The SPEECH Act: The Federal Response to "Libel Tourism"

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Summary

The 111th Congress considered several bills addressing "libel tourism," the phenomenon of litigants bringing libel suits in foreign jurisdictions so as to benefit from plaintiff-friendly libel laws. Several U.S. states have also responded to libel tourism by enacting statutes that restrict enforcement of foreign libel judgments. On August 10, 2010, President Barack Obama signed into law the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), P.L. 111-223, codified at 28 U.S.C. §§ 4101-4105, which bars U.S. courts, both state and federal, from recognizing or enforcing a foreign judgment for defamation unless certain requirements, including consistency with the U.S. Constitution and section 230 of the Communications Act of 1934 (47 U.S.C. § 230), are satisfied.

Although the SPEECH Act does not have an express preemption provision, it appears designed to preempt state laws on foreign libel judgments. It explicitly applies to all "domestic" courts, which it defines to include state courts notwithstanding contrary state law. Moreover, its legislative history suggests that Congress perceived a need for, and understood the SPEECH Act as establishing, a single uniform approach to the problem of foreign libel judgments against U.S. persons.

The SPEECH Act may, however, implicate aspects of international comity. One concern is that foreign countries may opt to decline to enforce U.S. libel judgments or become less receptive to calls for enforcement of U.S. judgments in legal areas in which U.S. law is perceived as relatively friendly to plaintiffs.

Contents

Background ... 1
Obtaining Defamation Judgments Overseas ... 2
Distinctions Between U.S. and English Libel Laws ... 2
Key Cases and the Rationale for Legislative Action ... 4
Recognition of Foreign Judgments in U.S. Courts ... 6
Principles Governing Domestic Recognition of Foreign Judgments ... 6
Nonrecognition Provisions in State Libel Tourism Laws ... 8
The Federal SPEECH Act ... 10
Preemption of State Libel Tourism Laws ... 11
Implications for International Comity ... 13
Conclusion ... 14

Contacts

Author Contact Information ... 15
Acknowledgments ... 15

Background

"Libel tourism"[1] describes the act of bringing a defamation[2] suit in a country with plaintiff-friendly libel laws, even though the parties might have had relatively few contacts with the chosen jurisdiction prior to the suit. Libel tourism, like "forum shopping," may be negatively associated with plaintiffs who attempt to strategically manipulate legal processes to enhance the likelihood of a favorable outcome. However, a "libel tourist" could also be described as a plaintiff seeking favorable law under which to obtain redress for a grievance which he perceives as legitimate. Regardless of the characterization, given the increasingly globalized market for publications, some have warned that the libel tourism trend will cause an international lowest common denominator effect for speech, whereby "every writer around the globe [will be subjected] to the restrictions of the most pro-plaintiff libel standards available."[3]

The practice has affected U.S. persons in several suits brought by litigants who wish to avoid the relatively high burden of proof necessary to win defamation claims in the United States. U.S. courts interpret the First Amendment to protect speech that would be considered defamatory under traditional common law and in many other countries. For that reason, U.S. authors and publishers have been especially vulnerable to the possibility that a foreign libel judgment will impose penalties for speech that is protected in the author's home country.[4]

Although a committee of the English House of Commons has recommended reforms,[5] England[6] has a long history of providing redress for reputational injuries.[7] Modern English law appeals to potential libel tourists primarily because it offers a dual advantage to plaintiffs: plaintiff-friendly libel laws and a relatively low bar for personal jurisdiction in libel suits. As a result, although

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[1] The phrase "libel tourism" has appeared in several editorials. *See, e.g.*, David B. Rivkin Jr. and Bruce D. Brown, *'Libel Tourism' Threatens Free Speech*, Wall St. J. at A11 (January 10, 2009), and was also the title of a House subcommittee hearing, *Libel Tourism: Hearing Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. (2009). Because several high-profile cases have been brought by alleged supporters of terrorist groups for the supposed purpose of dissuading reporters from exposing their terrorist connections, the phrase "libel terrorism" has been used in reference to the same phenomenon. *See, e.g.*, Libel Terrorism Protection Act, N.Y. CPLR §§ 302(d), 5304(b)(8).

[2] Defamation is the act of harming a person's reputation by making a false statement to a third person. Libel is defamation within a fixed medium, such as a newspaper, website, sign, etc. For purposes of this report, the two terms are used interchangeably.

[3] Avi Bell, Jerusalem Center for Public Affairs, Legacy Heritage Fund, *Libel Tourism: International Forum Shopping for Defamation Claims*, 3 (2008), http://www.globallawforum.org/UserFiles/puzzle22New(1).pdf.

[4] The United States is not the only jurisdiction to guarantee freedom of expression. For example, the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, which applies in Council of Europe member states, guarantees a freedom of expression right. Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 10. However, many other countries' free speech provisions guarantee more limited protections than the U.S. First Amendment provides. For example, the Council of Europe Convention explicitly states that the right to freedom of expression it provides "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary ... for the protection of the reputation ... of others."

[5] Culture, Media, and Sport Committee, *Press Standards, Privacy and Libel*, 2009-10, H.C. 362-I, II, discussed *infra*.

[6] Although some aspects of English libel law apply throughout the United Kingdom, this report refers to "England" because laws may differ in other parts of the United Kingdom, such as Scotland.

[7] *See, e.g.*, *In re Rapier*, 143 U.S. 110 (1892) (noting that libel was a "a well known offence at [English] common law") (citing Lord Campbell in Dugdale's Case, 1 Dearsly Crown Cas. 64, 75; Holt's Laws of Libel, 73).

England is not the only country with plaintiff-friendly libel laws, English courts have been an especially popular venue for defamation suits against U.S. nationals.[8]

Because obtaining a judgment and actually receiving the money awarded constitute two separate components of a successful lawsuit, winning a judgment in a foreign court does not end the discussion. If a defendant chooses not to appear in a foreign court, the court will typically award a default judgment against the defendant. In such circumstances, plaintiffs in foreign libel suits might involve U.S. courts when they seek to enforce judgments against U.S. defendants because foreign courts typically lack jurisdiction over assets located in the United States. Thus, the U.S. response to libel tourism has focused primarily on subsequent actions to recognize or enforce foreign court judgments in U.S. courts. For example, the first federal law on point, the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), bars U.S. courts, both state and federal, from recognizing or enforcing a foreign judgment for defamation unless certain requirements, including consistency with the U.S. Constitution and section 230 of the Communications Act of 1934 (47 U.S.C. § 230), are satisfied.

