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REPORT
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SECURING THE PROTECTION OF OUR ENDURING AND ESTABLISHED CONSTITUTIONAL HERITAGE ("SPEECH") ACT

JULY 19, 2010.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 2765]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (H.R. 2765), to amend title 28, United States Code, to prohibit recognition and enforcement of foreign defamation judgments in United States Courts where those judgments undermine the First Amendment, and to provide a cause of action for declaratory judgment relief against a party who has brought a successful foreign defamation action whose judgment undermines the First Amendment, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

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I. BACKGROUND AND PURPOSE OF THE SECURING THE PROTECTION OF OUR ENDURING AND ESTABLISHED CONSTITUTIONAL HERITAGE ACT

In the United States, the First Amendment to the Constitution protects writers and publishers from libel lawsuits that would discourage otherwise protected speech.[1] Since the landmark *New York Times v. Sullivan,*[2] a plaintiff must establish that an author, writer, or publisher of an allegedly libelous statement against a public figure acted with "actual malice" to prevail in a defamation suit.[3] Even a private figure must demonstrate that speech at issue is provably false to prevail in a libel action over a matter of public interest.[4] This is rooted in the basic First Amendment principle that vulgar and distasteful speech merits the same protections as speech that does not offend.[5]

Many other countries do not provide these same free speech protections. As a result, American authors, reporters, and publishers are sometimes sued in foreign countries where free speech protections are lower than those guaranteed by our First Amendment. These lawsuits occur even where the parties do not have any substantial connection to the foreign forum. That phenomenon, where a party has sought out the foreign court simply because of its plaintiff-friendly libel laws, is known colloquially as "libel tourism."

The prevalence of these foreign libel lawsuits is significantly chilling American free speech and restricting both domestic and worldwide access to important information. Given the international circulation of many U.S.-based publications, as well as the worldwide access to U.S.-based content over the Internet, concerns over foreign libel lawsuits confront many American authors, reporters, and publishers. Regardless, whether the foreign libel judgment is enforced in the United States or not, the mere filing of a foreign libel lawsuit can result in damage to an author, reporter or publisher's reputation.[6] As a result, these lawsuits have a chilling effect on U.S. authors, reporters and publishers who are forced to abide by the libel laws of the most restrictive countries in order to completely shield themselves from harm—a result that runs counter to the free speech guarantees of the First Amendment.[7]

The magnitude of this problem is well documented. In 2008, the United Nations Human Rights Committee reported that one foreign country's libel laws are so plaintiff-friendly that they have "served to discourage critical media reporting on matters of serious

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[1] *See Hart-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 684 (1989); *see also* Editorial, "Libel Tourism," N.Y. Times, A18, May 25, 2009, *available at* http://www.nytimes.com/2009/05/26/opinion/26tue2.html?_r=1.

[2] 376 U.S. 254, 268 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

[3] *See id.*

[4] *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990) ("a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved").

[5] *See Cohen v. California,* 403 U.S. 15, 26 (1971) ("[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of [a] single four-letter expletive a criminal offense.").

[6] Rachel Ehrenfeld, "The Chill of Libel Tourism," Guardian, June 9, 2009, *available at* http://www.guardian.co.uk/commentisfree/libertycentral/2009/jun/09/libel-tourism-rogues-gallery.

[7] Drew Sullivan, "Libel Tourism: Silencing the Press through Transnational Legal Threats," Report for the Center for International Media Assistance, 24, Jan. 6, 2010, *available at* (http://cima.ned.org/wp-content/uploads/2010/01/CIMA-Libel_Tourism-Report.pdf) ("Lawyers and media organizations say one of the reasons for these lawsuits is to intimidate media organizations. Threatening media with expensive suits can force them to hold off on stories or remove materials from stories. It can discourage them from publishing future materials.").

public interest, adversely affecting the ability of scholars and journalists to publish their work."[8] This U.N. report explained that the additional concern with these defamation suits is that the "advent of the Internet and the international distribution of foreign media . . . creates the danger that a State party's unduly restrictive libel law will affect freedom of expression world-wide on matters of valid public interest."[9]

