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ARE FOREIGN LIBEL LAWSUITS CHILLING AMERICANS' FIRST AMENDMENT RIGHTS?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Franken, Hon. Al, a U.S. Senator from the State of Minnesota	3
Kyl, Hon. Jon, a U.S. Senator from the State of Arizona	3
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	1
prepared statement	87

WITNESSES

Brown, Bruce D., Partner, Baker Hostetler, LLP, Washington, DC	6
Wimmer, Kurt A., Partner, Covington & Burling LLP, Washington, DC	3

QUESTIONS AND ANSWERS

Responses of Kurt A. Wimmer and Bruce D. Brown to questions submitted by Senator Whitehouse	24

SUBMISSIONS FOR THE RECORD

American Civil Liberties Union, Michael W. Macleod-Ball, Chief Legislative and Policy Counsel, Washington, DC, statement	27
American Library Association, Lynne E. Bradley, Director, Washington, DC, letter	32
Brown, Bruce D., Partner, Baker Hostetler, LLP, Washington, DC, statement and attachment	34
Ehrenfeld, Rachel, Director, American Center for Democracy, Washington, DC, statement	82
Rachlin, Robert D., essay	90
Rendleman, Doug, Professor, Law at Washington and Lew Law School, Lexington, Virginia, statement	124
Wimmer, Kurt A., Partner, Covington & Burling LLP, Washington, DC	125

VerDate Nov 24 2008 12:41 Sep 13, 2010 Jkt 057951 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\57951.TXT SJUD1 PsN: CMORC

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TUESDAY, FEBRUARY 23, 2010

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, Pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Specter, Franken, Sessions, and Kyl.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. First off, I will apologize for a little laryngitis from a week up in Vermont last week. I was delighted to be there. We do not seem to have the problems with snow that they do in the Washington area, although that is not always so. Over New Year's weekend, I know in Burlington they had 34 inches of snow, and two of the schools had to open an hour late on Monday. On Monday. I have determined that in Washington if terrorists could learn how to make it snow, that is all they would need to stop the Government forever. Anyhow, that has nothing to do with this hearing, and the views expressed do not necessarily represent the views of the sponsor of the U.S. Senate, or something like that.

But today's hearing, though, is on a very serious matter. It focuses on how lawsuits brought against American reporters and publishers in foreign courts are affecting our First Amendment rights here in America.

When the Supreme Court issued its landmark ruling in *New York Times* v. *Sullivan* over 40 years ago, Justice Brennan noted that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." I agreed at that time with Justice Brennan, and even though, like everybody in public office, I have felt the occasional stings—Senator Franken, why don't you come on up here? Though I have felt the stings of what might come out of the result of *New York Times* v. *Sullivan*, I would not change that decision one iota.

The role that American authors, reporters, and publishers play in our democracy is essential. Although they are protected under our First Amendment in American courts—and, interestingly enough, when the First Amendment was adopted, if you go back and read some of the things that were printed in the various broad-

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sides and all, I mean, they were scathing on political leaders, and yet we adopted the First Amendment. Many other countries, though, even a couple hundred years later, have not offered similar protections. When plaintiffs travel to countries where there is no regard for freedom of the press to sue American authors or publishers, that has come to be known as "libel tourism." Often, the publication at issue was not directed to that foreign country. In many cases, the plaintiff has no connection to the foreign forum. The foreign court has been chosen simply because of its plaintiff-friendly libel laws.

Now, due to the worldwide dissemination of materials through the Internet, as well as the international publication of U.S. newspapers, such lawsuits threaten to dramatically alter the quality of public debate both here and abroad. And as the son of a Vermont printer, and son of a man who once published a weekly newspaper in Vermont, this is an issue I take very seriously.

Whether it is an American institution like the New York Times or a popular blog like The Huffington Post, modern technology allows reports to be read around the world instantly regardless of the author's intent to target a foreign market. In other words, the author may well have intended this for a particular group here in the United States, but it can be read anywhere in the world. If American authors and publishers run the risk of foreign lawsuits with every article or book that they write, then there is going to be a race to the bottom. It is going to be the most chilling and restrictive standards that will be followed. And this potential chilling effect will in turn deprive Americans of the kind of candid commentary and uninhibited information that our laws are designed to foster and protect.