Obtaining Defamation Judgments Overseas

Distinctions Between U.S. and English Libel Laws[9]

U.S. and English defamation laws derive from a common origin, but the latter have evolved into a comparatively plaintiff-friendly approach to defamation that has made England a common destination for libel tourists. Traditionally, at common law, defamation liability under both U.S. and English law was strict, meaning that a defendant did not have to be aware of the false or defamatory nature of the statement, or even be negligent in failing to ascertain that character. Instead, a plaintiff had to prove only that a statement (1) was defamatory; (2) referred to the claimant; and (3) was communicated to a third party. However, this common law liability evolved differently under U.S. and English jurisprudence. Today, the differences between the U.S. and English defamation law is primarily attributable to the U.S. Supreme Court's interpretation of the First Amendment to the U.S. Constitution.[10] Today, U.S. defamation law places the burden of proof on plaintiffs, making it more difficult for them to win.

The U.S. Supreme Court first established a federal constitutional privilege in defamation law in *New York Times v. Sullivan*, a landmark First Amendment case.[11] The Court held that a public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he or she can prove with "convincing clarity" that the statement in question was made with "actual malice," defined by the Court as "with knowledge that it was false or with reckless disregard of whether it was false or not."[12] The Court derived this constitutional restriction from the text of the First Amendment, which prohibits any law "abridging freedom of

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[8] London has been called the "libel capital" of the world. *See, e.g.*, *Be Reasonable*, London Times (May 19, 2005) at 19 (noting that London has become a libel tourism destination because British laws are "uniquely stacked in [the] favor" of foreign libel plaintiffs).

[9] This section of the report was prepared by Vivian Chu, Legislative Attorney, 7-4576.

[10] U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press....").

[11] 376 U.S. 253 (1964).

[12] *Id*. at 279-80.

speech or of the press," and which has been applied to the states through the Fourteenth Amendment.[13] The Court further stated, "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."[14] The Court subsequently extended this constitutional protection to all "public figures."[15]

A second U.S. Supreme Court case, *Gertz v. Robert Welch*,[16] marked another shift in U.S. defamation law away from the common law approach used by England. In that case, which addressed a defamation suit brought by a *non-public* figure, the Supreme Court rejected the English law of strict liability, holding that even a private plaintiff is required to show fault amounting to the defendant's negligence or higher to recover damages.[17] Accordingly, a plaintiff in a U.S. court must prove (1) a false and defamatory communication that concerns another and is (2) an unprivileged publication to a third party; (3) fault that is at least negligence by the publisher; and (4) in certain instances, special damages.

English courts, on the other hand, have not modified the traditional common law elements that a public official must prove to recover for defamation. Instead, they allow a defendant to invoke, as a defense, a qualified or conditional privilege,[18] known as the *Reynolds* privilege. The *Reynolds* privilege is a relatively new defense, often referred to as "the test of responsible journalism."[19] In the case of *Reynolds v. Times*,[20] the court considered that statements in the newspaper, which

[13] *New York Times*, 376 U.S. at 264-65.

[14] *Id.* at 283. The "immunity granted to officials" refers to the absolute privilege granted to legislators pursuant to the Constitution's speech and debate clause, U.S. Const. art. I, § 6 cl. 1, which if invoked, serves as an absolute bar to recovery, thereby making it difficult for a plaintiff suing a public official to recover for defamation.

[15] *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The Court has since stated that an individual can be characterized as a public figure or limited public figure in either of two ways: (1) by achieving such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts; or (2) by voluntarily injecting himself into a particular public controversy and thereby becoming a public figure for a limited range of issues. *Gertz*, 418 U.S. at 351. *See also Harte-Hanks Communications, Inc. v. Cannaughton*, 491 U.S. 657, 666 (1989).

[16] 418 U.S. 323 (1974).

[17] *Id.* at 347.

[18] Qualified, or conditional privilege, is a common law defense that also exists in the United States. *See* RESTATEMENT (SECOND) OF Torts § 593. In general, the doctrine of qualified privilege shields defendants from liability if the communications were made on an occasion or under a set of circumstances that entitles them to protection. *See id. E.g.*, Bochenek v. Walgreen Co., 18 F. Supp. 2d 965, 972 (N.D. Ind. 1998) ("This doctrine protects 'communications made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person have a corresponding interest or duty.'" (quoting Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 262 (Ind. 1994)). A claim of qualified privilege is defeated upon a showing that, in making the statement, the speaker abused the privilege because he either knew that the statement was false or otherwise acted with reckless disregard for the truth. RESTATEMENT (SECOND) OF Torts § 600. *E.g.*, Ewald v. Wal-Mart Stores, 139 F.3d 619, 622-23 (8th Cir. 1998) (finding that an employer's statements to the plaintiff-employee, as well as to other employees, concerning the reason for his discharge were entitled to qualified privilege and there was no evidence of fault to defeat the application of the privilege); *Bochenek*, 18 F. Supp. at 972-74 (finding that plaintiff-employee failed to substantiate her claim that the allegedly defamatory statements about her discharge were made with malice and thereby failed to defeat the application of qualified privilege).

[19] In order for the defendant to invoke the *Reynolds* Privilege, it is key that the material is in the public interest as determined by the judge, that the defamatory material is justifiable and integral to the public interest, and that the journalist behaved reasonably and responsibly (i.e., the test of responsible journalism). Some factors the court considers are (1) the source of the information, (2) steps taken to verify the story, and (3) the status of the information. This defense can be defeated upon plaintiff showing that the privileged occasion was misused (i.e., by showing malice).

[20] [2001] 2 AC 127 (H.L.) (appeal taken from Eng.).

related to the conduct of individuals in public life, should be covered by a qualified privilege. Thus, while Members of Parliament or other public officials need only prove the traditional common law elements of defamation, they may be barred from recovery if the defendants are members of the media who can show that the publication in question falls under the *Reynolds* privilege.