Over the past several years, this fear has come to pass. The most prominent example of the harm caused by foreign libel lawsuits involves Rachel Ehrenfeld, an investigative reporter and New York Times journalist, who is a United States citizen. Ms. Ehrenfeld was sued in the United Kingdom for defamation over the content of a book that she authored and published in the United States. In that book, *Funding Evil: How Terrorism is Financed and How to Stop It,*[10] she reported, among other things, that Saudi billionaire Khalid bin Mahfouz deposited millions into terrorist accounts.[11] Though Mr. Bin Mahfouz was neither a British citizen nor a resident, he sued Ms. Ehrenfeld in England, a country whose libel laws are much less protective of journalists than the protections guaranteed by the First Amendment.[12] Mr. Bin Mahfouz won a default judgment against Ms. Ehrenfeld, and the British judge awarded damages and enjoined the publication of Ms. Ehrenfeld's book in the United Kingdom.[13]

While Ms. Ehrenfeld's suit is the most recognizable, similar examples have become all too common.[14] Today, lawyers must advise their journalist-clients of the legal repercussions of reporting on transnational issues such as international finance, terrorism, and celebrity scandals.[15] This advice influences the decision of what materials to publish both overseas and domestically, and stifles the free flow of information.

A few American states have enacted laws to protect American writers and publishers from foreign libel laws. In 2008, New York passed the Libel Terrorism Protection Act, which prohibits enforcement of foreign libel judgments in New York State that are inconsistent with the "freedom of speech and press protections guaranteed by the United States or New York Constitutions."[16] That law

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[8] U.N. Human Rights Comm., Consideration of Reports Submitted by States, p. 25, Commc'n No. CCPR/C/GBR/CO/6 (July 7–25, 2008), 47 Eur. Ct. H.R. SE 19; *see also* Sarah Staveley-O'Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment,* 4 N.Y.U. J.L. & LIBERTY 252, 265 (2009).

[9] U.N. Human Rights Comm., at 25.

[10] RACHEL EHRENFELD, FUNDING EVIL: HOW TERRORISM IS FINANCED AND HOW TO STOP IT (Bonus Books 2003).

[11] Samuel A. Abady and Harvey Silvergate, "'Libel Tourism' and the War on Terror," Boston Globe, Nov. 7, 2006, *available at* http://www.boston.com/ae/media/articles/2006/11/07/libel_tourism_and_the_war_on_terror/.

[12] *See id.*

[13] *See* "Florida Becomes Latest State to Pass Libel Tourism Bill; California Could be Next," Weil Briefing: Intellectual Property and the Media, 2, May 13, 2009, *available at* (http://www.weil.com/files/upload/WeilBriefing_IP-M_090513.pdf) ("In addition to awarding roughly $250,000 in damages, the court also issued a declaration of falsity and ordered that the book be removed from public libraries, that Ehrenfeld publish an apology, and that any unsold copies in England be destroyed.").

[14] *See, e.g.,* Rendleman, *supra* note 1, at 468 (detailing Saudi cleric Bin Badden's suit against American professor, Helene Herron in the United Kingdom); Ehrenfeld, *supra* note 3 (describing legal threats made to American writer Michael Gross after he wrote a book portraying socialite Annette de la Renta in a manner that she did not approve).

[15] *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 111th Cong. 9–10 n. 30 (2009) (written statement of Bruce D. Brown, Partner, Baker & Hostetler, LLP).

[16] N.Y. C.P.L.R. 5304(b)(8) (2008).

also expanded New York's long arm statute to enable the American party to seek separate declaratory relief to determine liability for the foreign judgment under U.S. law, even where the foreign party does not attempt enforcement.[17] In 2009, California enacted a similar law.[18] Illinois and Florida implemented libel tourism nonrecognition legislation in 2008 and 2009, although neither state addressed the jurisdictional issues necessary to facilitate effective declaratory relief.[19] Though a few other states are considering similar bills, the majority of states have not addressed this issue.

Federal legislation is necessary to ensure that American authors, reporters, and publishers have nationwide protection from foreign libel judgments, even when the foreign party has not yet sought enforcement of those judgments in the United States. Additionally, federal legislation is needed to provide a single, uniform standard for addressing these foreign libel judgments.

The Committee bill, as reported, combats the chilling effect that foreign defamation lawsuits are having on American free speech in two significant respects. First, the bill prohibits the enforcement of any foreign libel judgment that is inconsistent with United States First Amendment protections or Fifth and Fourteenth Amendment due process requirements. In that enforcement action, the burden falls on the foreign plaintiff to demonstrate that the foreign judgment is consistent with U.S. law. If the foreign plaintiff nonetheless seeks enforcement in an American court, the domestic party opposing enforcement of the judgment is entitled to reasonable attorneys' fees if it prevails in the enforcement action. This provision should serve to further deter enforcement actions of foreign judgments that threaten free speech.

