
Testimony of Bruce D. Brown
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Before the United States Senate
Committee on the Judiciary

“Are Foreign Libel Lawsuits Chilling
Americans’ First Amendment Rights?”

February 23, 2010

Mr. Chairman and Members of the Committee:

I am Bruce D. Brown, a partner at Baker & Hostetler LLP in Washington, D.C. We represent clients ranging from large media companies to book and magazine publishers to journalism advocacy organizations. I worked for David Broder at the Washington Post for two years prior to law school, received my J.D. from Yale in 1995, and then worked as a reporter at Legal Times covering the federal courts before joining my law firm. I am the immediate past co-chair of the legislative affairs committee of the Media Law Resource Center in New York and am an adjunct faculty member in Georgetown University's master's program in Professional Studies in Journalism.

I am honored to appear before the Committee today to discuss libel tourism and assist the Committee in finding a legislative remedy for a problem that is distorting and diminishing First Amendment protections for journalists and authors in the U.S. and thus creating a chilling effect that is limiting the amount of information the public receives here at home. Even if this abuse of foreign courts is finally starting to attract the attention of lawmakers overseas, as is the case in the U.K., we need not wait for the glacial pace of reform abroad to bear fruit in order to take steps in Congress today to protect our own free speech traditions. I support efforts by this Committee to pass legislation to curb this growing threat and strengthen the exercise of First Amendment freedoms.

As I emphasized in February of last year while testifying on this same issue before the House Judiciary Subcommittee on Commercial and Administrative Law, countering the impact of libel tourism is not about second-guessing foreign governments for coming to a different balance between reputational interests and freedom of speech than we have, it is about making sure that those jurisdictions do not dictate to us how we should strike this balance for ourselves. I attach and incorporate that testimony, which describes the problem of libel tourism and its chilling effect on First Amendment freedoms. See Testimony of Bruce D. Brown, Baker & Hostetler LLP, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law (February 12, 2009) (attached hereto as Exhibit A). Today, I will focus on potential legislative solutions aimed at curbing the practice of libel tourism.

The Need to Stem the Tide of Libel Tourism

It has become evident from the proliferation of defamation suits and other legal proceedings overseas against American writers that Congress must enact legislation to prevent libel tourists from taking advantage of lax foreign defamation laws to suppress the First Amendment rights of U.S. citizens and chill their future speech. In the 40 years since the constitutional revolution of New York Times v. Sullivan, American journalists and authors have hoped that foreign nations would follow suit and adopt similar speech-friendly protections. That has not occurred, and the advent of the Internet – where the stories that news organizations publish here for a U.S. audience are necessarily available to a global readership as well – and the willingness of foreign courts to entertain libel suits on the thinnest of jurisdictional bases have compelled the passage of additional legislative protections in the U.S. to preserve our own expressive freedoms.

A solution to libel tourism must not be left solely in the hands of foreign courts or legislatures. It may be that one day a treaty between the U.S. and the E.U. or the U.S. and the U.K., for example, provides guidance on jurisdictional and choice-of-law determinations in libel suits. But while we wait for that day, Congress should follow the lead of New York, California, Florida and Illinois, states that have all stepped in to protect their citizens from libel plaintiffs who seek to suppress First Amendment rights. The bill presented by Sen. Arlen Specter, S. 449, and its corollary in the House of Representatives sponsored by Rep. Peter King, H.R. 1304, show that we are ready to fill this void. Another proposal in the House of Representatives by Rep. Steve Cohen, H.R. 2765, also presents the first building blocks of a solution but may fall short of what is necessary to create a sufficient deterrence mechanism to stop foreign libel plaintiffs from targeting U.S. citizens.¹

Drafting Effective Legislation to Combat Libel Tourism

In this testimony, I describe libel tourism laws already on the books in four states and detail the legislation introduced by Sen. Specter, Rep. King and Rep. Cohen. Finally, I discuss the elements of a successful libel tourism law that will protect U.S. citizens from those who seek to circumvent the First Amendment through overseas forum-shopping.

1. State laws enacted to prevent libel tourism.

Four states – New York, Illinois, California and Florida – have passed libel tourism laws to prevent the enforcement of foreign defamation judgments within their borders, and at least four more – Hawaii, New Jersey, Utah and Arizona – have introduced bills to that same effect.

- New York. New York passed the first of the state libel tourism laws, dubbed “Rachel’s Law” after author Rachel Ehrenfeld, which requires the non-recognition of a foreign defamation judgment “unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.” N.Y. CPLR § 5304(b)(8). In addition, the legislation amended the New York long-arm statute to ensure that

[t]he courts of this state [] have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the

¹ For an explanation of the differences between U.S. and U.K. libel law, see Robert Balin, Laura Handman and Erin Reid, “Libel Tourism and the Duke’s Manservant,” available at <http://www.medialaw.org/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=7753>. For summaries and comparisons of various approaches to libel law around the world, see INTERNATIONAL LIBEL & PRIVACY HANDBOOK (Charles J. Glasser, Jr. ed., Bloomberg Press 2006).

judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to [CPLR § 5304], to the fullest extent permitted by the United States constitution[.]

N.Y. CPLR § 302(d). This provision requires that “the publication at issue was published in New York,” and that the “resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment.” Id.

- Illinois. Illinois followed New York’s lead with a nearly identical amendment to its statute regarding the “inconclusiveness” of judgments which states that any judgment secured in a foreign defamation action is “not conclusive” unless a court 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(7). The Illinois legislation also contained a jurisdictional provision identical to that provided for in the amended New York statute. See 735 ILCS 5/2-209(b)(5).

- Florida. The same language regarding the non-recognition of a foreign defamation judgment can be found in the Florida legislation. See Fla. Stat. § 55.605. Its jurisdictional provision is different in form, but not in substance. It states:

(1) For the purposes of rendering declaratory relief with respect to a person's liability for a foreign defamation judgment and determining whether the foreign defamation judgment should be deemed nonrecognizable under s. 55.605, the courts of this state have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who:

- (a) Is a resident of this state;
- (b) Is a person or entity amenable to the jurisdiction of this state;
- (c) Has assets in this state; or
- (d) May have to take action in this state to comply with the judgment.

Fla. Stat. § 55.6055.

- California. The California statute is consistent with its predecessors in calling for the non-recognition of a foreign defamation judgment “unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions.” Cal. Code Civ. Proc. § 1716. The jurisdictional provision mirrors that of those contained in the New York and Illinois legislation. See Cal. Code Civ. Proc. § 1717.

Each of these states has passed legislation to ensure that foreign defamation judgments that do not comport with the First Amendment and the relevant state constitution may not be enforced within their borders.

Bills introduced in the 111th Congress.

The bills introduced in the 111th Congress are in a few key respects more aggressive in their approach than the state laws.

- S. 449 and H.R. 1304. The bill introduced by Sen. Specter, S. 449, and its nearly-identical counterpart in the House introduced by Rep. Peter King, H.R. 1304, both call for the non-recognition of any foreign libel judgment based on speech or writings “published, uttered, or otherwise primarily disseminated in the United States” if the judgment does not constitute defamation under U.S. law.

They also provide for a federal cause of action by which the U.S. citizen against whom the foreign libel suit was brought can affirmatively file an action in federal court seeking a declaratory judgment that the overseas judgment is unenforceable and requesting injunctive relief against any attempted enforcement. As an added deterrent, S. 449 and H.R. 1304 permit the U.S. citizen to seek damages in the amount of any foreign judgment in the underlying action, costs and attorneys’ fees attributable to the underlying action borne by the U.S. citizen in that action, and harm caused to the U.S. citizen from the underlying action due to “decreased opportunities to publish, conduct research, or generate funding.” In addition, treble damages are available if a jury determines by a preponderance of the evidence that the foreign plaintiff “intentionally engaged in a scheme to suppress rights under First Amendment.”

Procedurally, S. 449 and H.R. 1304 do not require the U.S. citizen to wait until a judgment has been rendered by a foreign court or require the U.S. citizen to defend the libel charges overseas; rather, they permit the filing of a federal action as soon as the foreign libel suit is commenced. Finally, S. 449 includes a provision which provides that personal jurisdiction over foreign plaintiffs exists if they caused documents to be served in the U.S.

- H.R. 2765. The bill passed by the House provides for the non-recognition of judgments if the foreign plaintiff seeks to enforce a foreign libel judgment in a domestic court. The parties split the burdens of proof in the proceeding in the following ways. Where a foreign plaintiff moves to enforce a foreign judgment in the U.S., he is required to establish that the foreign judgment was consistent with the First Amendment. If he does that, the judgment will be enforced unless the U.S. citizen establishes that the exercise of personal jurisdiction over him by the foreign court failed to comport with U.S. due process requirements. H.R. 2765 also extends protection under the bill to anyone protected by Section 230 of the Communications Decency Act of 1996, which shields Internet service providers from defamation liability stemming from user-generated content posted on their websites.

The bill does not create a separate cause of action for declaratory or injunctive relief, and does not provide for an award of damages to the U.S. citizen. However, attorneys’ fees may be awarded in the enforcement action if the judgment is found non-recognizable. Procedurally, the U.S. citizen is not required to defend the libel action overseas, but U.S. litigation will not be proper until the foreign judgment is entered and foreign plaintiff seeks recognition or enforcement domestically.

3. Drafting effective federal legislation

This Committee faces the challenge of crafting federal legislation that both protects the First Amendment rights of U.S. citizens and deters potential libel tourists from pursuing Americans abroad, while at the same time comporting with constitutional requirements in the Due Process Clause and respecting international comity. A federal law is necessary to ensure that the recognition of foreign libel judgments does not depend on the common law or statutory law of the state where any enforcement proceeding is brought and that declaratory relief is available if no enforcement proceeding is even commenced. What follows are the most important elements that a federal libel tourism law should take into consideration in order to achieve those objectives.

a. Non-enforcement of foreign judgments.

The first step toward stemming the tide of libel tourism is to enact federal legislation that bars the enforcement of any judgment obtained against an American by an overseas court unless the party moving to enforce can prove that it is consistent with the Constitution. Precedent exists in New York and Maryland that judgments that do not meet these high standards are not enforceable. See Bachchan v. India Abroad Publ'ns, 585 N.Y.S.2d 661 (N.Y. Sup. Ct., N.Y. Cty. 1992); Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997).

Included in any libel tourism legislation must be a provision which prohibits the recognition of any foreign judgment secured outside the U.S. if it is rendered in contravention of U.S. due process requirements or does not comport with the First Amendment protections provided in defamation cases in this country. In addition, any potential libel tourism law must also contain a federal removal provision to ensure that U.S. citizens have the opportunity to litigate these important constitutional questions in federal court.

b. Declaratory relief.

The legislation should also be accompanied by a provision which allows U.S. citizens to sue the libel tourist for a declaration that the foreign judgment is unenforceable and repugnant to the U.S. Constitution. A declaratory relief provision in any proposed legislation would allow U.S. citizens sued for libel overseas by a libel tourist who has no intention of moving to enforce the judgment in the U.S. a mechanism to have the foreign award declared non-recognizable at home.

c. Recovery of attorneys' fees.

To add an additional means of deterrence, a libel tourism statute might provide for monetary relief of various types. Any bill could propose a range of solutions depending upon the facts of the case, including the recovery of attorneys' fees for an enforcement or declaratory judgment action in a U.S. court, the recovery of attorneys' fees for defense of the libel action in a foreign court, and the possibility of damages. Attached is a working chart I have prepared reflecting the scenarios in which these remedies could potentially be awarded. See Draft Chart

of Proposed Remedies (attached hereto as Exhibit B). There are, of course, many other ways to approach these issues, and this chart is offered as a starting point to the conversation.

For example, if the U.S. citizen against whom the judgment was rendered obtains declaratory relief from a federal court, the bill could include a one-way fee-shifting provision that would allow the U.S. citizen to recover the fees incurred bringing the declaratory relief action. The reward of attorneys' fees in that case would be consistent with the one-way fee-shifting provisions in various state anti-SLAPP ("Strategic Lawsuit Against Public Participation") laws. Anti-SLAPP protections often provide for the payment of attorneys' fees to the libel defendant if defamation litigation is used merely to stifle free expression. See Anti-SLAPP Statute Summaries (attached hereto as Exhibit C). In addition, the bill could also provide for the reward of attorneys' fees incurred defending the foreign libel action if the libel tourist moves to enforce the judgment in the U.S. and the court finds that the judgment was rendered inconsistent with due process or the First Amendment. Such a fee mechanism is one with which foreign plaintiffs, especially from the U.K. and other common-law countries, would be familiar because it is consistent with their "loser pays" theory of attorneys' fees.

d. Recovery of damages.