The *Reynolds* privilege, however, has limited application. First, it does not appear to be available to authors or others who publish outside the realm of journalism, and, second, the judge decides whether the statement at issue was privileged (i.e., in the public interest), a decision that determines whether the Privilege will apply to the defendant. Defendants in libel tourism suits brought in England have typically not been able to invoke the *Reynolds* privilege because they either do not qualify as media or the judge has not deemed their statements privileged.

In reporting the SPEECH Act out of committee in 2009, the House Committee on the Judiciary noted that British libel law has become more protective of free speech after the House of Lords issued a decision expanding the scope of Britain's *Reynolds* privilege.[21] However, this may have little effect on the majority of libel cases brought against U.S. persons in Britain.[22] Nevertheless, the U.S. response to libel tourism may motivate a re-examination of English libel law,[23] and, indeed, some proposals to reform libel laws in England have already garnered attention.[24] Among the changes that have been recommended are shifting the burden of proof in some cases and creating a one-year statute of limitations for libel cases arising from Internet speech,[25] however future changes cannot be predicted.

Key Cases and the Rationale for Legislative Action

A prominent example of libel tourism[26] is the suit brought by a Saudi billionaire, Sheikh Khalid Bin Mahfouz, against a New York author, Rachel Ehrenfeld, whose book documented his alleged role in financing terrorism.[27] Although the book was published in the United States, an English

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[21] H.Rept. 111-154, at 7 (2009) (referring to Jameel v. Wall St. J. Europe S.P.R.L. [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Britain) (H.L.))

[22] *See id.* ("[T]he Lords' decision is not as speech-protective as *New York Times v. Sullivan* ...").

[23] Culture, Media, and Sport Committee, *Press Standards, Privacy and Libel*, 2009-10, H.C. 362-I, II, at ¶ 205, http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36202.htm. *See id.* at paragraph 205 ("[W]e believe that it is more than an embarrassment to our system that legislators in the [United States] should feel the need to take retaliatory steps to protect freedom of speech from what they view as unreasonable attack by judgments in UK courts. The Bills presented in Congress ... clearly demonstrated the depth of hostility to how UK courts are treating 'libel tourism.' It is very regrettable, therefore, that the Government has not sought to discuss the situation with their US counterparts in Washington....").

[24] *See* Tim Shipman, *MPs: Curb the 'Chilling' Laws Threatening Press Freedom*, DAILY MAIL at 18 (Feb. 24, 2010); Howard Gensler, *Some Brit Lawmakers Want Change in Libel Laws*, Phil. Daily News at 36 (Feb. 25, 2010); Sarah Lyall, *Britain, Long A Libel Mecca, Reviews Laws*, N.Y. TIMES at A1 (Dec. 11, 2009).

[25] Culture, Media, and Sport Committee, *supra* note 23.

[26] *See, e.g.*, 155 Cong. Rec. S2342 (daily ed. Feb. 13, 2009) (statement of Sen. Specter); Editorial, *Attack of Libel Tourists*, Wash. Post, Feb. 22, 2009 at A22. *See also Libel Tourism: Are English courts stifling free speech around the world?*, Economist (Jan. 8, 2009) ("The best-known [libel tourism] case is that of Rachel Ehrenfeld").

[27] *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC 1156 (QB) (Eng.). Ehrenfeld directs the Center for American Democracy and has written several books documenting links between money streams and terrorist activity. The book at issue was published in 2003 and is entitled "Funding Evil: How Terrorism is Financed and How to Stop It." In testimony before the House Judiciary Committee, Ehrenfeld characterized Bin Mahfouz as a "wealthy and corrupt terror financier." *Hearing on Libel Tourism Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary*, 111th (continued...)

judge allowed the case to proceed in England because 23 copies of the book were sold through the Internet to English residents.[28] Ehrenfeld did not defend herself in the litigation, and the English court ultimately entered a default judgment against her, awarding more than $200,000 in damages and ordering her to destroy copies of the book and apologize.[29] In subsequent testimony before the House Judiciary Committee, Ehrenfeld expressed a concern that libel tourism was "limiting [scholars'] ability to write freely about important matters of public policy vital to our national security."[30] This prompted concerns among lawmakers about the possible negative impact of libel tourism on the fight against terrorism.[31]

Other cases have involved U.S. plaintiffs suing U.S. defendants. An English court dismissed at least one such case on forum *non conveniens* grounds (i.e., because England was an inappropriate forum for litigation given the parties' circumstances) despite finding that it had the requisite ground for jurisdiction.[32] On some occasions, however, English courts allowed the suits to proceed in England as long as a book or other publication had at least some exposure there.[33]

These suits against U.S. defendants in foreign courts prompted many lawmakers and editorial boards to characterize the libel tourism phenomenon as a threat to the U.S. Constitution's strong free-speech protections.[34] A key concern was that foreign libel suits would have a "chilling effect" on speech because the possibility of civil or criminal liability for expression would deter or stifle speech that is protected within the United States.[35] In turn, without a strong national law in the area, the possibility of foreign libel suits could inhibit the exchange of ideas vital to a functioning democracy.[36]

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Cong. (Feb 12, 2009), (statement of Dr. Rachel Ehrenfeld), http://judiciary.house.gov/hearings/pdf/Ehrenfeld090212.pdf.

[28] *Bin Mahfouz*, [2005] EWHC (QB) 1156 at 22.

[29] *Id.* at 74-75. In response, Ehrenfeld attempted to obtain a judgment from the U.S. District Court for the Southern District of New York declaring Bin Mahfouz's judgment unenforceable. The district court dismissed Ehrenfeld's suit for lack of personal jurisdiction, prompting legislative action, discussed *infra*, in New York State. 2006 U.S. Dist. LEXIS 23423 (April 25, 2006).

[30] *Hearing on Libel Tourism Before the Subcomm. on Comm. and Admin Law of the H. Comm. on the Judiciary*, 111th Cong. (Feb 12, 2009), (statement of Dr. Rachel Ehrenfeld).

[31] *Id.* (referring to First Amendment freedoms as both "essential to a functioning democracy" and "essential to the fight against terrorism").

[32] *Chadha & Osicom Technologies, Inc. v. Dow Jones & Co.*, [1999] E.M.L.R. 724; [1999] EWCA Civ 1415.

