Before the
Subcommittee on Contracting Oversight
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Senate Committee on Homeland Security and Governmental Affairs

Testimony of

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Accountability for Foreign Contractors: S. 526: Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act

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Hearing on
Accountability for Foreign Contractors:
S 526: Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act
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Chairman McCaskill, Ranking Member Bennett, and members of the Subcommittee. I am grateful for the invitation to testify on S. 526, the "Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act." This legislation is a response to a particular case, *Baragona v. Kuwait & Gulf Link Transport Company*, but its importance goes well beyond that one lawsuit. It is an effort to assure a measure of accountability whenever foreign businesses enter into contracts with the United States government and cause certain kinds of serious bodily injury to members of the armed forces, civilian employees of the government, and certain American citizens performing work for the United States.

In its current form, the proposed accountability regime rests on three pillars: (1) it debars or suspends government contractors who evade the service of process or fail to appear in actions "in connection with" government contracts; (2) it amends the Federal Acquisition Regulation ("FAR") to require *inter alia* that government contractors consent to personal jurisdiction in certain civil actions brought in U.S. courts by certain categories of plaintiffs; and (3) it amends the FAR to require *inter alia* that government contractors consent to personal jurisdiction in civil or criminal actions brought by the United States government for "wrongdoing associated with the performance of the covered contract."

In this testimony, I describe the likely trajectory of lawsuits under S. 526, with particular emphasis on the constitutional and international issues that are likely to arise. I base my conclusions on a quarter century of practice and scholarship on transnational litigation in U.S. courts. My expertise does not extend to government contract law, your invitation to testify does not extend to such issues, and I offer no observations on the legislation from that perspective.

In summary, I share every American's concern that government contractors not escape accountability, and I offer some modest suggestions for improving the reach and reliability of the legislation. At the same time, I am concerned that the legislation in its current form raises significant problems under the Constitution of the United States and under international law. Specifically, the legislation is problematic to the extent that it offers a statutory solution to a Constitutional problem and a domestic solution to an international problem. It also addresses issues that arise at the beginning of transnational litigation – notably jurisdiction and service -- without addressing the range of obstacles that can derail the litigation at a later stage.

THE CONSTITUTIONAL CONTEXT

It is axiomatic that Congress has the constitutional authority to regulate U.S. government contracts and contractors. Although the Constitution is silent on the specific power of federal contracting, the Appropriations Clause assures that Congress determines how taxpayers' money is spent: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., Art. I, Sec. 9, Cl. 7. Of course, the fact that Congress has the constitutional power to adopt S. 526 does not mean that all the constitutional issues that might arise in litigation under the law are easily or necessarily resolved. To the contrary: Congress may be able to specify the terms and conditions under which an appropriation may be used, but it cannot impose an unconstitutional condition on the use of those funds.[1]

The Committee should anticipate that the legislation in its current form will trigger constitutional challenges both on its face and as applied in any given case.

Personal Jurisdiction

In the United States, the power of a court over a particular person or a corporation is always a constitutional question, and defendants in every case under the legislation will have a right to have a court determine whether the exercise of personal jurisdiction *in that particular case* is constitutional or not. Stripped to its essentials, the question is whether the exercise of personal jurisdiction comports with Due Process and specifically whether the exercise of jurisdiction is fair and reasonable given the particular facts of the case. It was on precisely these grounds that Judge Duffy ruled in favor of the defendant in the *Baragona* case last May.

Although Congress can exercise its power over government contracts in a way to assure that the Baragona family receives compensation,[2] Congress cannot legislate a one-size-fits-all answer to the Due Process inquiry. Specifically, requiring a waiver of personal jurisdiction objections as a precondition for contracting with the government of the United States qualifies in my opinion as an unconstitutional condition.

Minimum contacts, purposeful availment, and reasonableness. Beginning with *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945) , the Supreme Court has ruled in a series of cases that a court may exercise jurisdiction over a defendant *unless* that would

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[1] *See, e.g., United States v. Klein*, 80 U.S. (8 Wall.) 128 (1872) (invalidating an appropriations provision that nullified certain aspects of a presidential pardon); *United States v. Lovett*, 328 U.S. 303 (1946) (invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials).

