

110TH CONGRESS  
2D SESSION

# S. 2977

To create a Federal cause of action to determine whether defamation exists under United States law in cases in which defamation actions have been brought in foreign courts against United States persons on the basis of publications or speech in the United States.

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IN THE SENATE OF THE UNITED STATES

MAY 6, 2008

Mr. SPECTER (for himself and Mr. LIEBERMAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To create a Federal cause of action to determine whether defamation exists under United States law in cases in which defamation actions have been brought in foreign courts against United States persons on the basis of publications or speech in the United States.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Free Speech Protection  
5       Act of 2008”.

6       **SEC. 2. FINDINGS.**

7       The Congress finds the following:

1           (1) The freedom of speech and the press is en-  
2 shrined in the first amendment to the Constitution  
3 of the United States.

4           (2) Free speech, the free exchange of informa-  
5 tion, and the free expression of ideas and opinions  
6 are essential to the functioning of representative de-  
7 mocracy in the United States.

8           (3) The free expression and publication by jour-  
9 nalists, academics, commentators, experts, and oth-  
10 ers of the information they uncover and develop  
11 through research and study is essential to the for-  
12 mation of sound public policy and thus to the secu-  
13 rity of the people of the United States.

14           (4) The first amendment jurisprudence of the  
15 Supreme Court of the United States, articulated in  
16 such precedents as *New York Times v. Sullivan*, 376  
17 U.S. 254 (1964), and its progeny, reflects the fun-  
18 damental value that the people of the United States  
19 place on promoting the free exchange of ideas and  
20 information, requiring in cases involving public fig-  
21 ures a demonstration of actual malice—that is, that  
22 allegedly defamatory, libelous, or slanderous state-  
23 ments about public figures are not merely false but  
24 made with knowledge of that falsity or with reckless  
25 disregard of their truth or falsity.

1           (5) Some persons are obstructing the free ex-  
2           pression rights of United States persons, and the  
3           vital interest of the people of the United States in  
4           receiving information on matters of public impor-  
5           tance, by first seeking out foreign jurisdictions that  
6           do not provide the full extent of free-speech protec-  
7           tion that is fundamental in the United States and  
8           then suing United States persons in such jurisdic-  
9           tions in defamation actions based on speech uttered  
10          or published in the United States—speech that is  
11          fully protected under first amendment jurisprudence  
12          in the United States and the laws of the several  
13          States and the District of Columbia.

14          (6) Some of these actions are intended not only  
15          to suppress the free speech rights of journalists, aca-  
16          demics, commentators, experts, and other individuals  
17          but to intimidate publishers and other organizations  
18          that might otherwise disseminate or support the  
19          work of those individuals with the threat of prohibi-  
20          tive foreign lawsuits, litigation expenses, and judg-  
21          ments that provide for money damages and other  
22          speech-suppressing relief.

23          (7) The governments and courts of some for-  
24          eign countries have failed to curtail this practice,  
25          permitting lawsuits filed by persons who are often

1 not citizens of those countries, under circumstances  
2 where there is often little or no basis for jurisdiction  
3 over the United States persons against whom such  
4 suits are brought.

5 (8) Some of the plaintiffs bringing such suits  
6 are intentionally and strategically refraining from  
7 filing their suits in the United States, even though  
8 the speech at issue was published in the United  
9 States, in order to avoid the Supreme Court's first  
10 amendment jurisprudence and frustrate the protec-  
11 tions it affords United States persons.

12 (9) The United States persons against whom  
13 such suits are brought must consequently endure the  
14 prohibitive expense, inconvenience, and anxiety at-  
15 tendant to being sued in foreign courts for conduct  
16 that is protected under the first amendment, or de-  
17 cline to answer such suits and risk the entry of cost-  
18 ly default judgments that may be executed in coun-  
19 tries other than the United States where those indi-  
20 viduals travel or own property.

21 (10) Journalists, academics, commentators, ex-  
22 perts, and others subjected to such suits are suf-  
23 fering concrete and profound financial and profes-  
24 sional damage for engaging in conduct that is pro-  
25 tected under the Constitution of the United States

1 and essential to informing the people of the United  
2 States, their representatives, and other policy-mak-  
3 ers.

4 (11) In turn, the people of the United States  
5 are suffering concrete and profound harm because  
6 they, their representatives, and other government  
7 policymakers rely on the free expression of informa-  
8 tion, ideas, and opinions developed by responsible  
9 journalists, academics, commentators, experts, and  
10 others for the formulation of sound public policy, in-  
11 cluding national security policy.

12 (12) The United States respects the sovereign  
13 right of other countries to enact their own laws re-  
14 garding speech, and seeks only to protect the first  
15 amendment rights of the people of the United States  
16 in connection with speech that occurs, in whole or in  
17 part, in the United States.

18 **SEC. 3. FEDERAL CAUSE OF ACTION.**

19 (a) CAUSE OF ACTION.—Any United States person  
20 against whom a lawsuit is brought in a foreign country  
21 for defamation on the basis of the content of any writing,  
22 utterance, or other speech by that person that has been  
23 published, uttered, or otherwise disseminated in the  
24 United States may bring an action in a United States dis-  
25 trict court specified in subsection (f) against any person

1 who, or entity which, brought the foreign suit if the writ-  
2 ing, utterance, or other speech at issue in the foreign law-  
3 suit does not constitute defamation under United States  
4 law.