Two libel tourism bills are pending before this Committee. They both address what role American courts should play in protecting the First Amendment rights enshrined in the U.S. Constitution. Now, as much as we might like to, we cannot legislate changes in foreign law to simply eliminate libel tourism. We all know that. But I would hope that we could all agree and I would hope this could be a bipartisan agreement that our courts—our courts—should not become a tool to uphold foreign libel judgments that would undermine the First Amendment or due process rights. Making that explicit with Federal legislation makes sense.

When I was growing up, it was almost an article of faith in our family that the First Amendment was as important a part as any—more important than most—in our Constitution. It gives you the right to practice any religion you want or none if you want. It protects your right of free speech. If you protect those things in your Constitution, you protect diversity and you protect democracy. With such diversity guaranteed and protected, then you have a democracy. And I think you have to make that explicit with Federal legislation. They say that protections in our courts are going to continue for Americans. Whether the U.S. Congress should pass legislation creating an unprecedented retaliatory cause of action in American courts, of course, is a tougher question.

I thank Senator Whitehouse, who is the Chairman of the Subcommittee on Administrative Oversight and the Courts, for co-

chairing this hearing. I thank Senator Franken, who has long discussed such issues, for being here. And I thank those who are here.

Do you want to say anything?

STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator FRANKEN. Well, as someone who has written and been sued here and won, this is of interest to me, and so I did not have an opening statement prepared, but I look forward to the testimony.

Chairman LEAHY. For which you have a passing interest.

Senator FRANKEN. I would say I have more than a passing interest, having been to court and prevailed here in the United States, and I actually think I would have prevailed anywhere in the frivolous case that was filed against me.

Chairman LEAHY. That does not always happen. As a lawyer, let me tell you, it does not always happen.

Mr. Wimmer is a partner at the law firm of Covington & Burling. He has advised journalist associations and legislators in more than two dozens countries concerning new media laws in protection of journalists and freedom of information. He served as general counsel of Gannett Company.

Mr. Wimmer, we are delighted to have you here. Please go ahead, sir—oh, I am sorry. Senator Kyl has been urging me to hold this hearing, and I agree with him on it, and we talked about it last night. Did you want to say something, Jon?

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Just thank you, and we want to hear from the witnesses. This is a really growing, important topic for American citizens, and to have the Committee engaged in it I think is very important. So I appreciate your holding the hearing, Mr. Chairman, and I apologize for being a little late.

Chairman LEAHY. No. I thought you made a very good point on the need for it.

So, please, Mr. Wimmer, go ahead.

STATEMENT OF KURT A. WIMMER, PARTNER, COVINGTON & BURLING LLP, WASHINGTON, DC

Mr. WIMMER. Thank you. Chairman Leahy, Senator Franken, and Senator Kyl, it is an honor to be here with you. I really appreciate the opportunity.

Chairman Leahy, like you, I am also descended from a printer. My grandfather was a printer in Luxembourg City during World War II, and his presses were destroyed by the Nazis. So my heroes have always been journalists. I am now privileged to represent them.

My work includes a challenging task: advising publishers and authors on how to publish the robust journalism that Justice Brennan's opinion that you quoted from this morning requires in an era when they can be sued anywhere in the world simply because their work can be accessed through the Internet. The issues that you are

addressing today can help preserve the vitality of the First Amendment in an internationally networked world.

The potential for being sued or prosecuted on the basis of an online publication really does chill the exercise of essential First Amendment freedoms. This chill can result in self-censorship. It can result in decisions not to publish. It can result in decisions to assess American content based on legal standards that protect free speech much less than do our laws.

Some ask, legitimately so, whether this chill really exists. If we know that U.S. courts will refuse to enforce a foreign judgment that does not comply with the First Amendment, is there still a chill? The answer, in my view, is yes. A foreign judgment, as soon as it is rendered, has an immediate and damaging effect on the author who has been sued, even if the judgment is never enforced in U.S. courts, because of the impact of having that judgment against you.