[2] For example, I believe that Congress could constitutionally insist that foreign contractors post a bond that would provide the protected class of injured plaintiffs a compensation fund in the event that litigation in U.S. courts were derailed. Or the United States could pay the claim and seek compensation from the contractor wherever it can be sued, including in a foreign jurisdiction.

be so unfair as to violate the Due Process clause of the U.S. Constitution. The defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[3] The courts have had occasion to apply the "minimum contacts" standard in a bewildering variety of cases but have done little to reduce the *ad hoc* fact-dependency of these decisions. At a minimum however, the constitutional inquiry has evolved from *International Shoe* into a three-step inquiry: (1) does the plaintiff's claim arise out of the defendant's conduct within the forum state?; (2) do the defendant's contacts within the forum state constitute "purposeful availment" of the privilege of conducting business there?;[4] and (3) is the exercise of jurisdiction "reasonable?" In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), the reasonableness inquiry required the court to consider a range of interests in addition to the burden on the defendant, including:

> the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief (at least when not protected by the plaintiff's power to choose the forum), the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

In summary, "[a]n exercise of personal jurisdiction . . . complies with constitutional imperatives only if the defendant's contacts with the forum relate sufficiently to his claim, are minimally adequate to constitute purposeful availment, and render resolution of the dispute in the forum state reasonable." *United States v. Swiss American Bank*, 191 F.3d 30, 36 (1st Cir. 1999).

Each of these inquiries is implicated by S. 526.

1. *Does the plaintiff's claim arise out of the defendant's conduct within the forum state?* It is clear that S. 526 attempts to establish personal jurisdiction over conduct that occurs entirely abroad, as in the *Baragona* case itself. That is difficult enough form a constitutional perspective, but there is also no requirement in the legislation that the plaintiff's claim actually arise out of the government contract itself. To the contrary, at various points in the legislation, the specified relationship is only that the action must be "in connection with the performance of the contract" or involve "wrongdoing associated with the performance of the covered contract."

Under the Constitution, if the plaintiffs' claims are not related to the defendant's contacts with the forum state, the jurisdiction is properly characterized as "general," which means in turn that plaintiffs must demonstrate the defendant's continuous and systematic contacts or presence. The effort in S. 526 to require foreign companies doing business with the U.S. government to waive their objections to personal jurisdiction runs afoul of this constitutional requirement and

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[3] 326 U.S. at 316 (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)).

[4] In *Hanson v. Denckla*, 357 U.S. 235 (1958), for example, the Supreme Court wrote that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws...." *Accord, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.")

potentially amounts to an unconstitutional condition on the privilege of doing business with the U.S. government.

2. *Do the defendant's contacts within the forum state constitute "purposeful availment" of the privilege of conducting business there?* There is an attractive logic to the assertion that bidding on a contract with the U.S. government qualifies as "purposeful availment." But the courts have generally required that the defendant purposefully avail itself of the privilege of doing business in the forum, and the primary indicators of that purpose include the location of negotiation, execution, and performance. Certainly some government contracts with the United States will qualify as evidence of an intent to do business in the United States. But not all of them can be so construed, especially if the contract is negotiated, signed, and performed abroad. A statute requiring companies to waive this constitutional requirement and also amounts to an unconstitutional condition on the privilege of doing business with the U.S. government.

3. *Is the exercise of jurisdiction "reasonable?"* The Due Process inquiry into fairness is inevitably open-ended and dependent on the facts of every individual case. The factors identified in *Woodson*, *supra*, cannot be legislatively determined in advance, although the existence of legislation can itself be taken as evidence of a powerful national interest in resolving the litigation locally. But that is only one factor of many, and, as noted above, Congress has no authority by legislation to preclude a constitutional protection to which the defendant may be entitled. I am especially concerned that a court will invalidate the effort in Section 3(a)(3) to extract consent to be sued in the United States District Court for the District of Columbia if the events giving rise to the action occurred abroad and personal jurisdiction cannot be established in another Federal Court.

Service of Process

The Constitution defines the minimal requirements for the service of process. Specifically, under the Due Process Clause as interpreted in *Mullane v. Central Hanover Bank & Trust Co.*, *supra,* defendants must receive "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[5] The Supreme Court has ruled that foreign nationals in particular must be "assured of either personal service, which typically will require service abroad and trigger the [Hague Service] Convention, or substituted service" that meets the *Mullane* test.[6]

In *Baragona*, the plaintiffs attempted to serve the defendants using the Hague Service Convention – discussed below -- and encountered some of the recurring difficulties associated with that treaty. S. 526 attempts to avoid those problems by creating an incentive to accept service, specifically debarring or suspending any government contractor "that evades service of process in any civil action or criminal prosecution brought against the contractor by the United States or a citizen … of the United States in connection with the performance of the contract."