[33] *See* [2000] 2 All ER 986 at 16 (holding that England was an appropriate forum in a suit involving Russian individuals and Forbes Magazine, because some publications had been read in England and the plaintiffs' reputations had been affected there).

[34] *See, e.g.*, Editorial, *Attack of Libel Tourists*, Wash. Post, Feb. 22, 2009 at A22 ("The problem has lightheartedly come to be known as libel tourism, but the damage inflicted on the First Amendment and academic freedom is serious"); Arlen Specter and Joe Lieberman, *Foreign Courts Take Aim at Our Free Speech*, Wall St. J., July 14, 2008, at A15 ("[The United States'] free-flowing marketplace of ideas, protected by our First Amendment ... faces a threat").

[35] Justice Brennan introduced the phrase "chilling effect" in the First Amendment context in a 1965 opinion, *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

[36] *See, e.g.*, 155 Cong. Rec. S2342-43 (daily ed. Feb. 13, 2009) (statement of Sen. Specter) ("[I]t is the chilling effect and the mere threat of litigation that suffices to silence authors; there is no need to try the cases.").

Recognition of Foreign Judgments in U.S. Courts

Principles Governing Domestic Recognition of Foreign Judgments

Except where preempted by federal law, state law governs the recognition and enforcement of foreign judgments in U.S. courts. No federal law provides uniform rules, nor is the United States a party to any international agreement regarding treatment of such judgments.[37] Although states generally must recognize judgments from sister states under the Full Faith and Credit Clause of the U.S. Constitution, that requirement does not apply to judgments from foreign courts.[38] For that reason, even if one state enacts a law prohibiting its courts from enforcing foreign libel judgments, the judgment might be enforceable in another state where a defendant has assets.

Nonetheless, many states' recognition statutes share identical language, because most are based on one of a few common sources—namely, rules articulated in *Hilton v. Guyot*,[39] a 19th-century U.S. Supreme Court case, or one of two uniform state acts, which in turn draw from *Hilton*. Principles of international comity (i.e., "friendly dealing between nations at peace"[40]) undergird all of these sources. Comity need not be applied reciprocally, and reciprocity has been disregarded as a basis for recognition in some recent U.S. cases.[41] In contrast, countries such as England have adopted a reciprocity-based approach to recognition of foreign judgments.[42] Such countries will generally decline to recognize U.S. judgments if U.S. courts would not recognize a similar judgment rendered by its courts.

In *Hilton*, the Supreme Court explained that international comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other."[43] Rather, "it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens[.]"[44] Under this principle, a foreign judgment should be recognized "where there has been opportunity for a full and fair trial ... under a system of jurisprudence likely

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[37] In January 2009, the United States became a signatory to a the Hague Convention on Choice of Court Agreements, which requires its parties to recognize, with some exceptions, judgments rendered by a court in another signatory country that was designated in a choice of court agreement between litigants. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98. Although 29 countries, including the United Kingdom under the auspices of the European Union, had signed the Convention as of August 17, 2010, the Convention will not enter force until at least two countries deposit instruments of ratification or accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the designated depositary of the Convention. *Id.* at Arts. 27, 31. To see a list of parties and signatories as of August 17, 2010, visit http://www.hcch.net/upload/statmtrx_e.pdf.

[38] U.S. Const. art. IV, § 1 ("Full faith and credit shall be given in each *state* to the public acts, records, and judicial proceedings of every other *state*") (emphasis added).

[39] *Hilton v. Guyot*, 159 U.S. 113 (1895).

[40] *Id.* at 162.

[41] *See* De la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1382 (D. Del. 1991) ("Courts and commentators have almost universally rejected or ignored the doctrine that reciprocity should be required as a precondition to the recognition and enforcement of a foreign country's judgment."). *See also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 481 note 1 ("[T]he great majority of courts in the United States have rejected the requirement of reciprocity ...").

[42] United Kingdom, Foreign Judgments (Reciprocal Enforcement) Act 1933, Chap. 13 23_and_24_Geo_5, pt. 1, § 1.

[43] *Hilton*, 159 U.S. at 163-64.

[44] *Id.*

to secure an impartial administration of justice ... and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment."[45] Although states are not bound by that interpretation,[46] most states have adopted the basic approach from *Hilton* as a matter of statutory or common law.[47]

Two uniform laws[48]—the 1962 Uniform Foreign Money-Judgments Recognition Act and the 2005 Uniform Foreign-Country Money Judgments Recognition Act, which clarifies and updates the 1962 version—provide statutory language which many state legislatures have enacted to codify the basic principles articulated in *Hilton*.[49] More than 30 states have enacted one of the two model laws, in whole or in part. The model acts provide, as a general rule, that "any foreign judgment that is final and conclusive and enforceable where rendered," and in which an award for money damages has been granted or denied, shall be recognized.[50]

However, exceptions apply. Both the common law comity principles and the uniform statutes provide grounds for refusing to recognize foreign judgments. Most relevant is the discretionary public policy exception, which is based on the idea that "no nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum."[51] In states that have enacted the 1962 model act, a court may refuse to recognize a judgment arising from a cause of action or claim for relief that is "repugnant to the public policy of the state."[52] The 2005 version, which only a handful of states have adopted, offers an even broader public policy exception. Under this exception, a state court may refuse to recognize a foreign judgment if the judgment itself, as opposed to the underlying cause of action, is repugnant to the public policy of the state.[53] In addition, it provides a similar ground for nonrecognition if the judgment or cause of action is repugnant to the United States as a whole.[54] By including the foreign judgment itself within the scope of the exception, the act allows a judicial examination of the laws and procedures under which the foreign judgment was rendered. However, although the 2005 act's public policy exception is explicitly broader than the 1962 act's

[45] *Id.* at 202-03. Reciprocity is sometimes included as an additional requirement. In *Hilton*, the Court ultimately declined to enforce a French judgment, despite the judgment's fulfillment of these other requirements, because French courts would not enforce a similar judgment rendered by a U.S. court. *Id.* at 227-228.

[46] The *Hilton* decision established the comity principle for federal courts applying federal common law. Later, in *Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938), the Supreme Court held that there is no federal common law. Thus, although the *Hilton* decision no longer binds any U.S. court, its articulation has been incorporated into state common law by multiple states' courts.