Finally, the statute might also provide for damages in the most egregious cases, which are those in which the foreign plaintiff holding a judgment that violates both the First Amendment and the Due Process Clause moves to enforce the foreign judgment or does not move to enforce the judgment within the statute of limitations for defamation in the foreign jurisdiction where the suit was filed. In such cases, where a U.S. court agrees that the foreign judgment was rendered in violation of constitutional due process and the speech involved was protected by the First Amendment, the U.S. citizen sued overseas should be able to sue for damages. Providing relief in the U.S. based on extraterritorial conduct is consistent with other federal statutes such as the Alien Tort Statute and the Torture Victims Protection Act.

e. Interpretation of state long-arm statutes co-extensive with due process.

Libel tourism legislation must include a provision which dictates that, in a declaratory judgment action brought by a U.S. citizen, state long-arm jurisdiction must be read co-extensively with the Due Process Clause. While that is already the case under many state long-arm statutes, several states still interpret their jurisdiction more narrowly than the Constitution permits.

f. Nationwide service of process and adherence to constitutional due process.

In crafting a legislative solution to libel tourism, it is tempting to ensure that U.S. citizens are always able to defend the attack on their First Amendment rights by hauling the foreign plaintiff into U.S. courts to answer for the affront. But proposed legislation must take care not to ignore one part of the Constitution while vindicating another, and any proposed libel tourism legislation must achieve its goals in a manner that is consistent with due process. The urge to provide for a mechanism to go after any foreign libel plaintiff in the U.S. is a strong one, as evidenced by Dr. Ehrenfeld's case. Saudi businessman Khalid bin Mahfouz never sought to

enforce his English judgment in the United States and had no ties to New York. That deficiency led the New York Court of Appeals to dismiss Dr. Ehrenfeld's declaratory judgment suit on grounds that it had no jurisdiction over Mr. bin Mahfouz. The New York legislature has attempted to remedy that deficiency by including a provision claiming jurisdiction over individuals who have no ties to the U.S. other than that they have sued an American in a foreign court.

But as my colleague David B. Rivkin and I expressed in the Wall Street Journal last year, Congress should have deep reservations about the constitutionality of subjecting plaintiffs from foreign lands to the personal jurisdiction of our courts unless they have sufficient minimum contacts with the United States. See David B. Rivkin, Jr. and Bruce D. Brown, "'Libel Tourism' Threatens Free Speech," WALL ST. J., Jan. 10, 2009 (attached hereto as Exhibit D). The current Senate bill proposes that personal jurisdiction exists when a foreign plaintiff causes documents to be served in this country. But even under what some commentators have seen as a generous reading of the Due Process Clause in Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199 (9th Cir. 2006), service within the U.S. alone has been held insufficient to satisfy due process.²

Within this constitutional framework, however, Congress has included in federal legislation from time to time nationwide service-of-process provisions that would permit courts to consider a potential defendant's ties with the nation as a whole rather than just with the forum state for purposes of personal jurisdiction. A nationwide service-of-process provision like those contained in the bankruptcy rules or in federal statutes such as RICO and ERISA would permit the federal courts to expand their examination of the connections to those between the potential defendant and the nation as a whole, making it more likely that a libel tourist would be amenable to suit in the U.S. Such a provision would not provide jurisdiction over those libel tourists who truly have no contacts or do no business within the U.S. But it would constitutionally catch in its net those libel tourists who sue, for example, a California-based author abroad and then continue to avoid the federal court's grasp by doing business in New York and Florida but purposely staying away from California.

² In Yahoo, the Internet company brought a declaratory judgment action against the French defendants (plaintiffs in the overseas action) seeking an order that the foreign judgment was unenforceable in the United States because enforcement would violate the First Amendment. The Ninth Circuit found that personal jurisdiction over the French defendants existed, but held that the case was not ripe for adjudication. The court's finding of specific jurisdiction was based on three contacts: 1) the cease and desist letter that LICRA, one of the French defendants, sent Yahoo "demanding that Yahoo[] alter its behavior in California to conform to what LICRA contended were the commands of French law"; 2) service of process by LICRA and UJEF, the other French defendant, on Yahoo in California; and 3) two interim orders LICRA and UJEF obtained from the French court "directing Yahoo[] to take actions in California, on threat of a substantial penalty." The Ninth Circuit held that "[t]he first two contacts, taken by themselves, do not provide a sufficient basis for jurisdiction. However, the third contact, considered in conjunction with the first two, does provide such a basis." See Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199 (9th Cir. 2006).

Congress must be cautious of doing precisely what makes the practice of libel tourism itself so shameful – exerting its authority over a foreigner who has few, if any, ties to the jurisdiction. Given the sensitive comities and interests that are at stake, it is important to ensure that any potential legislation addressing libel tourism stands on strong constitutional footing.

* * *

I look forward to responding to the Committee's questions and working with the Committee as it considers the threat of libel tourism and how legislation can appropriately and effectively combat the problem.

EXHIBIT A

Testimony of Bruce D. Brown
Baker & Hostetler LLP

Before the Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

On Libel Tourism

February 12, 2009

Mr. Chairman and Members of the Subcommittee:

I am Bruce D. Brown, a partner at Baker & Hostetler LLP in Washington, D.C. We represent clients ranging from large media companies to book and magazine publishers to journalism advocacy organizations such as the Society of Professional Journalists. I worked for David Broder at the Washington Post for two years prior to law school, received my J.D. from Yale in 1995, and then worked as a reporter at Legal Times covering the federal courts before joining my law firm. I am the co-chair of the legislative affairs committee of the Media Law Resource Center in New York and am an adjunct faculty member in Georgetown University's master's program in Professional Studies in Journalism.

I am honored to appear before the subcommittee today to discuss the phenomenon known as libel tourism and to assist the subcommittee in any way I can to illustrate the urgency in finding a legislative remedy for a problem that is distorting and diminishing First Amendment protections in the U.S. In this written testimony, I provide the subcommittee with evidence of recent cases in which the differences between U.S. and U.K. libel law have created an incentive for foreign plaintiffs to sue American publishers in England even when their connection to the U.K. is non-existent or tenuous at best. This trend has enabled overseas litigants to intimidate U.S. authors with the fear of large verdicts in Britain, thus reducing the amount of information the public receives here at home because of the resulting chilling effect.

While there is some reason to believe that this abuse of the English courts is finally starting to attract the attention of reform-minded U.K. lawmakers, I support efforts by this subcommittee to press ahead with legislation to curb this growing threat and protect First Amendment interests. Countering the impact of libel tourism is not about second-guessing the British people for coming to a different balance between reputation interests and freedom of speech than we have, it is about making sure that foreign jurisdictions do not dictate to us how we should strike this balance for ourselves.

"From Plassey to Pakistan" – and on to London

To understand the menace of libel tourism, the subcommittee need go no further than several miles up Connecticut Avenue to Bethesda, Maryland, where author Humayun Mirza lives. Mr. Mirza, who spent more than 30 years working in finance at the World Bank, turned to writing only after his retirement. He devoted years to composing a biography of his father, Iskander Mirza, the first President of Pakistan. "From Plassey to Pakistan: The Family History of Iskander Mirza," was published by Lanham, Maryland-based University Press of America in November 1999.

This scholarly work took readers back through more than 300 years of Indian and Pakistani history from the perspective of the Nawab Nazims who ruled Bengal, Bihar and Orissa. It explored the events leading to the British rule of India, India's independence, and Pakistan's secession from India. From there, Mr. Mirza documented his father's rise to power as a secular leader as well as the military coup d'état that led to his father's exile. Through the book's more than 400 pages, Mr. Mirza wove together the historical origins of this volatile region and the fortunes of generations of his family who bore witness to it all.

But shortly after publication, University Press received a letter from the U.K. attorneys of Begum Nahid Mirza, the second wife of Mr. Mirza's father, complaining of libel and threatening to sue in the U.K. Mr. Mirza had written about the Begum Mirza only in connection with her relationship with his father, and each statement was founded on firsthand observations, decades of conversations with family members and Pakistani leaders, and official documents from the U.S. Department of State. Stated more succinctly, the book was a well-researched work of scholarship and historical interpretation that would unquestionably have been protected under U.S. law. "From Plassey to Pakistan" was hardly distributed in the U.K., but the Begum Mirza, who had a residence in the U.K., had lined up one of London's leading law firms – a firm that has since played a prominent role in the libel tourism industry – to attempt to scare Mr. Mirza into withdrawing his book. She was able to do this because of the many advantages she would enjoy as a libel plaintiff in the U.K. courts.

For example, under U.S. law, a libel plaintiff has the burden of showing that the statements at issue were false – a requirement that the Begum Mirza could never have satisfied. In the U.K., however, the defendant has the burden of proving the truth of the statements – a much more difficult (and costly) proposition for any author or publisher. Moreover, English courts do not require, as American courts have since New York Times Co. v. Sullivan, 376 U.S. 254 (1964), that a plaintiff must prove that allegedly defamatory statements about public officials or public figures were published with "actual malice," or clear and convincing evidence that the author was aware that the statements were false or made them with reckless disregard for the truth. (Only recently has England recognized a qualified privilege for defendants who act "responsibly" but this privilege is no substitute for New York Times protections or the shield of the fair report privilege as it has evolved in U.S. courts.¹) Under American law, the Begum Mirza, whose status as the wife of a former head of state makes her a public figure, would have had no evidence with which to prove that the author published with actual malice. In fact, Mr. Mirza made several unsuccessful attempts to contact her for her side of the story, evidence which would have tended to protect him in a U.S. court because it was a sign of his effort to find and publish the truth. A chart of the constitutional protections in U.S. libel law, organized by the status of the plaintiff, is attached as Exhibit A.

These protections at the trial level are all supported by the unique constitutional commitment by appellate courts in the U.S. to conduct "independent appellate review" in libel cases to ensure that any judgment awarded to a plaintiff "does not constitute a forbidden intrusion on the field of free expression."² This probing standard, enunciated in Bose Corp. v. Consumers Union of U.S., 466 U.S. 485 (1984), requires judges to deviate from the typical standard of appellate review of jury verdicts by examining the entire record and substituting their own judgment for that of the jury on matters relating to the weighing of evidence and the drawing of inferences. As a result, as the Media Law Resource Center has been diligently documenting for years, more than 70 percent of libel verdicts are overturned on appeal in the U.S.³ Appellate tribunals in the U.K. have no analogue to the Bose rule.

As a result of the deep chasm between American and British libel law, and the enormous burden of trying to prove the truth of matters that took place nearly half a century earlier in Pakistan, Mr. Mirza and his publisher faced the very real probability that they could be held liable in Britain for something they had every right to publish in the U.S., where the vast majority of their readers could be found. After more than a year of negotiation with the Begum

Mirza, they reached a settlement and the first edition of the book was destroyed. The threat of significant damages, in addition to attorney's fees to the plaintiff if she prevailed, was simply too much to risk.

The Evolution of Libel Tourism

Until the mid-1990s, the difference in U.S. and U.K. libel law was a subject largely confined to academic journals and law school classrooms. Then, in 1996, controversial English historian David Irving sued Emory University Professor Deborah Lipstadt in London for defamation after she properly and accurately called him a "Holocaust denier."⁴ The Irving-Lipstadt case became international news, bringing to the forefront the salient divide between U.S. and U.K. defamation standards. Professor Lipstadt assumed that the suit would be a minor inconvenience, but she soon learned exactly why being sued in England is so damaging to an American author.⁵ It was only after five-year ordeal that culminated in a 10-day trial and cost upwards of \$3 million that she escaped liability.⁶

For me, watching the Lipstadt case unfold and then handling the Mirza matter shortly thereafter, it was apparent that with the arrival of the Internet, while the world was shrinking, the disparity between U.S. and U.K. libel was not – and that this tension was only going to grow. I wrote a piece on the subject for the Washington Post, which the newspaper called, "Write Here. Libel There. So Beware."⁷ The headline writers knew what they were talking about.