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[5] 339 U.S. 306, 314 (1950).

[6] *Volkswagenwerk Aktiengesellschaft v. Schlunk* 486 U.S. 694, 705 (1988).

For contracts whose value is not less than $5 million, the contractor must also designate an agent located in the United States for service of process if it does not maintain an office in this country.

It is understandable that Congress would penalize any bad faith effort to evade service of process. But statutory directives to accept service will be subject to constitutional scrutiny, and the precedents are not favorable for finding jurisdiction on the basis of service on a statutorily-designated agent, if the defendant is not actually doing business in the forum. *See, e.g., Arkwright Mut. Ins. Co. v. Scottsdale Ins. Co.*, 874 F.Supp. 601 (S.D.N.Y., 1995). From this perspective, S. 526 might solve the problem of assuring that defendants have actual notice of the lawsuit, but that standing alone does not solve the personal jurisdiction problem.

The proposed legislation might minimize these constitutional issues if it were amended to allow the service of process on the defendant contractor "wherever the [contractor] resides, is found, has an agent, or transacts business...." Several federal statutes permit world-wide or nationwide service of process by any federal district court to any place that the foreign defendant "may be found" or "transacts business." Notably included are the Racketeer Influenced and Corrupt Organizations Act,[7] the Federal Interpleader Act,[8] the federal securities laws,[9] the Clayton Act,[10] and the Telemarketing and Consumer Fraud and Abuse Prevention Act,[11] among others. *On its face*, such a service provision, though broad, is as constitutional as these similar provisions in other federal legislation. Whether the provision is constitutional *as applied* in any given case will depend of course on the facts of that case, especially if service is attempted on a U.S.-based agent, subsidiary, or partner of the foreign company.

THE INTERNATIONAL CONTEXT

S. 526 address an international problem, and international law, including treaties of the United States (like the WTO government procurement code and various friendship, commerce, and navigation treaties) and customary international law, is relevant. As a matter of U.S. law, Congress may legislate in derogation of pre-existing treaties and customary international law. When it does so consciously and explicitly, the later-in-time prevails in U.S. courts to the extent of the conflict.[12] But under the authoritative Vienna Convention on the Law of Treaties, Article

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[7] 18 U.S.C. §1965.

[8] 28 U.S.C. §2361.

[9] 15 U.S.C. §§77v and 78aa.

[10]15 U.S.C. § 22 .

[11] 15 U.S.C. §6101.

[12] Under the Supremacy Clause of the Constitution, treaties are "the Supreme Law of the Land" on a par with federal legislation, and, if there is an unavoidable conflict between a statute and a

27, domestic law is not a defense to international breach, and the United States is subject to international remedies if it breaches a pre-existing treaty or customary international law by legislation. For that reason among others, it is never presumed that Congress intends to override the international obligations of the United States, and U.S. courts will attempt to construe the legislation and the treaty consistently with one another whenever possible.

One of the genetic markers of legislation that runs afoul of international law is that it fails the reciprocity test: how would the United States government react if such legislation were enacted and enforced abroad? In this case, how would the United States government regard an effort to hold a U.S. company liable in a foreign court "in connection with" that company's performance of a contract with that country's government? The case is easy if the company's conduct occurs in the country that is asserting jurisdiction. But that is not what S. 526 purports to cover.

Jurisdiction to Prescribe, to Adjudicate, and to Enforce

Customary international law recognizes and protects a variety of powers for nations, including (1) the jurisdiction to prescribe or to legislate, *i.e.*, the authority of a nation to extend its laws substantively to particular persons or property or events; (2) the jurisdiction to adjudicate, *i.e.*, the international equivalent of personal jurisdiction; and (3) the jurisdiction to enforce, *i.e.*, the authority of a nation to compel compliance with its law. With respect to prescriptive jurisdiction, under the theory of so-called "objective territoriality," international law recognizes the right of nations to regulate foreign conduct that has domestic effects, especially if those effects are significant and intentional. In Sections 402 and 403 of the RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW (1987), for example, the American Law Institute recognized every nation's jurisdiction to legislate with respect to "the conduct outside its territory that has or is intended to have substantial effect within its territory," so long as the exercise of jurisdiction in any given case is "reasonable." The courts of the United States have applied that standard for decades, in effect harmonizing the international and the constitutional standard for the application of U.S. law.