Proving a First Amendment chill, as you know, in any area is never easy. We cannot know for sure when punches have been pulled, when stories have been killed, and when manuscripts have been left unpublished. But there are a few concrete examples.

One involves the Cambridge University Press, surely one of the most prestigious publishing houses in the world, that published a book written by two Americans—Professor Robert Collins and a former State Department official, J. Millard Burr—entitled "Alms for Jihad: Charity and Terrorism in the Islamic World." The plaintiff in that case was a Saudi billionaire named Sheik Khalid bin Mahfouz, who claimed the book defamed him by linking him to the funding of terrorism.

Cambridge University Press, rather than mounting a spirited defense in the English courts against that suit, simply settled. It could not afford the litigation. In 2007, it not only stopped publishing the book, it destroyed all copies of the book it had on hand and sent out a communication to all libraries in the world, including those in the United States, asking them to destroy copies of the book in their possession. Thanks to the American Library Association, that did not occur in most U.S. libraries, but it is a chilling idea.

And, of course, foreign judgments that are not enforced can cause real damage to U.S. authors. Take, for example, the case of Dr. Rachel Ehrenfeld, who is seated just behind me, who published the book "Funding Evil," which also dealt with the issue of financing terrorism. The book was published solely in the United States, and was never meant to be published outside of the United States. Less than two dozen copies managed to find their way to the United Kingdom, and the same billionaire who sued the Oxford University Press then sued Dr. Ehrenfeld. Dr. Ehrenfeld decided not to defend in England, and a default judgment was rendered, and that judgment is very interesting because it shows the difference between a default judgment that we are familiar with in U.S. courts and one that is rendered in a foreign court. This judgment not only entered damages and attorneys' fees against Dr. Ehrenfeld, but also included a declaration of falsity, a direction that Dr. Ehrenfeld publish an apology, and injunction against the further publication of the challenged statement. So this has a current effect on Dr.

Ehrenfeld. Not only will there never be a European edition of "Funding Evil," which may or may not have been on the plans to begin with, but it may impede Dr. Ehrenfeld from obtaining future publishing contracts because publishers carry insurance policies that might make them shy away from an author that is already subject to a libel judgment. And, in fact, Dr. Ehrenfeld told a New York court that this has happened.

Most importantly, though, the chill of these judgments impedes the free flow of information that *New York Times* v. *Sullivan* was premised on and that our First Amendment requires.

If a publisher can be sued in any country based just on a few downloads, the media loses the ability to predict which country's law will apply to the work. A publisher engaging in pre-publication review may have no choice but to tailor the work to the standards of the nations that afford the weakest protections for free expression. And American audiences will have to accept the lowest common denominator. That is not the intent of the First Amendment, of course.

This chill affects international authors as well. If American authors meet this challenge by deciding to limit the expression of their work to only the United States, either by trying to limit publication of written works or trying to block IP addresses from other countries, which some publishers are now doing, the rest of the world will lose access to the robust American investigative journalism that is often the only light being shed on corrupt governments.

Under the state of the law today, the foreign plaintiff really has control. The foreign plaintiff decides when to enforce, whether to enforce, and how long to control this process. Pending legislation that has been talked about would shift some of this control back to the U.S. author and give the author the opportunity to seek a declaratory judgment in a U.S. court that the foreign judgment is not enforceable, which would remedy a number of these chilling effects.

It would not solve the entire problem, Chairman Leahy, as you noted. There needs to be international law reform, and it needs to move ahead. But it is a first step in that direction.

Chairman LEAHY. If I could just interrupt on that, even if they were precluded from enforcing it in the U.S. courts, somebody could still file suits in, say, a dozen jurisdictions. Let us say they were successful in all of them. Even though you cannot touch the person here in the U.S., where their assets might be, it pretty well makes it pretty frightening for that author to travel anywhere.