Second, the Committee bill, as reported, provides a mechanism for American authors, reporters, or publishers to clear their names even when the foreign party does not attempt to enforce its judgment in the United States. The bill creates a cause of action for declaratory relief where the foreign judgment is repugnant to the Constitution or laws of the United States. Such an action may be brought against a party with sufficient contacts anywhere in the United States. In this declaratory judgment action, the burden falls on the domestic author, writer, or publisher to demonstrate that the foreign judgment is inconsistent with the Constitution or the laws of the United States. Attorneys' fees are not available to the U.S. plaintiff in this declaratory judgment action, since it would be initiated by a U.S. author, reporter or publisher.

In addition, the Committee bill, as reported, protects Internet service providers (defined as providers of "interactive computer service" under section 230 of the Communications Act of 1934)[20] from libel litigation stemming from the content published on its network. The bill also includes an important provision to ensure that a U.S. party's appearance in a foreign court to contest a libel lawsuit does not bar that party from opposing domestic enforcement of the judgment as provided by this legislation. Further, the bill provides for removal to Federal court of any enforcement action

[17] N.Y. C.P.L.R. 5304(d).
[18] Cal. C.C.P. CODE § 1716 (2010).
[19] *Compare* 735 ILL. COMP. STAT. ANN. 5/12–621(b)(7) (2008), *with* FLA. STAT. ANN. §§ 55.601, 55.605 (2009).
[20] 47 U.S.C. § 230(f)(2) (2006).

brought in State domestic court, where the foreign defamation judgment meets certain diversity requirements.

Finally, the Committee bill, as reported, provides further that it is the "sense of Congress" that for the purposes of pleading a cause of action for a declaratory judgment, a foreign judgment for defamation constitutes a "case of actual controversy" under section 2201(a) of title 28, United States Code. This provision pertains to a jurisdictional requirement of Article III of the Constitution requiring a case or actual controversy.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

On June 9, 2009, Representative Cohen introduced H.R. 2765. The bill was referred to the House of Representatives Committee on the Judiciary, which reported it favorably by voice vote. On June 15, 2009, the bill passed the House of Representatives, as amended, by voice vote. The bill was then sent to the Senate, where it was referred to the Committee on the Judiciary. A full history of the House Judiciary Committee's consideration of H.R. 2765, including related hearings, can be found in House of Representatives Report 111–154.

On February 23, 2010, the Senate Committee on the Judiciary held a hearing on "Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?". This hearing was chaired by Senator Leahy. The following witnesses testified: Bruce Brown, Partner at Baker & Hostetler LLP; and Kurt Wimmer, Partner at Covington & Burling LLP. The following materials were submitted for the Record: statement of Dr. Rachel Ehrenfeld, Director of American Center for Democracy; statement of the American Civil Liberties Union; statement of Doug Rendleman, Huntley Professor Of Law at Washington and Lee Law School; letter from Lynne E. Bradley, Director of Government Relations, American Library Association; and an article authored by Robert D. Rachlin, Lecturer, Vermont Law School, entitled *The Sedition Act of 1798 and the East-West Political Divide in Vermont.*

On June 22, 2010, Chairman Leahy introduced the SPEECH Act, S. 3518, which is cosponsored by Senator Sessions, Senator Specter, Senator Schumer, Senator Lieberman, and Senator Kaufman. This bill was referred to the Committee on the Judiciary. The following persons or groups submitted letters of support for the SPEECH Act: Michael B. Mukasey, former Attorney General; R James Woolsey, former Director, Central Intelligence Agency; Allan Adler, Vice President for Government and Legal Affairs, Association of American Publishers; Corey Williams, Associate Director, American Library Association; Marti Fiske, President, Vermont Library Association; Lucy Dalglish, Executive Director, Reporters Committee for Freedom of the Press; Dr. Rachel Ehrenfeld, Director, American Center for Democracy; Markham Erickson, Executive Director, NetCoalition; Daniel Kornstein, Partner at Kornstein, Veisz, Wexler & Pollard; and Floyd Abrams, of Cahill Gordon and Reindel LLP.

On July 13, 2010, the Committee on the Judiciary considered H.R. 2765. One amendment was considered during this debate. Senator Leahy offered a substitute amendment, which was adopted by unanimous consent. That amendment contained the full text of the SPEECH Act.