[47] *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1013 (2007).

[48] The uniform laws are model statutes drafted by legal experts under the auspices of the National Conference of Commissioners of Uniform State Laws. States can voluntarily adopt a uniform act as state law.

[49] Nat'l Conf. of Comm. of Uniform State Laws, *Unif. Foreign Money Judgments Recognition Act* (approved in 1962), http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf; Nat'l Conf. of Comm. of Uniform State Laws, *Unif. Foreign-Country Money Judgments Recognition Act* (approved in 2005), http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.pdf. These uniform acts were drafted by the National Conference of Commissioners on Uniform State Laws, a group that drafts uniform state laws in a range of areas. The prefatory note to the 1962 model explained that the model statute "states rules that [had] long been applied by the majority of courts in this country." 1962 Unif. Act at 1.

[50] 1962 Unif. Act at §§ 2, 3; 2005 Unif. Act at §§ 3, 4.

[51] *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). *See also* Born & Rutledge, *International Civil Litigation in United States Courts* at 1061-62.

[52] 1962 Unif. Act at § 4(3).

[53] 2005 Unif. Act at § 4(c)(3).

[54] *Id.*

exception, it appears that the change merely incorporates the trend among state courts to interpret the 1962 provision to include judgments, rather than only causes of action, and to include policies of the country as a whole rather than only of the states.[55]

These public policy exceptions have been raised as grounds for nonrecognition in the small number of actions brought in U.S. courts to enforce foreign libel judgments. Even prior to the enactment of the SPEECH Act, courts in such cases generally declined to enforce foreign libel judgments on the basis of the public policy exceptions, concluding that the foreign libel laws upon which the judgments were based are repugnant to the U.S. Constitution.[56]

Nonrecognition Provisions in State Libel Tourism Laws

Although state courts have generally declined to enforce foreign libel judgments, some states enacted statutes addressing the libel tourism phenomenon. The first was New York's Libel Terrorism Protection Act,[57] which makes foreign defamation judgments unenforceable in New York state courts unless a court finds that the foreign country's defamation law provides "at least as much protection for freedom of speech and press" as U.S. law provides.[58] The other state statutes include similar "at least as much protection" language. For example, under the Illinois and Florida statutes, courts "need not [recognize]" a foreign defamation judgment unless the court "first determines that the defamation law applied in the foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and [Illinois or Florida] Constitutions."[59] In general, these statutes appear to codify, and perhaps expand, the public policy exceptions as applied to libel suits under the states' foreign judgment recognition statutes. Although courts applying state law before the statutes were enacted might have rejected enforcement under the states' existing public policy exceptions,[60] these libel-specific nonrecognition provisions made it more likely that courts in these states would decline to enforce foreign libel judgments.

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[55] *See id.* at § 4, cmt. 8.

[56] *See, e.g.*, *Telnikoff v. Matusevitch*, 702 A.2d 230, 251 (Md. 1997) (refusing to recognize an English libel judgment because it conflicted with Maryland's public policy concerning freedom of the press and defamation actions); *Bachchan v. India Abroad Pubs., Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Cty. 1992) (refusing to recognize a British libel judgment under the public policy exception in New York's foreign judgment recognition statute on ground that British libel law did not accord the protection to free speech and press embodied in U.S. and state constitutions); *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Anti-semitisme*, 169 F. Supp.2d 1181 (N.D.Cal. 2001) (refusing to enforce an order of a French court, which required an Internet service provider (ISP) to block French citizens' access to Nazi material displayed or offered for sale on the ISP's U.S. site on ground that order's content and viewpoint-based regulation "clearly" would be inconsistent with First Amendment), *rev'd and remanded with instructions to dismiss*, 433 F.3d 1199 (9th Cir. 2006), *cert. denied*, 126 S.Ct. 2332 (2006).

[57] 2008 N.Y. Laws 66.

[58] N.Y. CPLR § 5304(b)(8).

[59] 735 ILCS 5/12-621(b)(7); Fla. Stat. § 55.605(2)(h). A very similar provision in California provides that a court in that state "is not required to recognize" foreign defamation judgments "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. Civ. Pro. Code § 1716(c)(9).

[60] All of the states' foreign judgment recognition statutes—reflecting provisions in the uniform acts—had already provided that foreign judgments need not be recognized if "the cause of action on which the judgment is based is repugnant to the public policy" of the state. 735 ILCS 5/12-621(b)(3); N.Y. CPLR § 5304(b)(4); Cal. Civ. Pro. Code § 1716(c)(3); Fla. Stat. § 555.605(2)(c).

New York,[61] Florida,[62] and California[63] took the additional step of expanding the categories of people over whom courts in those states (and, by implication, federal courts applying state law there) may assert personal jurisdiction (i.e., persons over whom courts may exert power and whose rights and liabilities they may determine).[64] New York's statute, for example, authorizes personal jurisdiction over "any person who obtains a judgment in a defamation proceeding outside the United States" against (1) a New York resident, (2) a person with assets in New York, or (3) a person who may have to take actions in New York to comply with the judgment.[65] Under all three statutes, the extension of personal jurisdiction permits a cause of action for injunctive relief, whereby courts in those states may declare foreign defamation judgments unenforceable and rule that defendants in the foreign suits have no liability related to the judgments. This change in law would prevent the problems faced by New York author and prominent libel tourism defendant Rachel Ehrenfeld, whose action for a declaratory judgment establishing that Bin Mahfouz's judgment against her was unenforceable in the State of New York was dismissed for lack of personal jurisdiction in 2006.[66]

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[61] N.Y. CPLR § 302(d). New York's statute authorizes personal jurisdiction over "any person who obtains a judgment in a defamation proceeding outside the United States" against (1) a New York resident, (2) a person with assets in New York, or (3) a person who may have to take actions in New York to comply with the judgment.

[62] Fla. Stat. § 55.6055. The Florida statute tracks New York's but adds a fourth category of persons or entities who are "amenable to jurisdiction" in Florida.