On the heels of Professor Lipstadt's trial came the case that opened a new phase in the transatlantic free speech rift – lawsuits brought in England by plaintiffs who are not U.K. residents but who sue in that jurisdiction to exploit its plaintiff-friendly libel laws. The practice earned a neat nickname – "libel tourism." In 1997, Russian tycoon Boris Berezovsky filed suit against Forbes magazine in London over an article from the December 1996 issue of the magazine titled "Godfather of the Kremlin?"⁸ The piece, written by Russian-American journalist Paul Klebnikov, portrayed Berezovsky as a man who, as Forbes pointed out in a related editorial, was followed by "a trail of corpses, uncollectible debts and competitors terrified for their lives."⁹ Forbes argued that it made no sense to litigate a case involving a Russian plaintiff and a New York magazine in England, where a tiny fraction of the publication's readers were located and which was not a focal point of the reporting. But the English courts would not loosen their grips on the suit, and Forbes eventually retracted the claims and settled the case rather than face trial.¹⁰ Klebnikov was murdered on a Moscow street in 2004.¹¹

Fueled by the boom in Internet publishing that wiped out traditional, "real-world" jurisdictional lines across the globe, billionaires and politicians soon flocked – virtually, at least – to England to settle their scores where they knew the deck was stacked in their favor. Libel tourism's most frequent flier is the Saudi businessman Khalid bin Mahfouz, who notoriously sued American author Rachel Ehrenfeld for documenting evidence of his financial ties to terrorism in her book "Funding Evil: How Terrorism is Financed – and How to Stop It." Ms. Ehrenfeld may have been bin Mahfouz's most famous target, but she is not his only victim. In fact, Mr. bin Mahfouz has proudly posted a website identifying the many authors and publishers who have been intimidated by his courtroom tactics and have recanted or settled U.K. lawsuits that he has filed.¹² The chilling effect of Mr. bin Mahfouz's litigation campaign is clear.

Americans are not the only ones harmed by libel tourism. In the past few years alone,

- Ekstra Bladet, a tabloid newspaper in Denmark, was sued in the U.K. by Kaupthing, an investment bank in Iceland, over articles that were critical about the bank's advice to its wealthy clients about tax shelters. The bank and the newspaper are still litigating the dispute in a system, the newspaper notes, in which it is forced to pay five times as much to litigate the case than it would in Denmark.¹³
- A Dubai-based satellite television network, Al Arabiya, was successfully sued in England by a Tunisian businessman who, like Mr. bin Mahfouz, disputed allegations that he had ties to terrorist groups. The station chose not to defend the charges and the Tunisian businessman was awarded \$325,000.¹⁴
- Rinat Akhmetov, one of the Ukraine's richest men, filed lawsuits against two Ukrainian-based news organizations. In one case, the Kyiv Post quickly settled and apologized. In the other, Mr. Akhmetov won a default judgment of \$75,000 against Obozrevatel, a Ukrainian-based internet news site that publishes articles in Ukrainian.¹⁵

But the stark contrast between American and English libel law makes the effect of libel tourism that much more injurious on publishers and authors based in the U.S.

Moreover, the problem of libel tourism is only amplified by the willingness of English courts to allow plaintiffs with little connection to the U.K. to sue over publications that were in no way "aimed" at the jurisdiction – the test that U.S. courts apply as a matter of due process before subjecting a defendant to personal jurisdiction. This constraint is particularly important in the context of libel actions based on publication over the Internet because online content can be viewed anywhere around the world. See *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). For the U.K. courts, the almost 2,000 copies of *Forbes* distributed in England (as opposed to the nearly 800,000 sold in the U.S.) were enough to create personal jurisdiction over the magazine in London.¹⁶ In Ms. Ehrenfeld's case, only 23 copies of her book found their way into the hands of British citizens.¹⁷ In the case of the Danish publisher mentioned above, the articles were available as an English translation on a Danish website that received very little traffic in England.¹⁸ And in the case of Al Arabiya, the program in question was available in Britain only by satellite.¹⁹

As one British lawyer who frequently represents media defendants has noted, British courts, "somewhat sadly, are reluctant to give up jurisdiction," even where the facts giving rise to the allegations have almost no tie to the U.K.²⁰ English judges are also disinclined to throw out a lawsuit on *forum non conveniens* grounds, the legal doctrine that permits dismissal where personal jurisdiction over the defendant is established but where the practicalities of litigating in that jurisdiction dictate that the case should be heard somewhere else.²¹ As a result, libel plaintiffs find England a very hospitable place to sue American authors, and, the laws of supply and demand being what they are, London is home to a plaintiff's media bar with far more resources and far greater numbers than what is found in the U.S. As Ms. Ehrenfeld discovered, U.K. courts are appealing to libel tourists for the additional reason that they will grant injunctions against further publication, a remedy wholly foreign to American jurisprudence with its traditions against prior restraint. For Ms. Ehrenfeld, the injunction against "Funding Evil"

was the ultimate insult: she could in theory be held in contempt if a book she never intended for the U.K. audience continued to reach U.K. readers.

A Tale of Two Presses

In 2007, after Mr. bin Mahfouz sued two American authors who tied him to terrorism, the authors' publisher, Cambridge University Press agreed to pulp all unsold copies of the book, "Alms for Jihad," rather than defend the work.²² In a letter of apology to Mr. bin Mahfouz, Cambridge University Press wrote that the allegations contained in the book were "entirely and manifestly false" and asked that the Sheikh "accept [its] sincere apologies for the distress and embarrassment [publication] has caused."²³ Cambridge University Press also published an apology on its website noting that it would pay substantial damages and legal costs.²⁴

At around the same time, Yale University Press was sued by KinderUSA, a nonprofit group that states that it raises money for Palestinian children and families, and Laila Al-Marayati, the chair of the group's board, over the publication of "Hamas: Politics, Charity, and Terrorism in the Service of Jihad."²⁵ The suit identified two passages in the book about charitable groups in the U.S. that were linked to terrorist groups and objected to this passage specifically:

The formation of KinderUSA highlights an increasingly common trend: banned charities continuing to operate by incorporating under new names in response to designation as terrorist entities or in an effort to evade attention. This trend is also seen with groups raising money for al-Qaeda.²⁶

KinderUSA also alleged that the statement that it "funds terrorist or illegal organizations" was "false and damaging" and libelous.²⁷ The plaintiffs sought \$500,000 in damages.²⁸ But in a sudden change of heart shortly after filing its complaint, KinderUSA dismissed the suit.²⁹

Why did Yale University Press succeed in defending itself against charges almost identical to those that brought Cambridge University Press to its knees? The two books at issue presented different factual issues, for sure, but Cambridge was sued in England while Yale was sued in California. Yale thus enjoyed the protections of the First Amendment along with the procedural benefits California provides in its anti-SLAPP statute to defendants attacked by frivolous libel suits.³⁰ Yale took advantage of this law to file a motion to strike the complaint on the grounds that the lawsuit was a blatant attempt to silence legitimate criticism on a matter of public interest. In its motion, Yale called the suit a "classic, meritless challenge to free expression."³¹ KinderUSA withdrew the suit before the court could even hear the motion.³²

My law firm has experience with California's anti-SLAPP statute in a similar case. In 2003, we represented the National Review in a libel suit brought in California by Hussam Ayloush, the executive director of the Southern California chapter of the Council on American-Islamic Relations, against the magazine and its guest columnist, former California Republican Party president Shawn Steel. Mr. Ayloush's complaint concerned Mr. Steel's documentation of anti-Jewish comments made by an Egyptian Islamic leader at a public event co-hosted by Mr. Ayloush and CAIR. The allegations were, as we described them in an anti-SLAPP motion, a "thinly disguised attempt to squelch dissenting views in the rampant public discussion about

American-Islamic relations, an issue of utmost importance in the international political milieu.” The plaintiff never responded to the motion and the case was dismissed. A libel suit filed by the Islamic Society of Boston against the Boston Herald met a somewhat similar fate in 2007. The action was based on an article that linked the Islamic Society to Abdurahman Alamoudi, a public supporter of terrorist organizations including Hamas and Hezbollah.³³ The Islamic Society’s claims collapsed as soon as it began exchanging discovery with the Boston Herald, which we represented, and the Islamic Society quickly dropped its claims.³⁴

The dispositions of these last two lawsuits, which share with many of the libel tourism cases a focus on international terrorism and its financing, demonstrate the precise reason why foreign libel plaintiffs avoid U.S. courts and seek capitulation in the friendly confines of the U.K. That the libel tourism cases that have earned the most attention are ones where the actual malice rules would have supplied the U.S. defendant with far greater protections than those available in the U.K. is no accident. While theoretically true that cases brought by private figures involving private matters are not covered by the actual malice rules in the U.S., such disputes are unlikely to land in a British court. Even when U.S. law does not provide constitutional actual malice protections and instead only requires common-law negligence, the American defendant is still better protected in a U.S. court because of other substantive safeguards such as the shifting of the burden to the plaintiff to prove falsity.

The Chilling Effect of Libel Tourism

Today’s testimony will chronicle several of the well-known examples of libel tourism that have played out in the courts. Each of the panelists has particular experiences to highlight.

But the effects of libel tourism are felt well beyond the known public record. It has created a silent chilling effect that is felt by any author or publisher writing about controversial international subjects today. Journalists often find themselves forced to self-censor their speech to ensure not that it meets the standards for First Amendment protection, but instead so that it satisfies the much more stifling strictures of English libel law. While it’s nearly impossible to catalogue the smothering pressure of libel tourism on what was not published, media lawyers who handle prepublication review know firsthand how libel tourism has changed the legal landscape, particularly in the area of journalism that tackles global terrorism. As Senators Arlen Specter and Joe Lieberman noted in their Wall Street Journal opinion piece on libel tourism last summer, the chilling effect on reporters in the U.S. impacts our national security because it cuts off the flow of information that would otherwise reach the public.³⁵

Late last year, I reviewed Robert Spencer’s book “Stealth Jihad: How Radical Islam is Subverting America without Guns or Bombs” prior to publication to make sure that it met all appropriate legal standards. Mr. Spencer’s book was the sort of well-researched volume with copious notations to material in the public record that would traditionally have hardly been cause for alarm. But I knew that such a title bristled with potential exposure, not because any of the subjects of the book might bring suit in Lahore, but because they might bring suit in London. Even if publishers attempt to prevent wide distribution in England, it is inevitable that copies will end up in the hands of U.K. citizens, as Rachel Ehrenfeld discovered.

Lawyers therefore have no choice but to vet every name mentioned in such a book as well as all supporting documentation. But even with those precautions, which are more than enough to reassure clients that any defamation case brought in the U.S. could be disposed of swiftly, media counsel remain nervous about the risk of exposure in England. We are thus, as part of a new ritual, now routinely informing our clients, whether they be first-time authors, large media companies, participants at a citizen journalism academy sponsored by the Society of Professional Journalists, or the insurance companies that write the libel policies for all of the above, of the calculated risks of publishing in this climate. There are vulnerabilities that previously did not exist.

My colleagues Bruce Sanford, Lee Ellis, Henry Hoberman, and Bob Lystad represented journalist Craig Unger more than a decade ago in a libel suit filed by Robert McFarlane against Esquire magazine over an article on the alleged “October Surprise” at the end of the Carter presidency regarding efforts to negotiate the release of the American hostages in Iran.³⁶ The U.S. Court of Appeals for the D.C. Circuit affirmed summary judgment in Mr. Unger’s favor in 1996 on the grounds that he had no reason to believe anything in his piece was false and thus did not publish with actual malice.³⁷ Roughly a decade later, Mr. Unger’s British publisher cancelled plans to bring his U.S. bestseller “House of Bush, House of Saud: The Secret Relationship Between the World’s Two Most Powerful Dynasties” to the U.K. for fear of being sued.³⁸ Mr. Unger has experienced first-hand the chilling effect of libel tourism.

Book and magazine publishers and metropolitan daily newspapers are increasingly sharing the stage of investigative journalism with nonprofits and other sources of original reporting, such as academic programs at universities. These organizations, too, are subject to the same threat of libel tourism. Students in the master’s in journalism program in which I teach at Georgetown University, for example, have been tirelessly tracking down documents, interviewing sources, and gathering information for more than a year about the kidnapping and execution of Wall Street Journal reporter Daniel Pearl while on assignment in Pakistan.³⁹ The Pearl Project, as it is known, is now a part of the Center for Public Integrity, the well-regarded nonprofit in D.C. that has been publishing independent journalism since 1989. The students and their sponsors expect to release the results of their investigation later this year. Even though their final report will be published here in the U.S., and even though they will be scrupulous in their fact-checking, the project’s professors, nonprofit sponsors, and funders face legal uncertainties for their heroic work because of the very nature of what they are seeking to uncover. These students are just learning about the history of the First Amendment and the substantial protections it affords, and they need to be reassured that we are doing everything we can to make sure those protections are not taken away from them by foreign courts.