Mr. WIMMER. Absolutely. Absolutely right. It restricts their ability to work. It restricts where they can publish in the future. It restricts what publishing houses they can deal with, what media outlets they can deal with in the future. And, of course, it does restrict their travel. So I think it does have immediate and current effects even outside of the question of whether the judgment can be enforced.

I thank you very much for your time today, and I thank you for looking at this important topic.

[The prepared statement of Mr. Wimmer appears as a submission for the record.]

Chairman LEAHY. Thank you.

Bruce Brown is a former reporter of the Legal Times. He is now a partner at Baker Hostetler. His practice focuses on copyright, libel, and the law of news gathering. He is also an adjunct faculty member at Georgetown University's journalism program.

Mr. Brown, please go ahead, sir.

STATEMENT OF BRUCE D. BROWN, PARTNER, BAKER HOSTETLER, LLP, WASHINGTON, DC

Mr. BROWN. Thank you, Mr. Chairman, and thank you members of——

Chairman LEAHY. The little red light should be on, if it is not on. There you go.

Mr. BROWN. It should be on now. Thank you.

Thank you, Mr. Chairman and members of the Committee. It is an honor to appear before you today to talk about libel tourism.

I have to confess I do not have a grandparent who was in the printing business, but when I was in law school, I did stumble across, completely by happenstance, a Missouri Supreme Court decision from the early 1900s where my great-grandfather was a witness in a libel case. And I am proud to say he was a witness for the defense.

[Laughter.]

Chairman LEAHY. Good for him. And I went to Georgetown, so, OK, we are all right.

Mr. BROWN. Mr. Wimmer has just painted a picture here of the threat of libel tourism and the chilling effect it has created here at home. Short of having international treaties with jurisdictional and choice of law provisions, we may not be able to eliminate this threat entirely. But there are defensive measures we can take here at home to help reduce the risks that publishers face today.

My testimony this morning focuses on these potential legislative solutions. Four States already have libel tourism laws, and bills have been introduced in four more. Courts in two States have refused to enforce foreign libel judgments. But we need Federal legislation to create a uniform national policy. This is not an area where a speaker's protection should depend upon the substantive laws of the State in which he or she resides or whether that State's long-arm statute reaches as far as due process will allow.

One component of any bill should be barring the recognition during an enforcement proceeding here in the U.S. of any libel judgment obtained overseas unless it is consistent with both due process and First Amendment protections here at home.

Second, in cases where no enforcement proceeding is brought, the legislation should provide a cause of action for a U.S. citizen to sue a foreign plaintiff for a declaration that the foreign judgment is repugnant to the U.S. Constitution. Declaratory relief would provide such a remedy when the foreign plaintiff has no intention of moving to recognize the judgment in the U.S.

Three, on a jurisdictional level, Congress can ensure that foreign libel plaintiffs are more likely to fall within the reach of the Federal courts in a declaratory judgment action if it requires that State long-arm jurisdiction be read co-extensively with the Due Process Clause, regardless of the State in which the declaratory

judgment is brought. And to that same end, a potential libel tourism law should include a nationwide service-of-process provision to permit the Federal courts to make use of the connections between the foreign plaintiff and the country as a whole, making it more likely that the foreign plaintiff will be amenable to suit. These are some of the key reasons why we need Federal legislation.

Legislation to combat libel tourism will not be able to resolve all of the problems associated with this practice. Foreign plaintiffs with no ties to the U.S., no business interests here, no purpose to visit, et cetera, may be able to stay in splendid sanctuary overseas because our courts will not reach them. But there are some additional tools at Congress' disposal to make these persons think twice before filing lawsuits that seek to circumvent the First Amendment. An additional deterrence mechanism, for example, might involve libel tourism legislation that contains provisions to recover attorneys' fees. For example, if a U.S. citizen against whom a foreign judgment was rendered obtains declaratory relief from a Federal court here, the bill could include fee-shifting provisions that would allow the U.S. citizen to recover the fees incurred in that declaratory relief action. In addition, the bill could also provide for the fees incurred in defending the foreign action if the foreign plaintiff moves to enforce a judgment in the U.S. that is found to be inconsistent with due process or the First Amendment.

