked *state* policy as well as federal policy, and thus it may be necessary to clarify that the federal policy here is preemptive. [9]

More critically perhaps, the proposed provision does not solve the private international law aspects of the proper scope for "public policy" when that exception is invoked. Specifically, it does not distinguish situations where it would be appropriate for courts in the United States to recognize and enforce a foreign libel judgment from those where recognition and enforcement should be refused. Let me illustrate with the example of the *Telnikoff v. Matusevitch* case.[10] There, a libel judgment was obtained by one resident of England (Telnikoff) against another resident of England (Matusevitch), both of whom were Russian émigrés. The libel was first contained in a letter written by Matusevitch, which accused Telnikoff of being a racist hatemonger. Later the comments were published in an English newspaper. The court in *Telnikoff* refused to enforce the English judgment because it found that Maryland and English defamation law were rooted in fundamental public policy differences concerning the First Amendment's protection for freedom of the press and speech. Even if one accepts the point that the differences in the libel laws of England and the United States are such that they meet the

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[8] See, e.g., Sarl Louis Feraud International v. Viewfinder, Inc., 489 F.3d 474 (2d Cir. 2007); Telnikoff v. Matusevitch, 347 Md. 561, 792 A.2d 250 (Md.Ct.App. 1997)(on certified question from D.C. Circuit); Bachchan v. India Abroad Publications, 585 N.Y.S. 2d 661 (Sup.Ct. N.Y. 1992).

[9] The certified question to the Maryland Court of Appeals from the Court of Appeals of the District of Columbia Circuit in Telnikoff v. Matusevitch, 347 Md. 561, 702 A.2d 230 (Md. Ct. App. 1997) was "whether recognition of an English libel judgment would be repugnant to *the public policy of Maryland."* (Emphasis added). In *Telnikoff* , the parties agreed in oral argument that they viewed the case as being controlled by the First Amendment. In resting its decision on Maryland public policy as it was required to do under the Maryland certification legislation, the Maryland Court of Appeals observed that it was "appropriate to examine and rely upon the history, policies, and requirements of the First Amendment." The question of "federal" or "state" policy was potentially relevant because Maryland public policy arguably protected defamation even where the First Amendment did not. But the public policy relating to the First Amendment should be national public policy, and state public policy should be subordinated to national policy in a case such as this. For more on the proper relationship between state and federal policy in the context of a federal standard for recognition and enforcement of foreign judgments, see ALI Proposed Federal Statute § 5(a)(vi) and comment *h*, at 62-64.

[10] 347 Md. 561, 702 A.2d 230 (Md.Ct.App. 1997).

very high bar that is usually required to satisfy the "public policy" exception, there is a more serious objection here. The question to be asked is: when does a country itself have interests that are sufficiently implicated to warrant application of its own public policy? Let me elaborate further. In *Telnikoff*, neither of the parties nor the transaction had any connection to the United States at the time of the transaction or the proceedings in England. The only nexus with the United States was the fact that the judgment debtor eventually moved to the United States and had assets there.

One can imagine a finite number of situations where there would be an international consensus about norms that would deem recognition or enforcement of a judgment to violate public policy without looking to any territorial nexus. However, in a case like *Telnikoff*, what is at stake are differing English and American views about the appropriate balance between protection of reputation and free speech. And in the *Telnikoff* example, it is England that has the relevant policy interests with respect to these parties and the transaction in question. In a traditional conflict-of-laws analysis, the United States would have "no interest" in applying its standards of behavior and recovery to these parties. Therefore, it seems inappropriate for U.S. standards to be invoked as a public policy defense in a recognition/enforcement context. That view was expressed by the dissenting judge in the *Telnikoff* case who concluded his dissent with the following observation:

> Public policy should not require us to give First Amendment protection . . . to English residents in publications distributed only in England. Failure to make our constitutional provisions relating to defamation applicable to wholly internal English defamation would not seem to violate fundamental notions of what is decent and just and should not undermine public confidence in the administration of law. The Court does little or no analysis of the global public policy considerations and seems inclined to make Maryland libel law

> applicable to the rest of the world by providing a safe haven for foreign libel judgment debtors.[11]

The interests of the United States with respect to recognition and enforcement are far different where a U.S. party publishes in the United States and distributes a work both in the United States and abroad and then is sued in a foreign jurisdiction for libel under the more stringent defamation laws of that country. In such a case, both the foreign jurisdiction and the United States would seem to want their respective policies applied, but the United States would be justified in concluding that its First Amendment concerns should lead to non-recognition of a judgment if the rendering court did apply foreign law. There could be disagreement on this point because principles of comity have generally led courts in the United States to enforce foreign country *judgments* in situations where they would *apply a different law* were the case brought in a U.S. court in the first instance. But in the above hypothetical, invocation of the public policy exception would probably be appropriate at the recognition/enforcement stage, if the foreign judgment substantially undermined protective speech in the United States.[12] There are other cases that are more complicated. For example, if a U.S party directly and intentionally publishes and distributes material solely in a foreign country, that country may have the

[11] Telnikoff v. Matusevitch, 347 Md. 561, 621-22, 702 A.2d 230, 250-51 (Md. Ct. App. 1997)(Chasanow, J., dissenting).