One major U.S. publisher whom these students would all aspire to write for one day recently paid a substantial sum to avoid a lawsuit in the U.K. even though the reporting was based on government records and even though this publisher has a long and distinguished history in fighting for a free press. Senators Specter and Lieberman were exactly correct in going back to the defining moment of New York Times v. Sullivan in their opinion piece last summer. We are at that sort of juncture once again.⁴⁰

U.K. Reaction to the “International Scandal” of Libel Tourism

The British government is finally starting to come to terms with the problems posed by libel tourists. In December, three influential MPs urged the government to radically reform Britain’s libel laws to remedy what the Labour Party’s Denis MacShane called the “international scandal” of libel tourism that has turned British courts into a “Soviet-style organ of censorship.”⁴¹ He continued:

It shames Britain and makes a mockery of the idea that Britain is a protector of core democratic freedoms. Libel tourism sounds innocuous, but underneath the banal phrase is a major assault on freedom of information which in today’s complex world is more necessary than ever if evil, such as the jihad ideology that led to the Mumbai massacres, is not to flourish, and if those who traffic arms, blood diamonds, drugs and money to support Islamist extremist organisations that hide behind charitable status are not to be exposed.⁴²

In response, Justice Minister Bridget Prentice promised to consider the codification of the qualified privilege recognized in the Reynolds decision that provides defendants with a public interest defense to charges of libel if they can prove they acted responsibly.⁴³ She also pledged to give the public a chance to weigh in on British policies regarding defamation and the Internet, to consider whether to abolish criminal libel, and to review the high cost of defending defamation charges in the U.K.⁴⁴ See also Tim Luckhurst, “For freedom’s sake, we must stop libel tourism,” *THE GUARDIAN*, Aug. 15, 2008; Nick Cohen, “A free speech crusade we should all be proud to join,” *THE EVENING STANDARD*, Dec. 11, 2008.

Hearings such as this one highlight the problem and hopefully will encourage the British government to execute reforms so that American reporters who do not purposefully direct their reporting toward or publish their work in the U.K. will not be hauled into English courts to defend journalism that would be fully protected in the U.S.

Solving the Libel Tourism Problem

It is time for Congress to enact legislation to stem the tide of libel tourism. What began as a few isolated incidents has evolved into an industry in London and a sense of vulnerability here in the U.S. about our own constitutional safeguards. After the U.S. Supreme Court constitutionalized the law of libel in New York Times v. Sullivan, the American news media hoped for similar reform abroad. That transformation has not materialized over the last 40 years, but the problem with libel tourism is not that U.K. law has refused to evolve along the same path as ours, it is that U.K. law now threatens to undo the free speech protections we have chosen for ourselves at home.

The bills introduced in the 110th Congress were an excellent start to combating libel tourism. In this Congress, this subcommittee faces the challenge of crafting a bill that will not only serve as a powerful deterrent to libel tourists but also that will comport with other constitutional requirements. The starting point for any federal libel tourism statute should be to deny enforcement in domestic courts to overseas defamation judgments that fail under the First Amendment. But to create a robust disincentive, any libel tourism law should additionally

provide a cause of action in the federal courts to permit a U.S. publisher subjected to harassing litigation overseas intended to circumvent our free speech protections to countersue and seek money damages against the foreign plaintiff. Without the latter provision, the necessary deterrent will not be achieved. But a federal libel tourism statute must do all of this in a manner consistent with due process. My colleague David B. Rivkin and I have recently expressed reservations about subjecting plaintiffs from foreign lands to the personal jurisdiction of our courts unless they have sufficient minimum contacts with the U.S.⁴⁵

In designing a legislative response to libel tourism, the subcommittee may well find it useful to consider the experience of the states that have implemented anti-SLAPP bills. These state laws provide judges with the tools to make an initial evaluation as to whether an underlying libel suit is frivolous or should be dismissed. Effective libel tourism legislation will also demand this kind of early intervention and proactive response. Anti-SLAPP protections often provide for the payment of attorney's fees to the sued parties if defamation litigation is used merely to stifle free expression, another precedent that libel tourism legislation could borrow.

I look forward to working with the subcommittee as it considers the threat of libel tourism and all appropriate means to combat it and restore the equilibrium that has been lost over the last ten years.

¹ Reynolds v. Times Newspapers, [1999] 4 All ER 609, [2001] 2 AC 127, [1999] 3 WLR 1010, [1999] U.K.HL 45 (permitting defendants to use a public interest defense to charges of libel, even if they could not prove the allegations were true, if they acted responsibly in publishing them).

² Bose Corp. v. Consumers Union of U.S., 466 U.S. 485, 499 (1984).

³ Media Law Res. Ctr. Bulletin, Issue 1, 2007 Report on Trials and Damages (Feb. 2007).

⁴ Bruce D. Brown, "Write Here. Libel There. So Beware." WASH. POST., April 23, 2000, at B01 (attached as Exhibit B).

⁵ Sarah Luall, "Where Suing for Libel is a National Specialty; Britain's Plaintiff-Friendly Laws Have Become a Magnet for Litigators," N.Y. TIMES, July 20, 2000.

⁶ Luall, *supra* note 5.

⁷ Brown, *supra* note 4.

⁸ Paul Klebnikov, "Godfather of the Kremlin?" FORBES, Dec. 30, 1996.

⁹ Berezovsky v. Michaels and others, [2000] 2 All ER 986, [2000] 1 WLR 1004, [2000] All ER (D) 643.

¹⁰ Editor's Note, "Berezovsky versus Forbes," Forbes.com, March 6, 2003, available at http://www.forbes.com/forbes/1996/1230/5815090a_print.html.

¹¹ Valeria Korchagina, "Forbes Editor Klebnikov Shot Dead," MOSCOW TIMES, July 12, 2004.

¹² See www.binmahfouz.info.

¹³ Doreen Carvajal, "Britain, a destination for 'libel tourism,'" INT'L HERALD TRIBUNE, Jan. 20, 2008.

¹⁴ Carvajal, *supra* note 13.

¹⁵ "Writ large: Are English courts stifling free speech around the world?" ECONOMIST, Jan. 10, 2009 (attached as Exhibit C).

¹⁶ Berezovsky, *supra* note 9.

¹⁷ Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 832 (N.Y. 2007).

¹⁸ Carvajal, *supra* note 13.

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- ¹⁹ Carvajal, *supra* note 13.
- ²⁰ Carvajal, *supra* note 13.
- ²¹ See, e.g., Berezovsky, *supra* note 9 (dismissing Forbes forum non conveniens argument based on the conclusion that the plaintiffs, who were not residents of the U.K., had “reputations to protect [t]here”).
- ²² Gary Shapiro, “Libel Suit Leads to Destruction of Books,” N.Y. SUN, Aug. 2, 2007.
- ²³ Shapiro, *supra* note 22.
- ²⁴ Shapiro, *supra* note 22.
- ²⁵ Scott Jaschik, “A University Press Stands Up – And Wins,” INSIDE HIGHER ED, Aug. 16, 2007.
- ²⁶ Jaschik, *supra* note 25.
- ²⁷ Jaschik, *supra* note 25.
- ²⁸ Jaschik, *supra* note 25.
- ²⁹ Jaschik, *supra* note 25.
- ³⁰ Cal. Code Civ. Pro. § 425.16. SLAPP refers to “Strategic Lawsuit Against Public Participation.” SLAPP suits became common in the 1980s and 1990s as real estate companies and other commercial interests sought to use libel litigation to intimidate citizen-critics who, for example, might have petitioned government officials to halt neighborhood development or mounted a publicity campaign against a local initiative. When it became evident that SLAPP suits had created a substantial chilling effect, states began to pass so-called “anti-SLAPP” laws. These laws typically allow a defendant to file a special motion to strike a libel complaint at the outset. To win an anti-SLAPP motion, the defendant must first show that the libel lawsuit is based on activity that is protected by the First Amendment. The burden then shifts to the plaintiff, who must prove that he has a reasonable probability of prevailing in the action. Many anti-SLAPP laws provide for attorney’s fees and thus serve as a deterrent to the filing of frivolous libel actions.
- ³¹ Jaschik, *supra* note 25.
- ³² Jaschik, *supra* note 25.
- ³³ Floyd Abrams, “Be Careful What You Sue For,” WALL ST. J., June 6, 2007, at A19 (attached as Exhibit D).
- ³⁴ Abrams, *supra* note 33.
- ³⁵ Arlen Specter and Joe Lieberman, “Foreign Courts Take Aim at Our Free Speech,” WALL. ST. J., July 14, 2008, at A15 (attached as Exhibit E).
- ³⁶ McFarlane v. Esquire Magazine, 74 F.3d 1296 (D.C. Cir. 1996).
- ³⁷ McFarlane, *supra* note 36.
- ³⁸ Adam Cohen, “‘Libel Tourism’: When Freedom of Speech Takes a Holiday,” N.Y. TIMES, Sept. 14, 2008.
- ³⁹ The Pearl Project, <http://scs.georgetown.edu/pearlproject/>.
- ⁴⁰ Specter and Lieberman, *supra* note 35.
- ⁴¹ David Pallister, “MPs demand reform of libel laws,” THE GUARDIAN, Dec. 18, 2008.
- ⁴² Pallister, *supra* note 41.
- ⁴³ Reynolds, *supra* note 1.
- ⁴⁴ Pallister, *supra* note 41.
- ⁴⁵ David B. Rivkin, Jr. and Bruce D. Brown, “‘Libel Tourism’ Threatens Free Speech,” WALL ST. J., Jan. 10, 2009 (attached as Exhibit F).

Exhibit A

	Public official or public figure	Private figure on a matter of public concern	Private figure on a matter of private concern
Falsity	Plaintiff bears burden of proving that statement was substantially false as a matter of federal constitutional law. ¹	Plaintiff bears burden of proving that statement was substantially false as a matter of federal constitutional law, at least where a media defendant is involved. ²	Burden of proof not yet decided.
Fault	Plaintiff bears burden of proving with “convincing clarity” that statement was made with “actual malice,” defined as knowledge of falsity or reckless disregard for truth, as a matter of federal constitutional law. ³	Plaintiff bears burden of proving only negligence as a matter of federal constitutional law; ⁴ some states require proof of “actual malice” under state law.	Plaintiff bears burden of proving only negligence as a matter of federal constitutional law. ⁵
Compensatory Damages	If plaintiff proves “actual malice,” compensatory damages available. ⁶	If plaintiff proves negligence and actual injury, compensatory damages available; ⁷ if plaintiff proves “actual malice,” compensatory damages available. ⁸	If plaintiff proves negligence, compensatory damages available. ⁹
Punitive Damages	If plaintiff proves “actual malice,” punitive damages available. ¹⁰	Only if plaintiff proves “actual malice” are punitive damages available. ¹¹	If plaintiff proves negligence, punitive damages available. ¹²

¹ Philadelphia Newspapers Inc. v. Hepps, 475 U.S. 767 (1986); Masson v. New Yorker Magazine, 501 U.S. 496 (1991). Some states require clear and convincing evidence of substantial falsity as a matter of state law.

² Hepps, *supra* note 1.

³ New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

⁴ Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

⁵ Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

⁶ Gertz, *supra* note 4.

⁷ Gertz, *supra* note 4.

⁸ Gertz, *supra* note 4.

⁹ Dun & Bradstreet, *supra* note 5.

¹⁰ Gertz, *supra* note 4.

¹¹ Gertz, *supra* note 4.

¹² Dun & Bradstreet, *supra* note 5.

Exhibit B



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April 23, 2000, Sunday, Final Edition

SECTION: OUTLOOK; Pg. B01

LENGTH: 1750 words

HEADLINE: Write Here. Libel There. So Beware

BYLINE: Bruce D. Brown

BODY:

Until recently, Bethesda author Humayun Mirza never had to think about international libel law. A financier by trade, Mirza spent three decades working at the World Bank in Washington. He only turned to writing in retirement, devoting years to a biography of his father, the first president of Pakistan. Last November, his first book, "From Plassey to Pakistan: The Family History of Iskander Mirza," was published by the University Press of America.