Jurisdiction to prescribe. It appears at several points in S. 526 that the applicable law will be the law of the United States or the law of the State in which the action is brought. *See, e.g.,* Section 3(a) (5)(A) and (B). The concern from an international law perspective is that this will amount to the extraterritorial application of U.S. law. Events and persons occurring entirely abroad will be judged under the substantive laws of the United States. Certainly a breach of a government contract can be assessed under the laws of the United States, but S. 526 potentially goes much further, because it applies to actions that do not necessarily arise under the contract itself and include tort actions arising entirely abroad.

This is not necessarily illegal. As shown below, actions under the Alien Tort Statute typically involve transitory or transboundary torts: the defendants' tortious acts create an obligation to make reparation that follows the defendant wherever he or she goes in the world.

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treaty, the later-in-time prevails to the extent of the conflict.

But it is the defendant's actual presence in the United States that triggers the transitory tort doctrine in such cases, and S. 526 does not require the actual presence of the defendant in this country.

Jurisdiction to adjudicate. The RESTATEMENT also articulates the international standard for jurisdiction to adjudicate that resembles the domestic constitutional standard, discussed above. Under Section 421(1) of the RESTATEMENT,

> A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction *reasonable* [emphasis supplied].

Section 421(2) then offers a laundry list of factors that tend to show that the exercise of jurisdiction to adjudicate is "reasonable:"

> (h) the person, whether natural or juridical, regularly carries on business in the state;
> (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
> (j) the person, whether natural or juridical, had carried on outside the state an activity having a *substantial, direct, and foreseeable* effect within the state, but only in respect of such activity... [emphasis supplied]

The proposed legislation is intended to reach cases brought by a class of plaintiffs with significant contacts to the United States, but the defendant's actual contacts are equally important to the RESTATEMENT's reasonableness analysis.

Jurisdiction to enforce. The jurisdiction to enforce under S. 526 equally complicated. Under international law, no nation may exercise its sovereignty in the territory of another without the consent of the latter. Extraterritorial arrests and extraterritorial seizures of evidence by government officials are plainly illegal in the absence of the territorial state's consent, but considerably less dramatic exercises of power may also violate this basic standard, including the service of judicial documents like subpoenas and complaints. In many nations, service is a public function which, if undertaken by private parties, can violate local law. Serving the defendant in person or by mail can be equally unlawful. In order to avoid conflict, states have adopted various means of cooperation or international judicial assistance in the serving of documents, including the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"), discussed below, and the Inter-American Convention on Letters Rogatory. In the absence of a treaty framework for service, counsel generally reverts to the ancient mechanism of the letter rogatory, in which the forum court seeks assistance from the foreign court, a request that is transmitted through diplomatic channels, honored (or not) through the foreign judiciary, and returned through diplomatic channels. Neither the treaty regimes nor the letters rogatory are entirely seamless or reliable.

Service and the Hague Service Convention

To the extent that service under S. 526 is accomplished within the territory of the United States, international standards of jurisdiction to enforce will be satisfied. But difficulty will arise if litigants and courts simply treat the law as an override of the United States' pre-existing international obligations, including the Hague Service Convention. Every one of this nation's

major trading partners is a party to the Hague Service Convention (including Canada, China, Japan, Korea, Mexico, the United Kingdom and most members of the EU). According to the government of the United States itself, "United States courts have consistently and properly held that litigants wishing to serve process in countries that are parties to the Service Convention must follow the procedures provided by that Convention unless the nation involved permits more liberal procedures."[13] It is widely understood that the Convention procedures, when they apply, are exclusive and mandatory. *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988). I am concerned that S. 526 might be construed as an effort to identify circumstances under which the Convention simply does not apply, though nothing within the four corners of the legislation purports to do so.

If that is the intent of the legislation, I think it is short-sighted and potentially self-defeating. There is no doubt that defendants from countries that are parties to the Convention – and potentially their home governments – will insist on compliance with the treaty to the letter. That is significant not only for the foreign relations of the United States. It can profoundly affect the ability of American plaintiffs who actually win their cases under S. 526 to enforce their judgments in the manufacturer's home country, where its assets are likely to be concentrated. The inadequacy or illegality of service is a powerful defense to the recognition and enforcement of U.S. judgments in foreign courts.