The awarding of damages against the foreign plaintiff in the most egregious cases, those where both the First Amendment and due process are violated and the plaintiff moves to enforce here, is something this Committee might keep in mind as it deliberates other more incremental approaches.

Finally, in closing, I have to say that watching with great excitement as the clock ticked down against Team Canada on Sunday night, the proverbial hockey puck hit me in the head. A libel tourism bill should deal sternly with the foreign plaintiff who secures a judgment overseas and never moves to enforce it here, leaving the American author, like Dr. Ehrenfeld, in legal limbo. I have already discussed a first possible step in these cases: creating a cause of action for declaratory judgment with attorneys' fees incurred in that name-clearing proceeding. But if a foreign plaintiff does not move to enforce a judgment within a certain period of time, say, for example, within the statute of limitations for defamation in the foreign jurisdiction where the suit was initially filed, it makes the foreign lawsuit look even more dubious. We should, therefore, consider additional deterrence in these cases. Let us start the clock ticking so that U.S. authors and journalists are not faced with perpetual uncertainty.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Brown appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Brown.

First, Mr. Wimmer, I listened very carefully to what you were saying on the chilling effect. You know whatever you write or whatever you say can go on the Internet. You can say it in Montpelier, Vermont, at 10 o'clock in the morning and have it on the Internet in Britain or China 2 minutes later, and you have to be thinking what is going to happen when it goes there. That certainly goes

contrary to everything that constitutionally and historically we have ever intended in our First Amendment protection.

But let me play devil's advocate for a little bit. No American court has ever enforced a foreign libel judgement so that we even need legislation.

Mr. WIMMER. It is a fair question. In fact, when I started looking at these cases many years ago, particularly with the Yahoo case out of France, that was my first thought: Well, simply wait for them to enforce and then use the line of cases that both Bruce and I described in our written testimony that prevents a U.S. court from recognizing those sorts of judgments.

But as you look more deeply at the effects of the judgments, it just seemed to me that a declaratory remedy would be really helpful for U.S. publishers and authors.

In the Yahoo case, for example, substantial monetary damages were ticking away under that fine, regardless of whether the plaintiffs came over here or not. In the case of Dr. Ehrenfeld and some others, there are immediate problems with their ability to continue publishing just because they have a judgment against them. In fact, many of these plaintiffs, as Bruce described, have no intention of ever coming over to enforce the judgment. Their purpose of getting the judgment is exactly to chill free speech. They want to stop the publisher from saying anything else against them.

Chairman LEAHY. But if we have a retaliatory cause of action in our courts, for example, with treble damages, is this going to really help? Or how is this going to be viewed internationally?

Mr. WIMMER. Well, I think it is a very interesting question. It is a fine line to walk because I think the—you know, a declaratory judgment remedy, a remedy that basically says, look, we will decide in the United States what our courts will enforce and we find that this judgment does not meet those standards and it will not be enforced strikes me as entirely a domestic remedy that does not impinge on any other country's issues.

And, you know, I also like the idea of attorneys' fees because an author such as Dr. Ehrenfeld should not have to lose money to go and get that declaration. At the same time, I think if we talked about treble damages, it becomes more difficult because then it looks like we are punishing another party in another country for accessing his or her own country's courts in an action that might be legitimate under that country's laws.

So it is a fine line that the Committee has to walk, and, you know, we are happy to discuss it.

Chairman LEAHY. What do you think about that, Mr. Brown?

Mr. BROWN. Just to add to Mr. Wimmer's answer, I think that the fact that two States have refused to enforce foreign libel judgments is obviously a very helpful starting point, but it is important to remember that in both those cases the courts decided under State public policy. They did not reach the First Amendment issue. And one of the things that Federal legislation can do is to create a uniform national policy that would say recognition of these judgments violates the First Amendment.