But early this month, Mirza received a startling letter from a British law firm.

His father's second wife, who lives in London, was threatening Mirza and University Press, a client of my law firm, with libel litigation. She was unhappy with the book's depiction of her influence on his father's political fortunes. And she was considering filing suit not in the United States, where Mirza and his publisher would be protected by the First Amendment, but in England, where the book had recently been distributed--and where libel laws are notoriously friendly to plaintiffs.

This might have seemed like a stretch--after all, Mirza was writing in America mostly about events in Pakistan, and his publisher is located in Maryland. But Mirza had heard about the high-profile defamation lawsuit brought by controversial historian David Irving against author Deborah Lipstadt, a professor at Emory University in Atlanta who called Irving a "Holocaust denier." Lipstadt was vindicated; but Mirza--and others potentially in his shoes--are right to be worried by the spectacle of a 10-week libel trial in which an American defendant essentially had to prove the reality of the Holocaust in a London courtroom.

In an era of global publishing, particularly over the Internet, the hazards of foreign speech and defamation laws are very much an American problem. And they have the potential to affect a wide range of defendants--from large media corporations to individuals clicking and clacking into cyberspace from their home PCs.

Americans may not always like how the First Amendment protects others (their neighbors, TV tabloids, Matt Drudge), but they care deeply about their right to free expression. They may take it for granted that this right will follow along with the words and images that they now send effortlessly (and sometimes inadvertently) across national borders. They shouldn't. When the U.S. Supreme Court began to reform the libel laws radically in 1964 with *New York Times Co. v. Sullivan* (which set a high bar for public officials seeking damages from those they thought had defamed them), many hoped that Sullivan-style protections would catch on around the world. But American libel law has not been a very successful export.

For publications such as Time magazine and the International Herald Tribune that have long had a global presence, brushes with foreign media laws have come with the territory. Time's hard-fought victory in New York over Ariel Sharon was one of the best-known libel cases of the 1980s (Time made erroneous statements regarding the extent of Sharon's connection to a 1982 massacre of Palestinians, but a jury found it was done without malice); what is less familiar is that the former Israeli defense minister cornered Time into a settlement in Tel Aviv, where Israel's defamation laws gave him leverage he didn't have in the United States.

The Herald Tribune had a series of high-profile libel bouts with Singapore government officials over two opinion pieces in the 1990s. The paper lost one case and settled another, resulting in hundreds of thousands of dollars in damages and payments. (The Herald Tribune, which is based in Paris, is jointly owned by The Washington Post and the New York Times.)

But the boom in global and Internet publishing threatens to expose American publishers on a far broader and less predictable scale. Gone are the days when "publishing" in a foreign country took a conscious decision such as stocking books in shops on Charing Cross Road or selling newspapers along the Champs Elyses. Posting a news article or a message on a U.S. Web site, thereby making it instantly accessible to all those eyeballs around the globe, may now be enough to create an argument for jurisdiction in far-off foreign courts.

The Internet creates perplexing problems because of both its immediacy and its reach. For competitive U.S. media organizations, for example, the speed with which they must put news on the Internet makes editing copy to conform with overseas laws all but impossible. Unless we want the news to be self-censored at home, we'll have to hope that any offending speech won't be punished abroad. As for the reach of the Internet, it can transform chats among news groupies, individual Web sites, indeed almost any online communication into international bulletin boards with international implications.

A Cornell University graduate student learned this lesson the hard way. In 1997, Michael Dolenga was named in a libel lawsuit in London filed by English scientist Laurence Godfrey. According to Godfrey, Dolenga and another graduate student had posted defamatory messages about Godfrey on Usenet discussion groups, some of which were of a "highly personal" nature.

"He should have sued me in New York," said Dolenga at the time. "That's where I was living. I think a person should be subject to the laws where they're living." When asked about the fairness of bringing his claims in England, Godfrey--who has filed numerous related suits there--did not budge. "I don't think that if the situation were reversed, American courts would have any trouble at all with an American suing over some message that originated in England and was published in the States," Godfrey was quoted as saying in the New York Times.

Libel, it turns out, is only one of many threats foreign laws may present to expression carried on the Internet. A crazy quilt of speech restrictions is waiting for the unwary who venture online. These laws don't punish falsehoods; they punish speech that a particular government has deemed, for any reason, to be out of bounds.

In the Netherlands, for example, it is illegal to offend members of the royal family. Germany, France, Poland, Spain and Canada all have laws prohibiting the expression of racial hatred, desecration of the memory of Nazi victims or Holocaust denial. (Actually, for a free-speech advocate, having the awful oeuvre of David Irving publicly discredited is a far better solution than criminalizing his rantings.) South Korea authorizes prison terms for writings that "praise" North Korea. And these are the democracies. The possibility of action is not merely speculative: The Internet portal Yahoo was sued this month in France for its online auctions of Nazi memorabilia.

In this emerging area of international regulation, however, it is the libel laws of Britain that are still probably American writers' greatest worry--particularly because of the shared language, literature and, to some extent, culture. The fact that the annual "50-State Survey" of libel laws put out by the New York-based Libel Defense Resource Center includes this year, for the first time, a section on British defamation law speaks volumes.

In fact, Deborah Lipstadt may not have known it, but she has had considerable compatriot company with her in London lately. In March, Forbes took a libel appeal to the House of Lords, and earlier this month a London jury socked the New York Times and the Herald Tribune with a libel verdict for writing that celebrity chef Marco Pierre White, who runs several restaurants in England, had used drugs in the past. Other U.S. defendants in British courts over recent years have included Time, the New Republic and investigative reporter Seymour Hersh, who was sued by British media baron Robert Maxwell in a case not settled until two years after the latter's 1991 death.

The Forbes case could provide an opportunity for Britain's highest court to curtail "forum shopping" by plaintiffs seeking a friendly judicial venue. The Law Lords, a panel of the House of Lords, is considering the case of Russian tycoon Boris Berezovsky, who took issue with the magazine's characterization of him in a 1996 profile and sued the magazine in England, where Forbes's circulation is 2,000 copies, not the United States, where it sells nearly 800,000 copies. The magazine argued that the United Kingdom was not the appropriate place to try a claim brought by a Russian citizen against an American publication, but a U.K. appellate court disagreed. A reversal by the Lords could make it more difficult to haul U.S. citizens into Britain's libel-friendly terrain.

Of course, an American who loses a libel case in England but has no assets there may not need any help from the House of Lords. In practical terms, what sometimes has happened--for example in the case of the English scientist Godfrey suing the Cornell student Dolenga--is that the American defendant doesn't show up to defend, and the plaintiff wins a default judgment, which in the absence of assets cannot be enforced. Or the foreign plaintiff can try to get his judgment enforced in the United States. The tactic may not be successful--Maryland's highest court refused to recognize a British libel judgment just a few years ago--but it could tie up American defendants in lengthy court battles here.

The world is shrinking, to be sure, yet the divide between British and American libel law is not. Last October, the House of Lords reaffirmed the English rejection of the Sullivan standard. "The solution preferred in one country may not be best suited to another country," wrote Lord Nicholls of Birkenhead in a libel action brought by former Irish prime minister Albert Reynolds against London's Sunday Times.

That statement reflects the clarity of a different publishing era. If the "solution" of one nation could be so easily contained within its borders, U.S. citizens and news organizations would not have to worry, as they increasingly do today, about joining Deborah Lipstadt before a foreign tribunal. Since 1735, when a colonial New York court acquitted John Peter Zenger of libeling the British-appointed governor, the American response to overseas libel laws that we don't like has been to turn our backs on them. It has been enough for us to forge our own law for our own courts. That strategy may no longer work.

Bruce Brown is a Washington attorney specializing in First Amendment law.

GRAPHIC: Illustration, janusz kapusta for The Washington Post

LOAD-DATE: April 23, 2000

Exhibit C

Libel tourism

Writ large

Jan 8th 2009
From The Economist print edition

Are English courts stifling free speech around the world?

Illustration by David Simonds



SEEN one way, it is nothing short of a scandal. Small non-British news outlets and humble non-British authors (in many cases catering almost wholly to a non-British public) are being sued in English courts by rich, mighty foes. The cost of litigation is so high (\$200,000 for starters, and \$1m-plus once you get going) that they cannot afford to defend themselves. The plaintiffs often win by default, leaving their victims humiliated and massively in debt.

There is another side to the story, of course. Attempts to collect damages for libel and costs from people outside Britain are rare and often fruitless. Just because someone is rich, or holds a foreign passport, or lives abroad, that does not mean that they should not seek justice in an English court. Sometimes the defendants are global news organisations with a substantial presence in Britain.

Sometimes the plaintiffs are dissidents,

complaining about libellous attacks on them by state-friendly foreign media; a lawsuit in London may be their only chance of redress.

Yet some cases are still startling. Two Ukrainian-based news organisations, for example, have been sued in London by Rinat Akhmetov, one of that country's richest men. One, the *Kyiv Post*, had barely 100 subscribers in Britain. It hurriedly apologised as part of an undisclosed settlement. Mr Akhmetov then won another judgment, undefended, against *Obozrevatel* (Observer), a Ukraine-based internet news site that publishes only in Ukrainian, with a negligible number of readers in England. Judgment was given in default and Mr Akhmetov was awarded £50,000 (now \$75,000) in damages in June last year. The best-known case is that of Rachel Ehrenfeld, a New York-based author. She lost by default in a libel action brought by a litigious Saudi national, Khalid bin Mahfouz, over allegations made in her book "Funding Evil". It was published in America and available in Britain only via internet booksellers. Since then she has been campaigning hard for a change in the law.

Yet no attempt has been made to collect the £50,000 in costs and damages awarded against Ms Ehrenfeld, says Mr Mahfouz's lawyer, Laurence Harris. He adds: "It doesn't appear that we've had any chilling effect at all on her free speech." (Even now, British booksellers are offering second-hand copies of Ms Ehrenfeld's book over the internet.) Although Ms Ehrenfeld is sometimes portrayed as being unable to come to Britain because of the lawsuit, he says there is no reason why she can't visit England "unless she is bringing a lot of money with her". He notes: "We abolished debtors' prisons some time ago."

Nonetheless, cases such as these have outraged campaigners for press freedom in both Britain and America, who are trying to change the law in both countries. The states of New York and Illinois have passed laws giving residents the right to go to local courts to have foreign libel judgments declared unenforceable if issued by courts where free-speech standards are lower than in America. Ms Ehrenfeld sought such a ruling in late 2007 in New York state courts but failed; with the new law in place she may try again.

Now the campaign has moved to the American Congress. A bill introduced into the House of Representatives last year by Steve Cohen, a Democrat, sailed through an early vote but stood no chance of becoming law. A much tougher version submitted to the Senate, the Free Speech Protection Act, also gives American-based litigants an additional right to countersue for harassment. The bills have been strongly supported by lobby groups such as the American Civil Liberties Union, which fear that the protections offered by the First Amendment are being infringed by the unfettered use of libel law in non-American jurisdictions.

Similar concerns are being expressed in Britain. In a debate in the House of Commons last month Denis MacShane, a senior Labour MP, said that "libel tourism" was "an international scandal" and "a major assault on freedom of information". Lawyers and courts, he said, were "conspiring to shut down the cold light of independent thinking and writing about what some of the richest and most powerful people in the world are up to." He cited, among others, cases heard in London where a Tunisian had sued a Dubai-based television channel and an Icelandic bank had sued a Danish newspaper.

Mr MacShane also said the Law Society should investigate the actions of two leading British firms that act for foreign litigants, Schillings and Carter-Ruck, implying that they were "actively touting for business". Neither wished to comment on the record, though both, like other big law firms, have websites promoting their services and highlighting their successes.

British members of a parliamentary committee dealing with the media are now broadening a planned inquiry into privacy law and press regulation. The chairman, John Whittingdale, says the committee has received a large number of submissions from people worried about libel tourism.

These go well beyond the usual media-freedom campaigners. Groups that investigate government misbehaviour say their efforts are now being hampered by English libel law. "London has become a magnet for spurious cases. This is a terrifying prospect to most NGOs because of legal costs alone," says Dinah PoKemper, general counsel at the New York-based Human Rights Watch. It recently received a complaint from lawyers acting for a foreign national named in a report on an incident of mass murder. "We were required to spend thousands of pounds in defending ourselves against the prospect of a libel suit, when we had full confidence in the accuracy of our report," she says.