It is true that the Hague Service Convention may be an improvement over the prior haphazard system for the service of process, but it can be complicated, costly, and unreliable, as the *Baragona* litigation demonstrated. The Convention is criticized in part because some States-Parties require U.S. litigants to translate U.S. legal papers into the foreign language of the defendant. But of course, reciprocity is the key: plaintiffs in a foreign action may be required under the Convention to translate their court papers into English if they sue an American defendant. I urge Congress to calibrate the service measures of S. 526 in light of the reality that U.S. companies contracting with foreign governments will be subject to reciprocal measures abroad.

Discovery and the Hague Evidence Convention

There is an additional aspect of international judicial assistance that is implicated by S. 526 but not addressed by it: the gathering of evidence. The parties' discovery powers in U.S. litigation, combined with the power of the court under Federal Rule of Civil Procedure 37 to impose sanctions for non-compliance, offer a fertile breeding ground for international conflict, especially with those legal systems in which pre-trial discovery and the gathering of evidence is an exclusively judicial or public function. In response to what they perceive as unilateral, extraterritorial, invasive, and privatized discovery -- all in violation of their sovereign prerogative -- some foreign countries have adopted blocking statutes or non-disclosure statutes, which specifically prohibit compliance with U.S. discovery orders for the production of evidence located within the foreign state's territory. In high-profile litigation, especially in antitrust and

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[13] Brief for the United States as Amicus Curiae, *Volkswagenwerk, A.G. v. Falzon*, 465 U.S. 1014 (1984).

product liability cases where massive transnational discovery is routine, discovery requests and orders can provoke formal protests.

In an effort to prevent or manage these potential conflicts, many countries, including the United States and most Western European nations, have become parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention"), which, like the Hague Service Convention, obliges parties to designate a "Central Authority" to provide judicial assistance in the completion of official acts. The Hague Evidence Convention builds on a long-standing practice in which letters rogatory were used to request some particular act of judicial assistance in the territory of another state. When the Hague Evidence Convention is inapplicable, courts with transnational cases may attempt to apply the discovery provisions of the Federal Rules of Civil Procedure as though the case did not cross borders, or they may revert to the somewhat *ad hoc* technique of issuing letters rogatory. None of these expedients has worked particularly well, and Congress should anticipate that the problem of transnational discovery will recur in litigation under the proposed legislation.

CHOICE OF LAW

At some point in every transnational case (and sometimes at multiple points), the court is required to choose which law from which jurisdiction should apply to resolve each issue that arises – everything from standing and the elements of the claim, to the standard of liability, the burden of proof, the measure of damages, and evidentiary privileges. It is possible, even routine, that different jurisdictions' laws will control different issues in the same case. But, in stark contrast to issues of personal jurisdiction, where the Due Process Clause is fundamental, the constitutional dimension of choice-of-law decisions is surprisingly modest. Even taken together, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause do little to limit the constitutional discretion of state and federal courts to devise their own choice-of-law rules.

But the Constitution is not completely irrelevant in this arena, *see, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and I am concerned that the choice-of-law provisions of S. 526 will be challenged on multiple grounds. First, in Section 3(a)(5), the revised FAR will require (A) that any covered civil action will be analyzed "in accordance with" the laws of the United States and (B) that the substantive law of the forum state will be the "applicable" law if the substantive law otherwise applicable would be the place where the events giving rise to the cause of action occurred and that location is designated as a hazardous duty zone. I am unclear how these two clauses can operate in tandem, since one refers to the laws of the United States and the other refers in defined circumstances to the law of the forum State. Second, *Shutts* suggests that some kind of relationship must exist between the defendant and the forum whose law is being applied:

> For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

472 U.S. at 820. In *Shutts*, the mere fact of being the forum was not sufficient to pass constitutional muster. The concern in S. 526 is that another unconstitutional condition is being placed on the privilege of entering into a contract with the U.S. government.

FORUM NON CONVENIENS

Transnational litigation routinely requires the courts to decide whether they *should* hear cases that are admittedly within their power. The court may well have personal jurisdiction over a foreign defendant and subject matter jurisdiction over the case, for example, but the plaintiff's choice of forum is nonetheless unfair to the defendant or imprudent from the court's institutional perspective. The difficulties of gathering evidence abroad and the prospect of harassing a defendant through distant litigation may lead a court in its discretion to dismiss a case precisely because the chosen forum is seriously inconvenient or inappropriate.