[12] Bachchan v. India Abroad Publications, 585 N.Y.S. 2d 661 (N.Y.Sup.Ct. 1992) is a slight variation. In *Bachchan*, an Indian plaintiff brought suit in England against a foreign news agency operating in New York and elsewhere that had distributed a news story about misconduct in India that was carried in both England and New York. The New York state trial court refused to enforce the English libel judgment on the ground that enforcement of the judgment would violate the First Amendment. There are differences of view here with respect to the propriety of invoking the public policy exception in these circumstances. Compare Kyu Ho Youm, Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law, 16 Hastings Comm. & Ent. L.J. 235 (1994)(pointing out that U.S. libel law offers publishers significantly more protections than does English law) with Craig A. Stern, Foreign Judgments and the Freedom of Speech: Look Who's Talking, 60 Brook. L. Rev. 999, 1033-34 (1994)(criticizing *Bachchan* because England had the relevant interest in applying its law of defamation to this case).

stronger interest in having its own law applied, and the U.S. should, in the interests of comity, enforce that judgment.[13]

I do not take a firm position with respect to whether the judgments described in any of these last examples should be enforced, but they illustrate my point that H.R. 6146 fails to contain any nuance for these private international law concerns. The bill may encourage U.S. courts to apply U.S. law principles without regard to context and to invoke public policy too reflexively without sufficient regard for the competing interests of other countries. The danger is then that this provision will invite "libel tourism" in reverse -- where courts in the United States impose the United States view of free speech on the rest of the world regardless of the particular circumstances. The United States would then be engaging in the precise behavior of which it has been so critical.

I do believe that if the federal legislation were better able to articulate a nuanced and uniform national standard – thus offering the possibility of Supreme Court superintendence of such a standard – it would be preferable to the patchwork of solutions that are likely to be created at the state level.[14] But I return to the point I made at the

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[13] Cf. Desai v. Hersh, 719 F. Supp. 670 (N.D. Ill. 1989), aff'd, 954 F.2d 1408 (1992).

[14] Two states, New York and Illinois, have passed their own "libel tourism" laws. In 2008 New York amended its version of the Uniform Act to provide that a defamation judgment obtained outside of the United States need not be enforced unless the court in New York determines that the defamation law applied by the foreign court provides "at least as much protection for freedom of speech and press . . . as would be provided by both the United States and New York Constitutions." CPLR §5304(b)(8)(2008). In addition, New York amended its jurisdictional statute, CPLR §302(a), to provide that any person who obtains a judgment in a defamation proceeding outside the United States against a New York resident or person amenable to jurisdiction in New York with assets in New York is subject to jurisdiction in New York for the purpose of obtaining declaratory relief, provided the alleged defamatory publication was made in New York and the person against whom the judgment was rendered has assets in New York or may have to take action in New York to comply with the judgment. Illinois amended its version of the Uniform Foreign Money-Judgments Recognition Act to add an additional ground for non-enforcement: "when the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this State first determines that the defamation law applied in the foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions." 735 ILCS 5/12-621(b)(7)(2009). Illinois also amended its jurisdictional statute to allow for jurisdiction over Illinois residents for the purpose of rendering declaratory relief provided the publication was published in Illinois and the resident has assets in Illinois to satisfy the

outset of my remarks – the need generally for a broader solution on the national, indeed the international level, and one that belongs in the hands of Congress.

Let me offer an example of why a more comprehensive approach to recognition and enforcement of foreign judgments is desirable. There are other defenses that might be asserted to refuse recognition and enforcement of these "libel tourism" judgments that would take account of the jurisdictional excesses of foreign courts. When a foreign court exercises jurisdiction over a U.S. defendant in what might be regarded as an exorbitant assertion of jurisdiction (in a defamation case or any other), generally accepted principles of law in the United States relating to the recognition and enforcement of foreign judgments provide that such a judgment should not be recognized or enforced.[15] Thus, it is not only the defense of "public policy" but also the defense of an "unreasonable assertion of jurisdiction" that might be used to prevent recognition and enforcement of a foreign defamation judgment that is thought to undermine fundamental U.S. interests. However, H.R. 6146 concerns itself with only a very small piece of the more general problem of recognition and enforcement of foreign country judgments and does not address other relevant aspects.