[63] Cal. Civ. Pro. Code § 1717(c). The California statute includes the same four categories but makes it a condition that the foreign judgment was obtained against a California resident or a person or entity amenable to jurisdiction there and requires both (1) that the publication at issue was published in California; and (2) the person against whom the judgment might be enforced either has assets in California that may be sought in an enforcement action or may otherwise "have to take actions in California to comply with the foreign-country defamation judgment."

[64] A court's assertion of personal jurisdiction over a particular defendant must be both constitutional and statutorily authorized. Thus, even if a state or federal statute expressly authorizes jurisdiction over litigants from foreign libel suits, a court might lack jurisdiction under the due process clauses of the Fifth or Fourteenth Amendments to the U.S. Constitution. In cases brought in state courts or against U.S. defendants, the personal jurisdiction analysis implicates the Fourteenth Amendment Due Process Clause. In these cases, the Supreme Court has held that personal jurisdiction is constitutional if defendants have had "minimum contacts" in the judicial forum, such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). In some cases, the defendant must have "purposefully availed" himself of the privilege of carrying out activities in the forum, meaning that a defendant's activities in the forum were such that the defendant should have "reasonably anticipated," rather than merely been able to foresee, the possibility of being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The federal appellate case most relevant to the exercise of personal jurisdiction in suits against plaintiffs in foreign libel suits is *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (per curiam). In *Yahoo!*, an *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit determined that courts in California had personal jurisdiction over two French organizations whose only U.S. contacts included actions connected with their libel suit against Yahoo! in France. *Id.* at 1205.

[65] N.Y. CPLR § 302(d).

[66] Ehrenfeld v. Mahfouz, No. 04 Civ. 8641, 2006 U.S. Dist. LEXIS 23423, at *2 (S.D. N.Y April 25, 2006). Although he successfully fought Ehrenfeld's suit for declaratory judgment, as of June 20, 2009, bin Mahfouz had not sought to have his award for damages enforced in the state of New York. *See* Robert Sharp, *Anti-Free Speech? UK Courts Can Help*, THE GUARDIAN, June 20, 2009, *as corrected on* June 29, 2009, *available at* http://www.guardian.co.uk/commentisfree/libertycentral/2009/jun/20/libel-tourism-uk-free-speech ("The article below was amended to delete an incorrect statement that Sheikh Bin Mahfouz had sought to have his award for damages enforced in the state of New York. This has been changed."). He died on August 23, 2009. Douglas Martin, *Khalid bin Mahfouz, Saudi Banker, Dies at 60*, N.Y. TIMES, Aug. 27, 2009, *available at* http://www.nytimes.com/2009/08/28/world/middleeast/28mahfouz.html.

The Federal SPEECH Act

The 111th Congress considered several proposals to address libel tourism,[67] and ultimately passed the Securing the Protection of our Enduring and Established Constitutional Heritage Act (or the "SPEECH Act"),[68] which was signed into law on August 10, 2010.

The SPEECH Act avoided the constitutional questions that accompanied some of the other proposals. For example, S. 449 and H.R. 1304, which were collectively referred to as the Free Speech Protection Act, would have authorized counter-suits and a basis for exercising personal jurisdiction over a person who served documents related to a foreign defamation lawsuit on a U.S. person.[69] Had this approach been adopted, it may have been viewed as authorizing federal courts to exercise personal jurisdiction beyond the boundaries permitted by due process, which requires the defendants to have "minimum contacts" in the judicial forum, such that the court's assertion of jurisdiction over them conforms with traditional notions of fairness.[70] For these reasons, as well as concern for international comity, the House Committee on the Judiciary indicated that this approach would be too aggressive.[71]

Accordingly, the SPEECH Act does not authorize counter-suits against plaintiffs in foreign libel cases. Instead, the SPEECH Act bars U.S. courts from recognizing or enforcing a foreign judgment for defamation unless certain requirements are satisfied.[72] However, advocates of a federal cause of action have argued that, without the threat of a counter-suit, bars on enforcement like the one created by the SPEECH Act are insufficient to prevent a chilling effect on the speech of U.S. persons.[73]

The SPEECH Act prohibits domestic courts from recognizing or enforcing foreign judgments for defamation in any one of three circumstances:

1. When the party opposing recognition or enforcement claims that the judgment is inconsistent with the First Amendment to the Constitution, until and unless the

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[67] *E.g.*, Free Speech Protection Act of 2009, S. 449 and H.R. 1304, 111th Cong. 1st Sess.; Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), S. 3518 and H.R. 2764, 111th Cong., 1st Sess.

[68] P.L. 111-223 *codified at* 28 U.S.C. §§ 4101-4105.

[69] S. 449, § 3(a), (b); H.R. 1304, § 3(a), (b).

[70] *See* H.Rept. 111-154, at 6 (2009) (characterizing the constitutional effects of this approach). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *supra* note 64 and accompanying discussion.

[71] H.Rept. 111-154, at 6 (2009). *But see id.* at 10 (stating the additional views of Senator Jon Kyl that "Congress needs to pass broader measures that permit U.S. citizens accused of libel in foreign courts to force their accusers to pay for legal fees incurred abroad and, in certain cases, additional damages...."). The Committee also wrote that principles of international comity suggested that these counter-suits might represent too great an intrusion into the legal systems of other countries. *Id.*

[72] 28 U.S.C. § 4102.

[73] *See, e.g., Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (Feb. 23, 2010) (written testimony of Kurt Wimmer, Partner, Covington & Burling), http://judiciary.senate.gov/hearings/testimony.cfm?id=4414&wit_id=9121 (asserting that because "the very act of rendering a foreign judgment has immediate and damaging effects on [a] publisher or author," a lack of enforcement is insufficient to prevent a chilling effect). *See also* S.Rept. 111-224, at 10 (2010) (stating the additional views of Senator Jon Kyl that "Congress needs to pass broader measures that permit U.S. citizens accused of libel in foreign courts to force their accusers to pay for legal fees incurred abroad and, in certain cases, additional damages ... We support this bill as a good first step toward addressing an important problem, but there is more that can, and should, be done.").

domestic court determines that the judgment is consistent with the First Amendment,

2. When the party opposing recognition or enforcement establishes that the exercise of personal jurisdiction by the foreign court failed to comport with the due process requirements imposed on domestic courts by the U.S. Constitution, or
3. When the foreign judgment is against the provider of an interactive computer service and the party opposing recognition or enforcement claims that the judgment is inconsistent with section 230 of the Communications Act of 1934 (47 U.S.C. § 230) regarding protection for private blocking and screening of offensive material, until and unless the domestic court determines that the judgment is consistent with those provisions.[74]

Moreover, in any of those three circumstances, a U.S. citizen opposing recognition or enforcement of the foreign judgment may bring an action in a federal district court for a declaratory judgment that the foreign judgment is repugnant to the Constitution. The SPEECH Act also permits any action brought in a *state* domestic court to be removed to federal court if there is diversity jurisdiction or one party is a U.S. citizen and the other is either a foreign state or citizen of a foreign state.