Forum non conveniens is the common law doctrine under which a court may decline to exercise judicial jurisdiction, when some significantly more convenient alternative forum exists. In the United States, the touchstone for all litigation under the *forum non conveniens* doctrine is *Gulf Oil Corp. v. Gilbert*,[14] and its companion case, *Koster v. Lumbermens Mut. Cas. Co.*[15] In those decisions, the Supreme Court endorsed a presumption in favor of the plaintiff's choice of forum, directing that that choice be disturbed only rarely and in compelling circumstances.

Specifically, the court is to engage in a two-step process. First, it must determine if an adequate alternative forum exists, and much contemporary litigation turns on the adequacy of the asserted alternative.[16] Second, assuming that an adequate alternative forum does exist, the court must balance a variety of factors involving the private interests of the parties and any public interests that may be at stake, all for the purpose of determining whether trial in the chosen forum would "establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience," or whether the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."[17] The defendant

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[14] 330 U.S. 501 (1947).

[15] 330 U.S. 518 (1947).

[16] For example, the court may be asked to consider whether the applicable law in the alternative forum is less favorable to the plaintiff in the alternative forum. Perhaps the statute of limitations has run there, or the court may be unsure about the quality of justice meted out in an alternative forum that is available.

[17] *Koster*, *supra*, at 524. To guide the lower courts' discretion, the Supreme Court has provided a list of 'private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1982). The factors pertaining to the private interests of the litigants included the "[1] relative ease of access to sources of proof; [2] availability of compulsory process for attendance

bears the burden of establishing that an adequate alternative forum exists and that the pertinent factors "tilt[ ] strongly in favor of trial in the foreign forum,"[18] with the understanding that "the plaintiff's choice of forum should rarely be disturbed." [9]1

Neither *Gilbert* nor *Koster* was an international case. Both involved the *forum non conveniens* doctrine in cases involving different states of the Union, and the litigated question today is whether the public and private factors announced in these cases need to be modified in transnational cases or replaced altogether with a different set of criteria. After all, globalization – whether in the form of e-commerce, international intellectual property, or human rights law – puts paradoxical pressure on the *forum non conveniens* doctrine. On one hand, the rise of transnational litigation will raise the prospect of court proceedings in a distant forum under unfamiliar rules, suggesting that foreign defendants will increasingly argue that the exercise of jurisdiction would be imprudent even if it is constitutional. On the other hand, the very forces that give rise to transnational litigation may reduce the inconvenience of foreign litigation, especially with the digitization of information, nearly instantaneous communication, the internationalization of virtually every economy on earth, and the harmonization of law across borders.

Nothing in S. 526 overrides or modifies the *forum non conveniens* doctrine,[20] and foreign companies who can identify a meaningful alternative foreign forum will establish the necessary precondition for applying the doctrine. But that standing alone is not sufficient, and the legislation puts extra weight on the scale at the second step by establishing the public interest of

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of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S., at 508. The public factors bearing on the question included [1] the administrative difficulties flowing from court congestion; [2] the "local interest in having localized controversies decided at home;" [3] the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; [4] the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and [5] the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.*, at 509.

[18] *R. Maganlal & Co.v. M.G. Chemical Co. Inc.*, 942 F.2d 164, 167 (2d Cir. 1991).

[19] *Gilbert*, 330 U.S. at 508.

[20] In some cases, the courts have found a statutory override of the *forum non conveniens* doctrine grounded either in the federal interests behind the law, as in *Wiwa v. Royal Dutch Shell Co, et al.*, 226 F. 3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (the Alien Tort Statute), or in the language of the statute itself, especially if there is an exclusive venue provision requiring venue in the United States. *See e.g.,* the Jones Act, 46 U.S.C. App. § 688(a) or the Federal Employers' Liability Act, 45 U.S.C. § 56. It is conceivable that courts will reach a similar disposition under S. 526.

the United States in assuring certain U.S. plaintiffs a meaningful remedy against foreign contractors who cause injury in another country.