The problem is not just money. Under English libel law, a plaintiff must prove only that material is defamatory; the defendant then has to justify it, usually on grounds of truth or fairness. That places a big burden on human-rights groups that compile reports from

confidential informants—usually a necessity when dealing with violent and repressive regimes. People involved in this kind of litigation in Britain say that they have evidence of instances where witnesses have been intimidated by sleuthing and snooping on behalf of the plaintiffs, who may have powerful state backers keen to uncover their opponents' sources and methods.

Private matters

A further concern is what Mark Stephens, a London libel lawyer, calls “privacy tourism”, arising out of recent court judgments that have increased protection for celebrities wanting to keep out of the public eye. In December alone he has seen seven threatening letters sent by London law firms to American media and internet sites about photos taken of American citizens in America. “Law firms are trawling their celebrity client base,” he says.

The more controversial and complicated international defamation law becomes, the better for lawyers. The main outcome of the proposed new American law would be still more court cases, with lucratively knotty points of international jurisdiction involved. Prominent Americans with good lawyers may gain some relief, but for news outlets in poor countries it is likely to make little difference. And as Floyd Abrams, an American lawyer and free-speech defender, notes, a book publisher, for example, will still be nervous about an author who has written a “libellous book”.

Mr Stephens, the London lawyer, is taking a case to the European Court of Human Rights, where he hopes to persuade judges that the size of English libel damages is disproportionate. If you get only around £42,000 for losing an eye, why should you get that much or more from someone writing something nasty about you, he asks. But even limiting damages is not enough. For reform to have any effect, it will have to deal with the prohibitive cost of any litigation in London.

Exhibit D



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THE WALL STREET JOURNAL

The Wall Street Journal

June 6, 2007 Wednesday

SECTION: Pg. A19

LENGTH: 1085 words

HEADLINE: Be Careful What You Sue For

BYLINE: By Floyd Abrams

BODY:

Pursuing a libel or slander suit has long been a dangerous enterprise. Oscar Wilde sued the father of his young lover Alfred Douglas for having referred to him as a "posing Somdomite" and wound up not only dropping his case but being tried, convicted and jailed for violating England's repressive laws banning homosexual conduct. Alger Hiss sued Wiltaker Chambers for slander for accusing Hiss of being a member of the Communist Party with Chambers, and of illegally passing secret government documents to him for transmission to the Soviet Union. In the end, Hiss was jailed for perjury for having denied Chambers' claims before a grand jury.

More recently, British historian David Irving sued American scholar Deborah Lipstadt in England for having characterized him as a Holocaust denier and was ultimately so discredited in court that an English judge not only determined that he was indeed a Holocaust denier but an "antisemite" and "racist" as well.

On May 29 of this year, the potential vulnerability of a plaintiff that misuses the courts to sue for libel once again surfaced when the Islamic Society of Boston abandoned a libel action it had commenced against a number of Boston residents, a Boston newspaper and television station, and Steven Emerson, a recognized expert on terrorism and, in particular, extremist Islamic groups. In all, 17 defendants were named.

Those accused had publicly raised questions about a real estate transaction entered into between the Boston Redevelopment Authority and the Islamic Society, which transferred to the latter a plot of land in Boston, at a price well below market value, for the construction of a mosque and other facilities. The critics urged the Boston authorities to reconsider their decision to provide the land on such favorable terms (which included promised contributions to the community by the Islamic Society, such as holding lectures and offering other teaching about Islam) to an organization whose present or former leaders had close connections with or who had otherwise supported terrorist organizations.

On the face of it, the Islamic Society was a surprising entry into the legal arena. Its founder, Abdurahman Alamoudi, had been indicted in 2003 for his role in a terrorism financing scheme, pled guilty and had been sentenced to a 23-year prison term. Another individual, Yusef Al-Qaradawi, who had been repeatedly identified by the Islamic Society as a member of its board of Trustees, had been described by a U.S. Treasury Department official as a senior Muslim Brotherhood member and had endorsed the killing of Americans in Iraq and Jews everywhere. One director of the Islamic Society, Walid Fitaihi, had written that the Jews would be "scourged" because of their "oppression, murder and rape of the worshippers of Allah," and that they had "perpetrated the worst of evils and brought the worst corruption to the earth."

The Islamic Society nonetheless sued, claiming both libel and civil-rights violations. Motions to dismiss the case were denied, and the litigants began to compel third parties to turn over documents bearing on the case. In short order, one after another of the allegations made by the Islamic Society collapsed.

Their complaint asserted that the defendants had falsely stated that monies had been sent to the Islamic Society from "Saudi/Middle Eastern sources," and that such statements and others had devastated its fund-raising efforts. But documents obtained in discovery demonstrated without ambiguity that fund-raising was (as one representative of the Islamic Society had put it) "robust," with at least \$7.2 million having been wired to the Islamic Society from Middle Eastern sources, mostly from Saudi Arabia.

The Islamic Society claimed it had been libeled by a variety of expressions of concern by the defendants that it, the Society, had provided support for extremist organizations. But bank records obtained by the defendants showed that the Islamic Society had served as funder both of the Holy Land Foundation, a Hamas-controlled organization that the U.S. Treasury Department had said "exists to raise money in the United States to promote terror," and of the Benevolence International Foundation, which was identified by the 9/11 Commission as an al Qaeda fund-raising arm.

The complaint maintained that any reference to recent connections between the Islamic Society and the now-imprisoned Abdurahman Alamoudi was false since it "had had no connection with him for years." But an Islamic Society check written in November 2000, two months after Alamoudi publicly proclaimed his support for Hamas and Hezbollah, was uncovered in discovery which directed money to pay for Alamoudi's travel expenses.

To top it all off, documents obtained from the Boston Redevelopment Authority itself revealed serious, almost incomprehensible, conflicts of interest in the real-estate deal. It turned out that the city agency employee in charge of negotiating the deal with the Islamic Society was at the same time a member of that group and secretly advising it about how to obtain the land at the cheapest possible price.

So the case was dropped. No money was paid by the defendants, no apologies offered, and no limits on their future speech imposed. But it is not at all as if nothing happened. The case offers two enduring lessons. The first is that those who think about suing for libel should think again before doing so. And then again once more. While all the ultimate consequences to the Islamic Society for bringing the lawsuit remain uncertain, any adverse consequences could have been avoided by not suing in the first place.

The second lesson is that in one way (and perhaps no other) we should learn from the English system and award counsel fees to the winning side in cases like this, which are brought to inhibit speech on matters of serious public import. Because all the defendants in this case were steadfast and refused to settle, they were eventually vindicated. But the real way to avoid meritless cases such as this is to have a body of law that makes clear that plaintiffs who bring them will be held financially responsible for doing so.

Mr. Abrams, a partner in the law firm of Cahill Gordon & Reindel LLP, represented Steven Emerson in the case discussed in this op-ed.

(See related letters: "Letters to the Editor: Islamic Groups Nationwide Use Courts to Intimidate Critics" -- WSJ June 12, 2007)

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THE WALL STREET JOURNAL

The Wall Street Journal

July 14, 2008 Monday

SECTION: Pg. A15

LENGTH: 664 words

HEADLINE: Foreign Courts Take Aim at Our Free Speech

BYLINE: By Arlen Specter and Joe Lieberman

BODY:

Our Constitution is one of our greatest assets in the fight against terrorism. A free-flowing marketplace of ideas, protected by the First Amendment, enables the ideals of democracy to defeat the totalitarian vision of al Qaeda and other terrorist organizations.

That free marketplace faces a threat. Individuals with alleged connections to terrorist activity are filing libel suits and winning judgments in foreign courts against American researchers who publish on these matters. These suits intimidate and even silence writers and publishers.

Under American law, a libel plaintiff must prove that defamatory material is false. In England, the burden is reversed. Disputed statements are presumed to be false unless proven otherwise. And the loser in the case must pay the winner's legal fees.

Consequently, English courts have become a popular destination for libel suits against American authors. In 2003, U.S. scholar Rachel Ehrenfeld asserted in her book, "Funding Evil: How Terrorism Is Financed and How to Stop It," that Saudi banker Khalid Bin Mahfouz helped fund Osama bin Laden. The book was published in the U.S. by a U.S. company. But 23 copies were bought online by English residents, so English courts permitted the Saudi to file a libel suit there.

Ms. Ehrenfeld did not appear in court, so Mr. Bin Mahfouz won a \$250,000 default judgment against her. He has filed or threatened to file at least 30 other suits in England.

Fear of a similar lawsuit forced Random House U.K. in 2004 to cancel publication of "House of Bush, House of Saud," a best seller in the U.S. that was written by an American author. In 2007, the threat of a lawsuit compelled Cambridge University Press to apologize and destroy all available copies of "Alms for Jihad," a book on terrorism funding by American authors. The publisher even sent letters to libraries demanding that they destroy their copies, though some refused to do so.

To counter this lawsuit trend, we have introduced the Free Speech Protection Act of 2008, a Senate companion to a House bill introduced by U.S. Rep. Pete King (R., N.Y.) and co-sponsored by Rep. Anthony Weiner (D., N.Y.). This legislation builds on New York State's "Libel Terrorism Protection Act," signed into law by Gov. David Paterson on May 1.

Our bill bars U.S. courts from enforcing libel judgments issued in foreign courts against U.S. residents, if the speech would not be libelous under American law. The bill also permits American authors and publishers to countersue if the material is protected by the First Amendment. If a jury finds that the foreign suit is part of a scheme to suppress free speech rights, it may award treble damages.

First Amendment scholar Floyd Abrams argues that "the values of free speech and individual reputation are both significant, and it is not surprising that different nations would place different emphasis on each." We agree. But it is not in our interest to permit the balance struck in America to be upset or circumvented by foreign courts. Our legislation would not shield those who recklessly or maliciously print false information. It would ensure that Americans are held to and protected by American standards. No more. No less.

We have seen this type of libel suit before. The 1964 Supreme Court decision in *New York Times v. Sullivan* established that journalists must be free to report on newsworthy events unless they recklessly or maliciously publish falsehoods. At that time, opponents of civil rights were filing libel suits to silence news organizations that exposed state officials' refusal to enforce federal civil rights laws.

Now we are engaged in another great struggle -- this time against Islamist terror -- and again the enemies of freedom seek to silence free speech. Our legislation will help ensure that they do not succeed.

Mr. Specter is a Republican senator from Pennsylvania. Mr. Lieberman is an Independent Democratic senator from Connecticut.

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THE WALL STREET JOURNAL

The Wall Street Journal

January 10, 2009 Saturday

SECTION: Pg. A11

LENGTH: 968 words

HEADLINE: 'Libel Tourism' Threatens Free Speech

BYLINE: By David B. Rivkin Jr. and Bruce D. Brown

BODY:

The farce of foreigners suing Americans for defamation in overseas forums, where the law does not sufficiently protect free speech, is so well-known that it has a fitting nickname: libel tourism. And London is its hot destination. Particularly since 9/11, foreign nationals have cynically exploited British courts in an attempt to stifle any discussion by American journalists about the dangers of jihadist ideology and terrorist supporters.

At long last, U.S. politicians are waking up to the dangers posed by libel tourism, which threatens both the First Amendment and American national security. The trouble is that their efforts, though well-intentioned, are relatively toothless and constitutionally problematic.

Early last year, New York State passed the nation's first anti-libel tourism law. The law allows state courts to assert authority over foreign citizens based solely on a libel judgment they have obtained abroad against a New Yorker.

The statute's passage was prompted by libel tourism's most frequent flier, Saudi bigwig Khalid bin Mahfouz. He brought a claim in England against author Rachel Ehrenfeld, who alleged in a 2003 book that the international money-man also financed terrorism. Although "Funding Evil" was published in the U.S., Mr. Mahfouz relied upon (and the British court accepted) the fact that the book was purchased by a small number of British readers on the Internet as sufficient grounds to sue Ms. Ehrenfeld in England.

Under the New York law, the target of a foreign libel suit does not even have to defend himself overseas. If a judgment is entered against him, he can seek a declaration that the foreign tribunal did not live up to First Amendment standards and therefore its ruling cannot be enforced against his U.S. assets. While emotionally satisfying, it does not protect a libel tourism victim's assets outside the U.S.

Moreover, the New York law takes a constitutionally dubious approach to the acquisition of personal jurisdiction over libel tourists. U.S. courts have never before claimed jurisdiction over individuals who have no ties whatsoever to the U.S., other than suing an American in a foreign court.