The SPEECH Act ensures that a party who appeared in a foreign court rendering a foreign judgment to which the act applies is not deprived of the right to oppose recognition or enforcement of that subsequent judgment. If the party opposing recognition or enforcement of the judgment prevails, the act allows the award of reasonable attorney fees under certain conditions.

Finally, the SPEECH Act appears to preempt state laws related to foreign judgments.[75]

Preemption of State Libel Tourism Laws

The enactment of the federal SPEECH Act may raise questions about its effect in state court proceedings in states with a libel tourism statute. It appears that, to the extent that the federal law places greater restrictions on the nonrecognition of foreign defamation judgments, it will be deemed to conflict and consequently preempt the relevant state law pursuant to the Supremacy Clause of the U.S. Constitution.[76] The Supremacy Clause states that the U.S. Constitution and laws made in pursuance thereof "shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any [s]tate to the contrary notwithstanding."[77]

In general, federal preemption of state law can occur where the federal law has an express provision to that effect, where there is a perceived conflict between the state and federal law, or

[74] Some commentators have noted that, in applying section 230 of the Communications Act of 1934 to foreign judgments, the SPEECH Act only extends protection to *providers* of interactive computer services even though section 230 protects providers and *users* of interactive computer services. *E.g.*, Eric Goldman, *New Anti-Libel Tourism Act (HR 2765) Extends 47 USC 230 to Foreign Judgments*, TECH. & MARKETING L. BLOG (Aug. 11, 2010, 9:20 AM), http://blog.ericgoldman.org.

[75] S.Rept. 111-224, at 7 (2010). *See* 28 U.S.C. § 4101(2).

[76] U.S. CONST. art. VI, cl. 2. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

[77] U.S. CONST. art. VI, cl. 2.

where the scope of the statute indicates that Congress intended to occupy the field exclusively.[78] The Court has identified two forms of implied conflict preemption: situations in which it is impossible for private parties to comply with both state and federal requirements and situations in which the state law frustrates the purpose of Congress.[79] However, these categories should not be interpreted formalistically[80] because the ultimate touchstone of the preemption analysis is whether, and to what extent, Congress intended, explicitly or implicitly, for the federal law to preempt relevant state law.[81] Like many other federal statutes, the SPEECH Act does not contain an express preemption provision, but its language and legislative history strongly suggest that Congress intended to preempt state laws that conflict with the accomplishment of its purpose.[82]

The primary evidence of Congress's preemptive intent is the explicit language of the SPEECH Act itself. The statute states that its provisions are applicable in all "domestic" courts and defines a "domestic court" to include both state and federal courts, "notwithstanding any other provision of [f]ederal or [s]tate law."[83] In addition, House and the Senate Judiciary Committee reports indicate that Congress believed the SPEECH Act would preempt "[s]tate laws related to foreign judgments."[84] Finally, the importance of ensuring a uniform approach towards foreign libel judgments is also likely to weigh in favor of preemption.[85]

Congressional intent aside, the preemptive effect of the Supremacy Clause can be constrained by other constitutional principles, notably federalism[86] and separation of powers,[87] leading courts to apply a presumption against preemption when the federal law in question appears to interfere

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[78] *See* Spreitsma v. Mercury Marine, 537 U.S. 51, 64-65 (2002) (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

[79] Spreitsma, 537 U.S. at 64-65 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995));

[80] *See* Geier v. Honda Motor Co., 529 U.S. 861, 873 (2000) ("The Court has not previously driven a legal wedge—only a terminological one—between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law ... it has assumed that Congress would not want either kind of conflict.").

[81] *See* David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 510 (2008). *E.g.*, Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985) (stating that congressional intent is the "ultimate touchstone" of preemption analysis).

[82] *See* Dana, *supra* note 81, at 509. *See, e.g.*, Cipollone v. Liggett Grp., 505 U.S. 504, 518-520 (1992) (indicating that the express language of the statute and its legislative history would support a finding of preemption of state statutes).

[83] 28 U.S.C. § 4101(2) ("The term 'domestic court' means a [f]ederal court or a court of any [s]tate."); 28 U.S.C. § 4102 ("Notwithstanding any other provision of [f]ederal or [s]tate law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless ..." certain criteria are met.). *See Gregory*, 501 U.S. at 466-67 (stating that it can be sufficiently plain to anyone reading a federal law that it preempts conflicting state law even in the absence of explicit language).

[84] S.Rept. 111-224, at 7 (2010); H.Rept. 111-154, at 9 (2009).

[85] *See* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S. C. L. REV. 967, 1016 (2002) ("The perceived need for uniformity of standards is, and has always been, a critical factor to the Court in evaluating whether a state law stands as an obstacle to the accomplishment of federal objectives."). *E.g.*, Geier, 529 U.S. at 871-71 (identifying that the need for uniformity in safety standards was a concern behind the legislation and favored preemption of state safety standards); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234-35 (1947) (indicating that the need for national harmonization of warehouse regulations supported preemption).

[86] Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L. J. 2085, 2086 (2000). *See* Gregory, 501 U.S. at 460-61.