The Committee then voted to report H.R. 2765, with an amendment in the nature of a substitute, favorably to the Senate by voice vote.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the "Securing the Protection of our Enduring and Established Constitutional Heritage Act" or the "SPEECH Act".

Section 2. Findings

This section contains congressional findings about the scope of the problem known as libel tourism.

Section 3. Recognition of foreign defamation judgments

Subsection (a). This subsection creates a new Chapter 181 in Part VI of title 28, United States Code, as follows—

Sec. 4101 provides definitions.

Sec. 4102 outlines circumstances under which domestic courts should not recognize a foreign defamation judgment. Specifically, this includes (1) First Amendment considerations, and the applicable burden of proof; (2) jurisdictional considerations, and the applicable burden of proof; (3) treatment of judgments against interactive computer services, and the applicable burden of proof; (4) treatment of appearances in foreign courts; and (5) rules of statutory construction.

Sec. 4103 provides grounds for removal of an enforcement action brought in a State domestic court to a United States District Court.

Sec. 4104 provides a cause of action for any United States person to obtain a declaratory judgment stating that a foreign defamation judgment entered against that person is repugnant to the Constitution or laws of the United States, where the foreign judgment would not be enforceable under the criteria provided in section 4102. This section also addresses the applicable burden of proof, and provides criteria for nationwide service of process.

Sec. 4105 provides that any party opposing enforcement of the foreign defamation judgment who prevails in a domestic court may recover a reasonable attorney's fee.

Subsection (b). This subsection provides that it is the "sense of congress" that for the purposes of pleading a cause of action for a declaratory judgment, a foreign judgment for defamation constitutes a "case of actual controversy" under section 22012(a) of title 28, United States Code.

Subsection (c). This subsection provides technical and conforming amendments.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, H.R. 2765, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

JULY 19, 2010.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2765, the Securing the Protection of our Enduring and Established Constitutional Heritage Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2765—Securing the Protection of our Enduring and Established Constitutional Heritage Act

H.R. 2765 would prohibit U.S. district and state courts from enforcing foreign defamation judgments that are inconsistent with Constitutional protections and certain telecommunications laws. In general, foreign courts do not have jurisdiction over the United States, and U.S. courts would not recognize a foreign judgment against the United States. (Under the Federal Tort Claims Act, the federal government waived its sovereign immunity and consented to being sued in federal courts only in particular cases). Therefore, CBO estimates that H.R. 2765 would have no significant effect on the federal budget. Because the legislation would not affect direct spending or revenues, pay-as-you-go procedures would not apply.

H.R. 2765 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt state laws related to foreign judgments. CBO estimates that state courts would incur no significant costs to comply with the preemption; therefore, the costs of the mandate would not exceed the annual threshold established in UMRA for intergovernmental mandates ($70 million in 2010, adjusted for inflation).

H.R. 2765 would impose private-sector mandates as defined in UMRA on individuals seeking to have certain foreign defamation judgments enforced in the United States. New requirements on those individuals would limit an existing right to recover damages and direct them to reimburse attorney's fees in the event a domestic court does not uphold a foreign judgment. The cost of the mandate would be the net value of forgone awards and settlements in such claims and any fees paid to opposing parties. Based on information about foreign defamation cases, CBO expects that the cost of the mandates would fall below the annual threshold established in UMRA for private-sector mandates ($141 million in 2010, adjusted annually for inflation).

On June 12, 2009, CBO transmitted a cost estimate for H.R. 2765, a bill to amend title 28, United States Code, to prohibit recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services, as ordered reported by the House Committee on the Judiciary on June 10, 2009. The two versions of the legislation are similar, and the CBO cost estimates are the same.

The CBO staff contacts for this estimate are Martin von Gnechten (for federal costs) and Marin Randall (for the private-sector impact). This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of H.R. 2765.

VI. CONCLUSION

The SPEECH Act will ensure that no domestic court can be used to diminish the First Amendment rights of American authors, reporters and publishers by enforcing a foreign libel judgment that is inconsistent with U.S. law. Moreover, the bill provides a new affirmative cause of action for any U.S. citizen who is the victim of a foreign defamation judgment that is inconsistent with the First Amendment or the due process guarantees of the U.S. Constitution. This bill will prevent the chilling of American free speech that is the inevitable result of these foreign libel lawsuits.

ADDITIONAL VIEWS OF SENATOR KYL

The complementary freedoms of speech and the press enshrined by our founding fathers in the First Amendment are cornerstones of American society. As Thomas Jefferson famously said, "Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it." The importance of these freedoms has not diminished with time.