Rep. Peter King (D., N.Y.) and Sens. Arlen Specter (R., Pa.) and Joe Lieberman (I., Conn.) have been advancing federal libel tourism bills. Unfortunately these bills, which are modeled on New York's, carry the same constitutional risks.

It is a mistake to respond to libel tourism by seeking to catch foreign plaintiffs with no U.S. contacts in our jurisdictional net. This smacks of the same legal one-upmanship that makes libel tourism itself so odious.

It is high time for a strategy that would stop libel tourists dead in their tracks, without sacrificing constitutional values. The answer lies not in stretching claims of personal jurisdiction, but in federal legislation that would enable American publishers to sue for damages, including punitive damages, for the harms they have suffered. A proper federal libel tourism bill would punish conduct that takes place overseas -- in this case, the commencement of sham libel actions in foreign courts -- by utilizing the well-recognized congressional authority to apply U.S. laws extraterritorially when compelling interests demand it. The Alien Tort Statute, for example, gives U.S. courts subject matter jurisdiction over brutal acts that violate the "law of nations" wherever they may occur. More recently, Congress has created civil remedies to enable victims of international terrorism and human trafficking to sue in our courts for money damages.

But in devising a robust, substantive cause of action for damages -- a bludgeon that Messrs. King, Specter and Lieberman appropriately include in their bills -- Congress should not change normal personal jurisdiction rules. In order to sue foreigners under the federal libel tourism bill and remain consistent with due process, these individuals would have to visit or transact business in the U.S. in order for the U.S. courts to acquire jurisdiction over them. (Radovan Karadzic, the Bosnian Serb leader charged with genocide, was famously served with an Alien Tort complaint while leaving a Manhattan hotel restaurant.)

Under such a law, U.S. courts would be asked to evaluate, at the beginning stages of a foreign lawsuit, whether the plaintiffs are seeking to punish speech protected under the First Amendment. This type of early intervention by judges has worked very well in the 26 states that have passed laws to discourage frivolous libel suits here in the U.S.

To give this approach sufficiently sharp teeth, the damages awarded in libel tourism cases would have to be very substantial. While it is somewhat unusual in tort law to set statutory damages, it presents no constitutional problems. Accordingly, an effective federal bill should give courts the authority to impose damages that amount to double any foreign judgment, plus court costs and attorneys' fees (in both proceedings) for good measure. Habitual libel tourists who obviously seek to impair Americans' First Amendment freedoms should face even stiffer fines. Such a robust response would make foreign libel adventures fiscally disadvantageous, and should deter most overseas suits from ever being filed.

For libel tourists our courts can't fairly touch, it is better to leave them alone than to overreach and tread into unconstitutional territory. But they may yet pay a price. Availing themselves the pleasures of American life could one day be costly. As Karadzic learned, if you violate U.S. law, don't dine out in Manhattan.

Messrs. Rivkin and Brown are partners in the Washington, D.C., office of Baker Hostetler LLP.

(See related letter: "Letters to the Editor: Confronting Libel Tourism Properly" -- WSJ Jan. 23, 2009)

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EXHIBIT B

DRAFT CHART OF PROPOSED RELIEF FROM LIBEL TOURISM

When Foreign Plaintiff Moves to Enforce in U.S. or Does Not Move to Enforce Within the Statute of Limitations Governing the Libel Tort in the Foreign Country Where the Lawsuit was Brought

	Speech protected by First Amendment	Speech not protected by First Amendment
Foreign court violates due process	<ul style="list-style-type: none"> - Judgment not enforceable - Attorneys' fees for U.S. enforcement action - Attorneys' fees for foreign libel action - Damages 	<ul style="list-style-type: none"> - Judgment not enforceable - Attorneys' fees for U.S. enforcement action - Attorneys' fees for foreign libel action
Foreign court does not violate due process	<ul style="list-style-type: none"> - Judgment not enforceable - Attorneys' fees for U.S. enforcement action - Attorneys' fees for foreign libel action 	<ul style="list-style-type: none"> - Judgment enforceable

When U.S.-Based Defendant Moves for Declaratory Relief

	Speech protected by First Amendment	Speech not protected by First Amendment
Foreign court violates due process	<ul style="list-style-type: none"> - Declaratory relief - Attorneys' fees for U.S. enforcement action - Attorneys' fees for foreign libel action 	<ul style="list-style-type: none"> - Declaratory relief - Attorneys' fees for U.S. enforcement action
Foreign court does not violate due process	<ul style="list-style-type: none"> - Declaratory relief - Attorneys' fees for U.S. enforcement action 	<ul style="list-style-type: none"> - No declaratory relief

EXHIBIT C

ANTI-SLAPP STATUTE SUMMARIES

Arizona

A.R.S. § 12-752 (2008)

Standard: “The court shall grant the motion unless the party against whom the motion is made shows that the moving party’s exercise of the right of petition [defined by *A.R.S. § 12-751* (2008)] did not contain any reasonable factual support or any arguable basis in law and that the moving party’s acts caused actual compensable injury to the responding party. At the request of the moving party, the court shall make findings whether the lawsuit was brought to deter or prevent the moving party from exercising constitutional rights and is thereby brought for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the court finds that the lawsuit was brought to deter or prevent the exercise of constitutional rights or otherwise brought for an improper purpose, the moving party is encouraged to pursue additional sanctions as provided by court rule.”

Fee shifting: “If the court grants the motion to dismiss, the court shall award the moving party costs and reasonable attorney fees, including those incurred for the motion. If the court finds that a motion to dismiss is frivolous or solely intended to delay, the court shall award costs and reasonable attorney fees to the prevailing party on the motion.”

Arkansas

A.C.A. § 16-63-501 et seq. (2008)

Standard: A complaint that could be subject to an anti-SLAPP motion is subject to a verification requirement certifying that “(1) the party and his or her attorney of record, if any, have read the claim; (2) to the best of the knowledge, information, and belief formed after reasonable inquiry of the party or his or her attorney, the claim is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (3) the act forming the basis for the claim is not a privileged communication; and (4) the claim is not asserted for any improper purpose such as to suppress the right of free speech or right to petition government of a person or entity, to harass, or to cause unnecessary delay or needless increase in the cost of litigation.” *A.C.A. § 16-63-505* (2008).

Fee shifting: If a claim is verified in violation of that statute, “the court, upon motion or upon its own initiative, shall impose upon the persons who signed the verification, a represented party, or both, an appropriate sanction, which may include dismissal of the claim and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the claim, including a reasonable attorney’s fee. Other compensatory damages may be recovered only upon the demonstration that the claim was commenced or continued for the purpose of harassing, intimidating, punishing, or maliciously inhibiting a person or entity from making a

privileged communication or performing an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern.” A.C.A. § 16-63-506 (2008).

California

Cal. Code Civ. Proc. § 425.16 (2008)

Standard: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech [defined by subsection (e)] under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

Fee shifting: “In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.”

Florida

Fla. Stat. § 768.295 (2008)

Standard: The statute applies only to claims filed by governmental entities. “No governmental entity in this state shall file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state, as protected by the *First Amendment to the United States Constitution* and s. 5, Art. I of the *State Constitution*.”

Fee shifting: “The court shall award the prevailing party reasonable attorney’s fees and costs incurred in connection with a claim that an action was filed in violation of this section.”

Delaware

10 Del. C. § 8136 et seq. (2008)

Standard: A motion to dismiss or for summary judgment “in which the moving party has demonstrated that the action, claim, cross-claim or counterclaim subject to the motion is an action involving public petition and participation as defined in § 8136(a)(1) of this title shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.” 10 Del. C. § 8137 (2008).

Fee shifting: “Costs, attorney’s fees and other compensatory damages may be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law[.]” *10 Del. C. § 8138* (2008).

Georgia

O.C.G.A. § 9-11-11.1 (2008)

Standard: A complaint that could be subject to an anti-SLAPP motion is subject to a verification requirement: “For any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, both the party asserting the claim and the party’s attorney of record, if any, shall be required to file, contemporaneously with the pleading containing the claim, a written verification under oath as set forth in *Code Section 9-10-113*. Such written verification shall certify that the party and his or her attorney of record, if any, have read the claim; that to the best of their knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the act forming the basis for the claim is not a privileged communication under paragraph (4) of *Code Section 51-5-7*; and that the claim is not interposed for any improper purpose such as to suppress a person’s or entity’s right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation. If the claim is not verified as required by this subsection, it shall be stricken unless it is verified within ten days after the omission is called to the attention of the party asserting the claim.

Fee shifting: “If a claim is verified in violation of this Code section, the court, upon motion or upon its own initiative, shall impose upon the persons who signed the verification, a represented party, or both an appropriate sanction which may include dismissal of the claim and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney’s fee.”

Hawaii

HRS § 634F-1 et seq. (2008)

Standard: “The court shall grant the motion and dismiss the judicial claim, unless the responding party has demonstrated that more likely than not, the respondent’s allegations do not constitute a SLAPP lawsuit as defined in section 634F-1,” which defines a SLAPP as “a strategic lawsuit against public participation and refers to a lawsuit that lacks substantial justification or is interposed for delay or harassment and that is solely based on the party’s public participation before a governmental body.”

Fee shifting: “The court shall award a moving party who prevails on the motion, without regard to any limits under state law: (A) Actual damages or \$5,000, whichever is greater; (B) Costs of suit, including reasonable attorneys’ and expert witness fees, incurred in connection with the motion; and (C) Such additional sanctions upon the responding party, its attorneys, or law firms as the court determines shall be sufficient to deter repetition of the conduct and comparable conduct by others similarly situated; and (9) Any person damaged or injured by reason of a claim filed in violation of their rights under this chapter may seek relief in the form of a claim for actual or compensatory damages, as well as punitive damages, attorneys’ fees, and costs, from the person responsible.”

Illinois

735 ILCS 110/1 et seq. (2009)

Standard: “The court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.” *735 ILCS 110/20* (2009). The Act “applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party’s rights of petition, speech, association, or to otherwise participate in government. Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome.” *735 ILCS 110/15* (2009).

Fee shifting: “The court shall award a moving party who prevails in a motion under this Act reasonable attorney’s fees and costs incurred in connection with the motion.” *735 ILCS 110/25* (2009).

Indiana

Burns Ind. Code Ann. § 34-7-7-1 et seq. (2008)

Standard: The person who files a motion to dismiss must state with specificity the public issue or issue of public interest that prompted the act in furtherance of the person’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana.” Then, “the motion to dismiss shall be granted if the court finds that the person filing the motion has proven, by a preponderance of the evidence, that the act upon which the claim is based is a lawful act in furtherance of the person’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana.” *Burns Ind. Code Ann. § 34-7-7-9* (2008).

Fee shifting: “A prevailing defendant on a motion to dismiss made under this chapter is entitled to recover reasonable attorney’s fees and costs.” *Burns Ind. Code Ann. § 34-7-7-7* (2008). On the flip side, “If a court finds that a motion to dismiss made under this chapter is: (1) frivolous;

or (2) solely intended to cause unnecessary delay; the plaintiff is entitled to recover reasonable attorney's fees and costs to answer the motion." *Burns Ind. Code Ann. § 34-7-7-8* (2008)

Louisiana

***La. C.C.P. Art. 971* (2008)**

Standard: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim."

Fee shifting: "[A] prevailing party on a special motion to strike shall be awarded reasonable attorney fees and costs."

Maine

***14 M.R.S. § 556* (2008)**

Standard: "The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party."

Fee shifting: "If the court grants a special motion to dismiss, the court may award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters."

Maryland

***Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. § 5-807* (2008)**

Standard: "A lawsuit is a SLAPP suit if it is: (1) Brought in bad faith against a party who has communicated with a federal, State, or local government body or the public at large to report on, comment on, rule on, challenge, oppose, or in any other way exercise rights under the *First Amendment of the U.S. Constitution* or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights regarding any matter within the authority of a government body; (2) Materially related to the defendant's communication; and (3) Intended to inhibit the exercise of rights under the *First Amendment of the U.S. Constitution* or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights."

Fee shifting: None.

Massachusetts

ALM GL ch. 231, § 59H (2008)

Standard: “In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party’s exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party’s exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party’s acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.”

Fee shifting: “If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney’s fees, including those incurred for the special motion and any related discovery matters.”

Minnesota

Minn. Stat. § 554.01 et seq. (2008).