5 (b) JURISDICTION.—It shall be sufficient to establish  
6 jurisdiction over the person or entity bringing a foreign  
7 lawsuit described in subsection (a) that such person or en-  
8 tity has filed the lawsuit against a United States person,  
9 or that such United States person has assets in the United  
10 States against which the claimant in the foreign action  
11 could execute if a judgment in the foreign lawsuit were  
12 awarded.

13 (c) REMEDIES.—

14 (1) ORDER TO BAR ENFORCEMENT AND OTHER  
15 INJUNCTIVE RELIEF.—In a cause of action described  
16 in subsection (a), if the court determines that the  
17 applicable writing, utterance, or other speech at  
18 issue in the foreign lawsuit does not constitute defa-  
19 mation under United States law, the court shall  
20 order that any foreign judgment in the foreign law-  
21 suit in question may not be enforced in the United  
22 States, including by any Federal, State, or local  
23 court, and may order such other injunctive relief  
24 that the court considers appropriate to protect the

1 right to free speech under the first amendment to  
2 the Constitution of the United States.

3 (2) DAMAGES.—In addition to the remedy  
4 under paragraph (1), damages may be awarded to  
5 the United States person bringing the action under  
6 subsection (a), based on the following:

7 (A) The amount of any foreign judgment  
8 in the applicable foreign lawsuit.

9 (B) The costs, including all legal fees, at-  
10 tributable to the foreign lawsuit that have been  
11 borne by the United States person.

12 (C) The harm caused to the United States  
13 person due to decreased opportunities to pub-  
14 lish, conduct research, or generate funding.

15 (d) TREBLE DAMAGES.—If, in an action brought  
16 under subsection (a), the court or, if applicable, the jury  
17 determines by a preponderance of the evidence that the  
18 person or entity bringing the foreign lawsuit at issue in-  
19 tentiously engaged in a scheme to suppress rights under  
20 the first amendment to the Constitution of the United  
21 States by discouraging publishers or other media not to  
22 publish, or discouraging employers, contractors, donors,  
23 sponsors, or similar financial supporters not to employ,  
24 retain, or support, the research, writing, or other speech

1 of a journalist, academic, commentator, expert, or other  
2 individual, the court may award treble damages.

3 (e) EXPEDITED DISCOVERY.—Upon the filing of an  
4 action under subsection (a), the court may order expedited  
5 discovery if the court determines, based on the allegations  
6 in the complaint, that the speech at issue in the foreign  
7 defamation action is protected under the first amendment  
8 to the Constitution of the United States.

9 (f) VENUE.—An action under subsection (a) may be  
10 brought by a United States person only in a United States  
11 district court in which the United States person is domi-  
12 ciled, does business, or owns real property that could be  
13 executed against in satisfaction of a judgment in the for-  
14 eign defamation lawsuit giving rise to the action.

15 (g) TIMING OF ACTION; STATUTE OF LIMITA-  
16 TIONS.—

17 (1) TIMING.—An action under subsection (a)  
18 may be commenced after the filing of the defamation  
19 lawsuit in a foreign country on which the action is  
20 based.

21 (2) STATUTE OF LIMITATIONS.—For purposes  
22 of section 1658(a) of title 28, United States Code,  
23 the cause of action under subsection (a) accrues on  
24 the date on which the defamation lawsuit in a for-



1       eign country on which the cause of action is based  
2       is filed.

3 **SEC. 4. APPLICABILITY.**

4       This Act applies with respect to any foreign lawsuit  
5 that is described in section 3(a) and is brought in the for-  
6 eign country concerned before, on, or after the date of the  
7 enactment of this Act.

8 **SEC. 5. CONSTRUCTION.**

9       Nothing in this Act limits the right of foreign liti-  
10 gants who bring good faith defamation actions to prevail  
11 against journalists, academics, commentators, and others  
12 who have failed to adhere to standards of professionalism  
13 by publishing false information maliciously or recklessly.

14 **SEC. 6. DEFINITIONS.**

15       In this Act:

16           (1) DEFAMATION.—The term “defamation”  
17 means any action for defamation, libel, slander, or  
18 similar claim alleging that forms of speech are false  
19 or have caused damage to reputation.

20           (2) FOREIGN COUNTRY.—The term “foreign  
21 country” means any country other than the United  
22 States.

23           (3) FOREIGN JUDGMENT.—The term “foreign  
24 judgment” means any judgment of a foreign coun-  
25 try, including the court system of a foreign country,

1 that grants or denies any form of relief, including  
2 injunctive relief and monetary damages, in a defa-  
3 mation action.

4 (4) UNITED STATES.—The term “United  
5 States” means the several States, the District of Co-  
6 lumbia, and any commonwealth, territory, or posses-  
7 sion of the United States.

8 (5) UNITED STATES PERSON.—The term  
9 “United States person” includes a United States cit-  
10 izen, an alien lawfully admitted for permanent resi-  
11 dence to the United States, and a business entity in-  
12 corporated in, or with its primary location or place  
13 of operation in, the United States.

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