ENFORCEMENT OF JUDGMENTS

Plaintiffs who win judgments against foreign companies under S. 526 should be able to enforce those awards by attaching the U.S.-based assets of the foreign defendants in the United States. But in many cases, the defendant may not have any assets in the United States, and in those common circumstances the value of a U.S. judgment will depend upon its recognition or enforcement abroad. Unfortunately, the relatively accommodating regime in the United States for recognizing foreign judgments[21] is not characteristic of other nations' approach to U.S. judgments, and the assumption has long been that U.S. litigants do not compete on a level playing field. "U.S. courts are quite liberal in their approach to the recognition and enforcement of judgments rendered in foreign jurisdictions, whereas the reverse is not true."[22]

It is impossible here to canvass transnational *res judicata* practices around the world, but it is possible to define and illustrate the *types* of obstacles that U.S. judgments encounter abroad, potentially including judgments under S. 526:

1. *Extraterritorial application of U.S. law*. Foreign courts may resist the recognition or enforcement of a U.S. judgment that is perceived to rest on an illegitimate extraterritorial application of U.S. law. [3]2

2. *Aggressive interpretations of personal jurisdiction*. Foreign courts will decline to enforce a U.S. judgment that rests on objectionable exercises of personal jurisdiction, such as "tag" or transient jurisdiction based on the defendant's temporary presence in the forum, or minimal or incidental effects within the state of extraterritorial conduct outside of it. This is potentially a significant hurdle under the proposed legislation.

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[21] *See,* e.g., *Hilton v. Guyot,*159 U.S. 113 (1895). *See also* The Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 149 (1962).

[22] Matthew H. Adler, "If We Build It, Will They Come? – The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments," 26 LAW & POL'Y INT'L BUS. 79, 94 (1994).

[23] For example, "[t]he United Kingdom has provided, by legislation, that U.S. antitrust judgments are not enforceable in British courts, and both Australia and Canada have given their Attorneys General authority to declare such judgments unenforceable or to reduce the [antitrust damage awards] that will be enforced." William S. Dodge, "Antitrust and the Draft Hague Judgments Convention," 32 LAW & POL'Y INT'L BUS. 363 (2001). Even in the absence of such blocking legislation in the foreign forum, the policy framework may differ so fundamentally that a U.S. judgment grounded in the offensive law will not be enforced, though "mere differences" in substantive law tend not to trigger the same hostility.

3. *Improper service and other procedural failings.* Foreign courts have occasionally declined to enforce a U.S. judgment if the defendant was not served in a way that the enforcing court considers proper. Class actions, summary judgments, and default judgments, though proper under the Federal Rules of Civil Procedure and equivalent state rules, have also occasionally encountered difficulty when enforcement is sought in foreign courts, typically on ground that the defendant did not receive a full trial on the issue of his or her individual liability.

4. *Excessive damage awards*. The American jury is neither mirrored nor conspicuously respected in foreign court systems around the world. In part, that reflects the tendency of the American system to rely on private litigation and juries to constrain the conduct of defendants through the award of compensatory and punitive damages, in contrast to other legal cultures which rely predominantly on administrative law and institutions to control hazardous behaviors.

In 1992, in an effort to overcome these obstacles and improve the reception of U.S. judgments abroad, the United States proposed that the Hague Conference on Private International Law develop the first global treaty addressing both the bases for personal jurisdiction and the recognition and enforcement of foreign judgments.[24] But international law-making of this sort, "[l]ike reform of judicial administration in the United States, ... is 'no sport for the short-winded.'"[25] After many years of negotiations, the proposed Hague Judgments Convention, was put on the back burner, and its eventual promulgation by the Hague Conference – let alone its adoption by the United States and other governments – remains profoundly unlikely for the foreseeable future. [6][2]

THE ALIEN TORT STATUTE

The Committee invited my testimony on the Alien Tort Claims Act, also known as the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). 1 1In its modern form, the Alien Tort Claims Act, 28 U.S.C. 1350, provides that

> the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

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[24] Although no universal treaty exists to resolve conflicts in the rules governing the recognition and enforcement of foreign court judgments, regional treaties in Europe and the Americas have settled interjurisdictional practices there, typically on the basis of reciprocity.

[25] Stephen B. Burbank, "Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law," 49 AM. J. COMP. L. 203 (2001).

[26] The Hague Convention on Choice of Court Agreements (2005) promotes party autonomy in the selection of a forum for the resolution of international disputes but is not a wide-ranging solution to the problem of enforcing judgments in the absence of private forum selection clauses.