Standard: “[T]he court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03 [which states that ‘Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person’s constitutional rights.’].” *Minn. Stat. § 554.04 (2008).*

Fee shifting: “The court shall award a moving party who prevails in a motion under this chapter reasonable attorney fees and costs associated with the bringing of the motion.” *Minn. Stat. § 554.04 (2008).*

Missouri

§ 537.528 R.S.Mo. (2008)

Standard: “Any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment.”

Fee shifting: “If the rights afforded by this section are raised as an affirmative defense and if a court grants a motion to dismiss, a motion for judgment on the pleadings or a motion for

summary judgment filed within ninety days of the filing of the moving party's answer, the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action. If the court finds that a special motion to dismiss or motion for summary judgment is frivolous or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to the party prevailing on the motion."

Nevada

Nev. Rev. Stat. Ann. § 41.635 et seq. (2008)

Standard: A motion to dismiss is appropriate where the communication at issue constituted a "good faith communication in furtherance of the right to petition," defined as any "(1) Communication that is aimed at procuring any governmental or electoral action, result or outcome; (2) Communication of information or a complaint to a legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; or (3) Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law[;] which is truthful or is made without knowledge of its falsehood." *Nev. Rev. Stat. Ann. § 41.637 (2008)*.

Fee shifting: "If the court grants a special motion to dismiss filed pursuant to *NRS 41.660*: (1) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this state or to the appropriate political subdivision of this state if the attorney general, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to *NRS 41.660*. (2) The person against whom the action is brought may bring a separate action to recover: (a) Compensatory damages; (b) Punitive damages; and (c) Attorney's fees and costs of bringing the separate action." *Nev. Rev. Stat. Ann. § 41.670 (2008)*.

New Mexico

N.M. Stat. Ann. § 38-2-9.1 et seq. (2008)

Standard: "Any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state is subject to a special motion to dismiss." *N.M. Stat. Ann. § 38-2-9.1 (2008)*.

Fee shifting: "If the rights afforded by this section are raised as an affirmative defense and if a court grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment filed within ninety days of the filing of the moving party's answer, the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action. If the court finds that a special motion to dismiss or motion for summary judgment is frivolous or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to the party prevailing on the motion." *N.M. Stat. Ann. § 38-2-9.1 (2008)*.

New York

NY CLS CPLR R 3211(g), 3212(h) (2008);

NY CLS Civ R § 70-a (2008); NY CLS Civ R § 76-a (2008)

Standard: Under Sections 3211(g) (motion to dismiss) and 3313(h) (motion for summary judgment), a motion “in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law.” *NY CLS CPLR R 3211(g), 3212(h) (2008).*

Section 76-a defines “action involving public petition and participation” as an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission. *NY CLS Civ R § 76-a (2008).*

Fee shifting: “A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney’s fees, from any person who commenced or continued such action; provided that: (a) costs and attorney’s fees may be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law; (b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and (c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.” *NY CLS Civ R § 70-a (2008).*

Oklahoma

12 Okl. St. § 1443.1 (2008)

Standard: Part of a broader statute on privileged communications, which provides that communications are exempt from libel when they are made: “First. In any legislative or judicial proceeding or any other proceeding authorized by law; Second. In the proper discharge of an official duty; Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any

and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.”

Fee shifting: None.

Oregon

ORS § 31.150 et seq. (2007)

Standard: “A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under *ORCP 21 A* but shall not be subject to *ORCP 21 F*. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice.” *ORS § 31.150 (2007)*.

Subsection (3) states: “A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.” *ORS § 31.150 (2007)*.

Subsection (2) states: “A special motion to strike may be made under this section against any claim in a civil action that arises out of: (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law; (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law; (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” *ORS § 31.150 (2007)*.

Fee shifting: “A defendant who prevails on a special motion to strike made under *ORS 31.150* shall be awarded reasonable attorney fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to a plaintiff who prevails on a special motion to strike.” *ORS § 31.152 (2007)*.

Pennsylvania

27 Pa.C.S. § 8301 et seq. (2008)

Standard: *Note that the Pennsylvania law only applies to the enforcement of environmental laws or regulations.* “Except as provided in subsection (b), a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action.” 27 Pa.C.S. § 8302 (2008).

Fee shifting: “A person that successfully defends against an action under Chapter 83 (relating to participation in environmental law or regulation) shall be awarded reasonable attorney fees and the costs of litigation. If the person prevails in part, the court may make a full award or a proportionate award.” 27 Pa.C.S. § 7707 (2008).

Rhode Island

R.I. Gen. Laws § 9-33-2 (2008)

Standard: “A party’s exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims. Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section, except if the petition or free speech constitutes a sham. The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose. The petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both: (1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and (2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.”

Subsection (e) notes that “‘a party’s exercise of its right of petition or of free speech’ shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern.”

Fee shifting: “If the court grants the motion asserting the immunity established by this section, or if the party claiming lawful exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern is, in

fact, the eventual prevailing party at trial, the court shall award the prevailing party costs and reasonable attorney's fees, including those incurred for the motion and any related discovery matters. The court shall award compensatory damages and may award punitive damages upon a showing by the prevailing party that the responding party's claims, counterclaims, or cross-claims were frivolous or were brought with an intent to harass the party or otherwise inhibit the party's exercise of its right to petition or free speech under the United States or Rhode Island constitution."

Tennessee

Tenn. Code Ann. § 4-21-1001 et seq. (2008)

Standard: "Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency." *Tenn. Code Ann. § 4-21-1003(a)* (2008). However, "[t]he immunity conferred by this section shall not attach if the person communicating such information: (1) Knew the information to be false; (2) Communicated information in reckless disregard of its falsity; or (3) Acted negligently in failing to ascertain the falsity of the information if such information pertains to a person or entity other than a public figure." *Tenn. Code Ann. § 4-21-1003(b)* (2008).

Fee shifting: "A person prevailing upon the defense of immunity provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense." *Tenn. Code Ann. § 4-21-1003(c)* (2008).

Utah

Utah Code Ann. § 78B-6-1401 et seq. (2008)

Standard: "A defendant in an action who believes that the action is primarily based on, relates to, or is in response to an act of the defendant while participating in the process of government and is done primarily to harass the defendant, may file: (a) an answer supported by an affidavit of the defendant detailing his belief that the action is designed to prevent, interfere with, or chill public participation in the process of government, and specifying in detail the conduct asserted to be the participation in the process of government believed to give rise to the complaint; and (b) a motion for judgment on the pleadings in accordance with the Utah Rules of Civil Procedure Rule 12(c)." *Utah Code Ann. § 78B-6-1403(1)* (2008). "The court shall grant the motion and dismiss the action upon a finding that the primary purpose of the action is to prevent, interfere with, or chill the moving party's proper participation in the process of government." *Utah Code Ann. § 78B-6-1404* (2008).

Fee shifting: "A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim to recover: (a) costs and reasonable attorney fees, upon a demonstration that the action involving public participation

in the process of government was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law; and (b) other compensatory damages upon an additional demonstration that the action involving public participation in the process of government was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the *First Amendment to the U.S. Constitution*.” *Utah Code Ann. § 78B-6-1405(1)* (2008).

Washington

Rev. Code Wash. (ARCW) § 4.24.500 et seq. (2008)

Standard: The Washington statute protects only individuals who make good-faith reports to appropriate governmental bodies. *Rev. Code Wash. (ARCW) § 4.24.500* (2008). The defense provides that “a person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.” *Rev. Code Wash. (ARCW) § 4.24.510* (2008).

Fee shifting: “A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys’ fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.” *Rev. Code Wash. (ARCW) § 4.24.510* (2008).

EXHIBIT D



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HEADLINE: 'Libel Tourism' Threatens Free Speech

BYLINE: By David B. Rivkin Jr. and Bruce D. Brown

BODY:

The farce of foreigners suing Americans for defamation in overseas forums, where the law does not sufficiently protect free speech, is so well-known that it has a fitting nickname: libel tourism. And London is its hot destination. Particularly since 9/11, foreign nationals have cynically exploited British courts in an attempt to stifle any discussion by American journalists about the dangers of jihadist ideology and terrorist supporters.

At long last, U.S. politicians are waking up to the dangers posed by libel tourism, which threatens both the First Amendment and American national security. The trouble is that their efforts, though well-intentioned, are relatively toothless and constitutionally problematic.

Early last year, New York State passed the nation's first anti-libel tourism law. The law allows state courts to assert authority over foreign citizens based solely on a libel judgment they have obtained abroad against a New Yorker.

The statute's passage was prompted by libel tourism's most frequent flier, Saudi bigwig Khalid bin Mahfouz. He brought a claim in England against author Rachel Ehrenfeld, who alleged in a 2003 book that the international money-man also financed terrorism. Although "Funding Evil" was published in the U.S., Mr. Mahfouz relied upon (and the British court accepted) the fact that the book was purchased by a small number of British readers on the Internet as sufficient grounds to sue Ms. Ehrenfeld in England.

Under the New York law, the target of a foreign libel suit does not even have to defend himself overseas. If a judgment is entered against him, he can seek a declaration that the foreign tribunal did not live up to First Amendment standards and therefore its ruling cannot be enforced against his U.S. assets. While emotionally satisfying, it does not protect a libel tourism victim's assets outside the U.S.

Moreover, the New York law takes a constitutionally dubious approach to the acquisition of personal jurisdiction over libel tourists. U.S. courts have never before claimed jurisdiction over individuals who have no ties whatsoever to the U.S., other than suing an American in a foreign court.

Rep. Peter King (D., N.Y.) and Sens. Arlen Specter (R., Pa.) and Joe Lieberman (I., Conn.) have been advancing federal libel tourism bills. Unfortunately these bills, which are modeled on New York's, carry the same constitutional risks.

It is a mistake to respond to libel tourism by seeking to catch foreign plaintiffs with no U.S. contacts in our jurisdictional net. This smacks of the same legal one-upmanship that makes libel tourism itself so odious.

It is high time for a strategy that would stop libel tourists dead in their tracks, without sacrificing constitutional values. The answer lies not in stretching claims of personal jurisdiction, but in federal legislation that would enable American publishers to sue for damages, including punitive damages, for the harms they have suffered. A proper federal libel tourism bill would punish conduct that takes place overseas -- in this case, the commencement of sham libel actions in foreign courts -- by utilizing the well-recognized congressional authority to apply U.S. laws extraterritorially when compelling interests demand it. The Alien Tort Statute, for example, gives U.S. courts subject matter jurisdiction over brutal acts that violate the "law of nations" wherever they may occur. More recently, Congress has created civil remedies to enable victims of international terrorism and human trafficking to sue in our courts for money damages.

But in devising a robust, substantive cause of action for damages -- a bludgeon that Messrs. King, Specter and Lieberman appropriately include in their bills -- Congress should not change normal personal jurisdiction rules. In order to sue foreigners under the federal libel tourism bill and remain consistent with due process, these individuals would have to visit or transact business in the U.S. in order for the U.S. courts to acquire jurisdiction over them. (Radovan Karadzic, the Bosnian Serb leader charged with genocide, was famously served with an Alien Tort complaint while leaving a Manhattan hotel restaurant.)

Under such a law, U.S. courts would be asked to evaluate, at the beginning stages of a foreign lawsuit, whether the plaintiffs are seeking to punish speech protected under the First Amendment. This type of early intervention by judges has worked very well in the 26 states that have passed laws to discourage frivolous libel suits here in the U.S.

To give this approach sufficiently sharp teeth, the damages awarded in libel tourism cases would have to be very substantial. While it is somewhat unusual in tort law to set statutory damages, it presents no constitutional problems. Accordingly, an effective federal bill should give courts the authority to impose damages that amount to double any foreign judgment, plus court costs and attorneys' fees (in both proceedings) for good measure. Habitual libel tourists who obviously seek to impair Americans' First Amendment freedoms should face even stiffer fines. Such a robust response would make foreign libel adventures fiscally disadvantageous, and should deter most overseas suits from ever being filed.

For libel tourists our courts can't fairly touch, it is better to leave them alone than to overreach and tread into unconstitutional territory. But they may yet pay a price. Availing themselves the pleasures of American life could one day be costly. As Karadzic learned, if you violate U.S. law, don't dine out in Manhattan.

Messrs. Rivkin and Brown are partners in the Washington, D.C., office of Baker Hostetler LLP.

(See related letter: "Letters to the Editor: Confronting Libel Tourism Properly" -- WSJ Jan. 23, 2009)

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