As you might expect from my earlier comments, I am highly critical of the attempts made in H.R. 5814 and S. 2977 to authorize jurisdiction and to create a cause of action for a declaratory judgment and other relief on behalf of "any United States person" who is sued for defamation in a foreign country if such speech or writing by that person "has been published, uttered, or otherwise disseminated in the United States." As I indicated above, the attempt to impose the standards of U.S. defamation law on the rest of

judgment or may have to take action in Illinois to comply with the judgment. 735 ILCS 5/2-209(b)(5)(2009).

[15] See, e.g., Uniform Foreign Money-Judgments Recognition Act § 4(a)(2).

the world goes too far in many situations, and the reach of this provision fails to give proper respect to the interests of other countries. The jurisdiction provision in the bills that purports to assert jurisdiction over any person who has brought a foreign lawsuit against a "U.S. person" (when speech has also been published or disseminated in the United States) is constitutionally problematic under the Due Process Clause of the Fifth Amendment. A person who brings a lawsuit in a foreign country and serves a defendant in the United States does not engage in the kind of "purposeful conduct" directed to the United States that the Supreme Court has required to meet the constitutional standard of "minimum contacts" and "reasonableness" for asserting jurisdiction.[16] Finally, in addition to the remedy of a declaratory judgment provided by H.R. 5814 and S. 2977, these bills offer more extreme and ultimately unsustainable remedies -- a "clawback" of damages recovered in the foreign judgment, an anti-suit injunction, and an award of treble damages in certain circumstances. These tools are much too aggressive an assertion of U.S. jurisdiction even in those situations where U.S. interests might be found to be compelling. One need only be reminded of the possibility that an anti-suit injunction by a court in the United States may meet with the response of an anti-anti-suit injunction in the foreign court to realize that accommodation of competing policies is best achieved in other ways.[17]

One should not assume that other countries are oblivious to the concerns of the United States with respect to global defamation. Where the interests of the foreign country are minimal, we have seen foreign courts abstain and/or refuse jurisdiction to

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[16] See Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987).
[17] See Andreas F. Lowenfeld, Forum Shopping Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation, 91 Am J. Int'l L. 314 (1997).

hear a libel case against a U.S.-based publisher.[18] Also, recent developments in Europe, such as the European Convention on Human Rights and the International Covenant of Civil and Political Rights are having an impact on the libel laws of many countries, including England,[19] and may result in greater sensitivity to principles akin to the First Amendment.[20]

I believe a comprehensive federal statute is the best solution to address the important and complex issues relating to the recognition and enforcement of foreign country judgments, including the particular issue of interest to this Committee – the problem of "libel tourism". It may well be that even national law will fall short in dealing with the problems arising from transnational libels and that only an international solution can ultimately address an issue that has become as global as the Internet itself.[21] But to the extent that Congress seeks a solution, it should do so by developing a broader proposal for federal law on the recognition and enforcement of foreign judgments and viewing the issues in the context of the foreign relations concerns of which they are a part.

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[18] See Jameel v. Dow Jones & Co., Inc., [2005] EWCA (Civ) 75 (staying libel action brought by Saudi claimants against the U.S.-based Dow Jones where only 5 subscribers in England had accessed the hyperlink disclosing claimants' names); Bangoura v. Washington Post [2005] D.L.R. (4th) 341 (holding that Ontario trial court could not exercise jurisdiction over Washington Post for allegedly libelous statements posted on its website where plaintiff was not an Ontario resident at the time the article was written).

[19] See, e.g., the recent decision of the House of Lords, Jameel v. Wall Street Journal Europe [2006]UKHL 44, [2007] 1 A.C. 359 (Eng.), which has been characterized as "moving English defamation law much closer to the American constitutional law of defamation"). See Marin Roger Scordato, The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law, 40 Conn. L. Rev. 165 (2007).

[20] See generally Michael Traynor, Conflict of Laws, Comparative Law, and The American Law Institute, 49 Am J. Comp. L. 391, 396 (2001).

[21] See Dow Jones & Co., Inc. v. Gutnick [2002]HCA 56 (Dec. 10 2002)(Australia)(Referring to the problems of the publication of defamatory material on the internet, Justice Kirby of the Australian High Court observed that the problems "appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself.").