If we leave it to the States, there is always the possibility that different State courts would interpret their own State's public policy differently, and you would end up with a patchwork series of

laws around the country where some States may be willing to accept such a foreign judgment and some States might not. And I think that Federal legislation is important for some of these other reasons, that it would enhance declaratory judgment remedies by making sure that if, for example, you attempted to bring a declaratory judgment action in a State that did not interpret due process—excuse me, did not interpret its long-arm statute to the extent of due process, Federal legislation could step in to make sure that any long-arm statute was interpreted to the full extent of due process.

Chairman LEAHY. But are you saying that the Federal legislation would override these State laws and State courts? Doesn't this create a bit of a problem if we are telling States how they interpret their own Constitutions and their own laws?

Mr. BROWN. I do think under the First Amendment, I think Congress can say it should be a national policy to——

Chairman LEAHY. You can say it is national policy, but how do you tell a State that they must—that their State laws and their State Constitutions must coincide with what we have stated to be a national policy?

Mr. BROWN. Well, I do believe that the First Amendment in this context could compel the States to interpret their own long-arm statutes to the full extent of due process so that declaratory relief would be possible. And I also do believe, Senator, that under some of the exemptions to the Anti-Injunction Act, for example, Congress could require States not to enforce foreign libel judgments that violate the First Amendment.

Chairman LEAHY. Well, that part I can understand a little bit easier. You co-authored an editorial in the Wall Street Journal last year in which you referred to the political efforts to combat libel tourism as "constitutionally problematic," and a concern I have is whether American courts would have personal jurisdiction over foreign plaintiffs who brought problematic libel claims. Do we remain silent on this issue in a legislative fix, or do we have to talk about the due process requirements?

Mr. BROWN. I think that the legislation can be silent on personal jurisdiction as it relates to the amenability to suit of a foreign libel plaintiff here in the U.S. The courts will interpret the statute to the full extent that due process permits them to do so. What we would like to see is some explicit provision that would make sure that the courts did go to the full extent of due process, and that also might include some kind of national service-of-process provision so that the courts could take into consideration the full panoply of contacts that a foreign libel plaintiff had with the U.S. in order to determine whether he or she would be amenable to suit here.

Chairman LEAHY. Thank you.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman, and thank you for having this hearing. I think it is a very important issue, but it is a complex issue, too, and it is difficult to get right.

Chairman LEAHY. Since I am leaving, I would just ask if I could submit for the record two letters.

Senator SESSIONS. We will admit them to the record. Is that what you want me to say?

[Laughter.]

[The letters appears as a submission for the record.]

Senator SESSIONS. Anyway, I appreciate Senator Kyl—I know he has done a lot of work on this, and I will yield to him. I have two other Committee hearings this morning.

I would just say that we would like to do it right. We would like to try to respond in a way that is effective, and the courts have not been anxious to enforce these kinds of foreign judgments, which I cannot help but remember Dean Harrison, old retired Dean Harrison of Alabama Law School teaching conflicts of laws, and Tobago had issued an order, and the question he posed to the class was: Can the island of Tobago bind the whole world? And their decision in that case was considered binding. So we have got to be careful about how we do this. We have a whole body of conflicts of law that are important.

I thank you for your testimony. We are going to be studying it, and I guess I would just yield back my time at this point, or maybe recognize Senator Kyl and yield my time to him. May I do that?

Senator KYL. Mr. Chairman, should I take a couple of minutes of Senator Sessions' time here?

First of all, I want to thank both witnesses and add to the voice here that this is a subject which I think it would be very important for Congress to begin to act on before this problem gets much worse, which leads to the first question. Is the problem getting worse? In other words, is this a problem that is behind us, or do we see an increasing trend, particularly in Great Britain or in other countries, with these kinds of suits being brought?

Mr. WIMMER. Personally, I think the trend is increasing, and, frankly, there has been a lot of attention given to the United Kingdom because of the English courts and their willingness not only to have judgments that enjoin speech, but also just because they will entertain jurisdiction over people with very slight ties to the country, which we might not do. But we see this happening all over the place. It is not an English issue, and so if the English courts were to engage in sudden law reform—which, frankly, I do not think is on the horizon—we would still have an issue in other countries. So I do think it is increasing.