[87] *See* U.S. CONST. art. I, § 8 (enumerating Congress's legislative powers). *See also* Dinh, *supra* note 86, at 2091 ("Preemption is not a substantive power of Congress, but rather a method of regulation in furtherance of some other substantive congressional authority. The power to preempt, therefore, is necessarily pendant on some enumerated power to regulate under Article I, Section 8.").

with a traditional area of state law.[88] Ultimately, whether such a presumption applies depends primarily on how the federal law is best characterized.[89] In the context of the SPEECH Act, the law's subject matter could be described as state courts and state judicial procedure, subjects that typically fall within the purview of the state legislation.[90] However, the SPEECH Act is perhaps more aptly characterized as a law that ensures uniformity and predictability in the federal and state posture towards foreign libel judgments and, therefore, it will likely be perceived as a law addressing foreign affairs, a subject over which the Congress has the primary lawmaking authority.[91] Accordingly, principles of federalism or separation of powers should not dissuade a court from deeming relevant state law preempted by the SPEECH Act.

Implications for International Comity

A decision by a domestic court pursuant to the SPEECH Act not to enforce particular foreign libel judgments could have negative repercussions on the enforcement of U.S. libel judgments in foreign courts. As discussed, some countries condition recognition of foreign judgments on the foreign country's reciprocal recognition of judgments of the same type. In such countries, U.S. courts' refusal to enforce libel judgments would likely serve as a ground for refusing to enforce libel judgments rendered by state or federal courts in the United States. In particular, in some areas of civil tort liability (e.g., antitrust law) the United States has developed what many believe are exceptionally plaintiff-friendly laws, and some countries have tried to undermine their extraterritorial effect.[92] Any U.S. diplomatic efforts to oppose these efforts by a foreign country, however, could be compromised if the SPEECH Act is perceived as employing a similar tactic.[93]

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[88] Dinh, *supra* note 86, at 2086. *E.g.*, Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001) (suggesting that only federal regulation in a "field the states have traditionally occupied" will "warrant a presumption against finding federal preemption of a state law cause of action."); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[B]ecause the [s]tates are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). *But see* Davis, *supra* note 85, at 968-971 (arguing that Supreme Court's "preemption analysis has, in effect, created a presumption *in favor* of preemption, contrary to the Court' oft-quoted dicta that there is a presumption *against* preemption ...").

[89] Dana, *supra* note 81, at 515.

[90] However, Congress has imposed restrictions on state courts in the past. *See, e.g.*, Foreign Assistance Act of 1961, Pub. L. 87-195, § 620(e)(2), *as amended and codified at* 22 U.S.C. § 2370(e)(2) (providing that, unless the President intervened or certain other circumstances existed, "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principle of international law in a case in which the claim of title or other rights to property is asserted by any party ..."); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, P.L. 104-114, § 302(a)(6) *codified at* 22 U.S.C. § 6082(a)(6) (providing that "[n]o court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action brought under" § 302(a)(1) of the act, establishing a civil remedy against persons trafficking in property confiscated by Cuba claimed by U.S. nationals).

[91] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 70 (2d ed. 1996). *See* U.S. CONST. art. I, § 8, cl. 1, 3, 10, 11, 15, 18. *See also* Zschernig v. Miller, 389 U.S. 429, 432 (1968) (stating that the field of foreign affairs is entrusted by the Constitution to the President and to the Congress).

[92] *See* William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL'Y INT'L BUS 363, 363 (2001) ("Other countries have long resisted the extraterritorial application of U.S. antitrust law. Several have passed blocking statutes to hinder the discovery of evidence that might be useful in such cases. The United Kingdom has provided, by legislation, that U.S. antitrust judgments are not enforceable in British courts, and both Australia and Canada have given their Attorneys General authority to declare such judgments unenforceable or to reduce the amounts that will be enforced.").

[93] For example, in the context of antitrust law, the United States has negotiated bilateral agreements with countries who have enacted blocking statutes and thereby obtained the foreign country's assurance that its blocking statute will not be triggered solely by U.S. efforts to use legal processes to procure evidence for an antitrust case in that country. *E.g.*, (continued...)

Conclusion

Prior to the enactment of the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), concern existed over the effect the threat of foreign libel suits was having on the exercise of Americans' freedom of speech rights. Although the U.S. Constitution provides relatively strong freedom of speech protections, it did not prevent courts in countries with a less protective view of speech from entering libel judgments against U.S. persons. The SPEECH Act is intended to address this libel tourism phenomenon and reduce or eliminate the potential "chilling effect" foreign libel suits may have on speech protected by the First Amendment to the U.S. Constitution.

Accordingly, the SPEECH Act prohibits domestic courts from recognizing or enforcing foreign judgments for defamation that are inconsistent with the First Amendment of the Constitution, that were entered by a court that exercised personal jurisdiction in contravention of the due process requirements imposed on U.S. courts by the Constitution, or that were inconsistent with section 230 of the Communications of 1934. Some have argued, however, that, without the threat of a counter-suit, this bar on enforcement will prove insufficient to prevent a chilling effect on the speech of U.S. persons.

There are several state libel tourism laws that predate the enactment of the SPEECH Act; however, the SPEECH Act appears to preempt state lawmaking in this area. Although the SPEECH Act lacks an explicit preemption provision, it applies to all "domestic" courts and defines a "domestic court" to include both state and federal courts, notwithstanding any other provision of state law. Furthermore, the legislative history of the act indicates that Congress believed, one, that the SPEECH Act would preempt state laws related to foreign judgments, and, two, that a uniform national approach towards foreign libel judgments was necessary.

The passage of the SPEECH Act may have implications for international comity. A decision by a state or federal court in the United States not to enforce particular foreign libel judgments could have negative repercussions on the enforcement of U.S. libel or other judgments in foreign courts. This will be particularly true in those countries that condition recognition of foreign judgments on the foreign country's reciprocal recognition of judgments of the same type. Similarly, in some areas, U.S. law is perceived as plaintiff-friendly, and the United States may find its diplomatic efforts to ensure that foreign countries recognize judgments pursuant to these plaintiff-friendly laws are opposed by countries' whose libel judgments are negatively affected by the SPEECH Act.

(...continued)

Agreement Relating to Cooperation on Antitrust Matters, Art. 5, U.S.-Aus., June 29, 1982, 34 UST 388. *See also* Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 47 n. 225 (1992) (identifying several bilateral consultation agreements between the United States and foreign countries); Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 578, 587 (1983) (describing the United States-Australian antitrust agreement's effect on Australia's blocking statute). The United States also has a history of opposing international initiatives to harmonize antitrust law. Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1118 (1996).

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