The text of the statute, included in the First Judiciary Act of 1789, suggests that claims under it must satisfy three requirements: the plaintiff must be an alien, the claim must be a tort (as distinct from a contractual cause of action), and the tort must be in violation of the law of nations (*i.e.,* customary international law) or a treaty of the United States. What little legislative history exists suggests that the First Congress of the United States intended to empower the federal courts to hear tort cases implicating the fundamentally federal interests in foreign nationals and the interpretation of international law. The framers also understood that transitory or transboundary torts would have fallen within each state's general jurisdiction. The framers of Section 1350 understandably endorsed the option to bring such cases in federal courts whenever the case involved international law. The Alien Tort Claims Act remained dormant for nearly two centuries until 1980, when it became a vehicle for human rights cases with the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 .2d 876 (2d Cir. 1980).

In *Sosa v. Alvarez-Machain*, 1124 S.Ct. 2739 ("*Sosa*"), the Supreme Court established that the ATS does not itself create a cause of action but that it does recognize a cause of action, derived from federal common law, for certain violations of international law.

> [A]lthough the [ATS] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. *The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.*

124 S.Ct. at 2761 (emphasis supplied). As of 1789, according to the Court, only three torts were recognized under the common law as being violations of the law of nations "with a potential for personal liability:" violation of safe conduct, infringement of the rights of ambassadors, and piracy. *Id.* at 2761. The Court also found that the "international law violations" recognized at federal common law were not frozen as of 1789:

> We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.

Id. at 2761. The recognition of a claim under the "present-day law of nations" as an element of common law is limited to "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 2761-2762. The ATS thus authorizes federal courts to develop common law rules of liability where the underlying abuse violates an international norm that is "specific, universal, and obligatory," as had occurred – *Sosa* noted with approval, *id.* at 2766 – in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir.1995) *cert. denied*, 518 U.S. 1005 (1996), and *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994).

In recent years, several cases have been filed against multinational corporations under the ATS, alleging their complicity in human rights violations. The most important current controversy in these cases is the standard for determining aiding-and-abetting liability. It is

important that this remedy remain open to those injured by the intentional torts of corporations that can be found within the jurisdiction of the United States. It is at least equally important that U.S. servicemen and citizens be able to recover just compensation in U.S. courts from foreign corporations that contract with the U.S. government.

My thanks again for the opportunity to testify on this important legislative initiative.

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BIOGRAPHICAL STATEMENT 1

Ralph G. Steinhardt is the Arthur Selwyn Miller Research Professor of Law and International Relations at the George Washington University Law School, in Washington, D.C., and, in Spring 2008, a Senior Research Fellow at Yale Law School. He is the co-founder and director of the Program in International Human Rights Law, at New College, Oxford University. For twenty-five years, Professor Steinhardt has been active in the domestic litigation of international human rights norms, having represented *pro bono* various human rights organizations, as well as individual human rights victims, before all levels of the federal judiciary, including the U.S. Supreme Court. He has also served as an expert witness in several cases testing the civil liability of multinational corporations for their complicity in human rights violations. He currently serves on the International Commission of Jurists' Expert Legal Panel on Corporate Complicity in International Crimes. He is also the Founding Chairman of the Board of Directors of the Center for Justice and Accountability, an anti-impunity organization that specializes in litigation under the Alien Tort Statute.

Professor Steinhardt is the author of numerous books and articles, including *International Civil Litigation: Cases and Materials on the Rise of Intermestic Law* (2002); *Human Rights Lawyering* (2008) (with Hoffman and Camponovo); "Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*," NON-STATE ACTORS AND HUMAN RIGHTS (Oxford University Press, 2005); "The Role of Domestic Courts in Enforcing International Human Rights Law," in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Transnational, 4th ed., 2004); *The Alien Tort Claims Act: An Analytical Anthology* (1999) (with Tony D'Amato), and *International Law and Self-Determination* (1994). He serves on the Board of Editors of the Oxford University Press Project on International Law in Domestic Courts.

Professor Steinhardt received his B.A. *summa cum laude* from Bowdoin College, where he was elected to Phi Beta Kappa. He was then awarded a Henry Luce Foundation Scholarship and appointed Visiting Scholar at the University of the Philippines Law Center. He received his J.D. from Harvard Law School, where he served as Articles Editor of the *Harvard International Law Journal* and won the Jessup Moot Court Competition. He then practiced law in Washington, D.C., for five years, before joining the faculty at the George Washington University Law School.