Regrettably, many other countries place lesser value on free expression and do not provide the strong legal protection for speech and the press that exists in the United States. These nations' judicial systems have, in many instances, become home to a practice known as "libel tourism," which occurs when an individual brings a libel or defamation suit against an American in a country with less protective free speech laws. Plaintiffs are increasingly engaging in global forum shopping in an effort to silence journalists, authors, publishers, and others who are merely exercising their First Amendment rights.

There can be no doubt that American citizens' rights of free expression are being abridged by this practice. Indeed, some Americans are falling victim to an international race to the bottom—they are able to write or publish only material that would be allowed in countries with the weakest free speech protections.

Although libel tourism conflicts with American values, it has proven to be an effective way to silence criticism. Several high profile cases illustrate how libel tourism stifles free speech, perhaps none better known than the case of Rachel Ehrenfeld. In 2003, Dr. Ehrenfeld published *Funding Evil: How Terrorism is Financed and How to Stop It,* which detailed how Saudi billionaire Khalid bin Mahfouz financed terrorism. In response, bin Mahfouz and two members of his family filed suit against Dr. Ehrenfeld in Britain to take advantage of that country's expansive libel laws. Despite the fact that neither the plaintiff nor the defendant was a British citizen, the courts permitted the case. Dr. Ehrenfeld refused to acknowledge the jurisdiction of the British court and chose not to defend the action. The British court issued a default judgment and ordered Dr. Ehrenfeld to pay each plaintiff £10,000 (and their accompanying legal fees), apologize, and destroy existing copies of her book.

Dr. Ehrenfeld was not bin Mahfouz's only victim. Reports indicate he has sued or threatened suit in Britain at least 33 times in order to silence those who have accused him of knowingly funding terrorism. He has taken similar legal actions in Belgium, France and Switzerland.

The record is clear that libel judgments can lead to the financial ruin of authors and severely restrict their ability to publish in the future. Moreover, the mere prospect of a meritless foreign libel suit can chill speech by deterring the publication of books and articles that may subject the author to financial loss and reputational harm.

Libel tourism also affects publishers. In 1997, Russian oligarch Boris Berezovsky sued Forbes magazine in a British court for publishing an article accusing him of substantial illegal activities and ties to organized crime. Rather than engage in a prolonged legal battle, Forbes reportedly settled with Mr. Berezovsky. Subsequently, Brazil issued a warrant for Mr. Berezovsky's arrest on charges of fraud and money laundering.

Several states including New York, Illinois, California and Florida have taken action to prevent their citizens from suffering the penalties of foreign libel judgments; however, Federal action is necessary to ensure that all Americans are protected by the rights they are afforded under U.S. law.

This bill takes important steps toward achieving this goal. First, the bill would protect U.S. citizens by barring the enforcement of baseless foreign libel judgments in the United States. It would also permit U.S. citizens targeted by foreign libel judgments to seek and obtain a declaratory judgment in U.S. court that a foreign libel judgment is repugnant to the Constitution or laws of the United States. This will help U.S. victims of libel tourism clear their names. Because a libel judgment can prevent an author from publishing in the future, this section is critical to protecting Americans from the destructive effects of libel tourism.

Finally, the bill takes an initial step toward making practitioners of libel tourism financially responsible for their actions. Specifically, the bill would allow Americans to recover attorney's fees incurred defending themselves against efforts to enforce a foreign libel judgment's enforcement in the United States.

But this bill will not, standing alone, eliminate the harm caused to Americans by baseless foreign libel lawsuits. After all, many plaintiffs never seek to enforce their judgments in the United States; Bin Mahfouz, for example, was content to deter publishers from distributing books overseas. And this law does not provide any recourse to Americans who have had foreign assets attached by a foreign court.

We believe that the Congress needs to pass broader measures that permit U.S. citizens accused of libel in foreign courts to force their accusers to pay for legal fees incurred abroad and, in certain cases, additional damages. Libel tourism will continue to pose problems for Americans until those who bring foreign libel lawsuits are faced with the same kinds of financial risks they seek to inflict on others.

We support this bill as a good first step toward addressing an important problem, but there is more that can, and should, be done. We look forward to working on additional measures to protect Americans from efforts to infringe on their free speech rights.

JON KYL.

VIII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

Pursuant to paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law made by H.R. 2765, as ordered reported.

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