That said, I have not seen as many of these suits as I expected to see 10 years ago. I thought there would have been an enormous watershed. It has been more of a gradual uptick. And I think as the strategy becomes more useful, as foreign plaintiffs find that they actually can stop authors from saying more things about them by suing them in other countries, I think we will start to see a lot more of it.

Senator KYL. I would also just note that you do not have to actually file the suit. You can write a letter, make inquiry, and that has happened in the case of one individual in Arizona that I know. It is basically the threat of a lawsuit. And it would be interesting to see how much of that is going on as well.

Mr. WIMMER. Well, that is the other reason why I think we will get more of these. A lot of the English law firms, for example, the Schillings firm and others, have really taken to being very aggres-

sive about telling people when they might have a lawsuit and encouraging them to think about doing that, which will lead to more litigation.

Senator KYL. Now, Senator Leahy asked an important question. What is it about the international nature of this that enhances the ability of Congress to deal with the issue as a Federal matter? You have the First Amendment, to be sure. But is there a basis in law for us to act because of the international nature of this?

Mr. WIMMER. Well, Bruce hit, I think, the most important reason for Congress to act, which is to create uniformity. Now, there are several States—New York, Florida, Arizona is now considering a bill—that have moved in this direction and are giving their authors some protection. But what happens in other States? And just as plaintiffs choose countries——

Senator KYL. Excuse me for interrupting.

Mr. WIMMER. Sure.

Senator KYL. I appreciate the desirability of having uniformity.

Mr. WIMMER. Right.

Senator KYL. My question, though, is: Is there a legal—does Congress have an enhanced legal ability to deal with this nationally because of the international nature of the issue? This is not just a matter of we decided that it would be a good idea to have tort reform in health care legislation. This is a matter of an international practice that the country, it seems to me, has a right to deal with. It is desirable to have a uniform way of dealing with it, in my opinion, but is there legally an enhanced ability of Congress to deal with this because of the international aspect, is what I am asking.

Mr. WIMMER. It is a great point, and, in fact, I think the fact that it is an international threat that affects the entire country as a whole enhances Congress' ability to set a national policy in this regard.

I have thought a lot about whether it would be offensive to the States for Congress to act, and, in fact, I think that it would not be any more than any First Amendment decision such as *New York Times* v. *Sullivan* sets the floor, it does not set the ceiling; States can do more if they wish. But in this area, because this is an international issue that really has an impact on the country as a whole, it strikes me that Congress can move forward with a national policy that would not be intrusive into the States.

Senator KYL. Mr. Brown, your views, too?

Mr. BROWN. Well, I was just going to add to that—it is sort of a technical answer in some ways, but legislation could ensure that any such cases were removed to Federal court so that these issues were ultimately resolved by Federal courts and not State courts, so that if there are some circumstances out there where we think an American author might be caught in the State court system if somebody was trying to enforce a judgment there, to make sure that there are adequate removal provisions to see that these issues are ultimately litigated in Federal court since we would like to see the standard be a First Amendment nationwide standard as opposed to what we have now where States have individually looked to their public policy.

Senator KYL. I am just looking for the legal basis. You are in court, the Chief Justice glares down at you and says, "And what is the provision of the U.S. Constitution that allows Congress to pass this legislation?"

Mr. BROWN. Well, I think that something you may be tapping into here, Senator, is that there has been a particular concern with these cases that they are impacting the flow of information relating to national security. Dr. Ehrenfeld's book is certainly one example of that. We worked with an author last year who was in the process of publishing a book on Islamic terrorism and was very concerned about lawsuits overseas that would either—the threat of the lawsuits, frankly, deterring the publication of the book here, or some kind of crippling wave of litigation overseas that would impede further distribution of the book.

So I do think that Congress is acting against a backdrop in which there certainly has been a pattern here of an effort to suppress books and journalism that relate to fundamental national security issues, and that may give Congress another tool to work with, another basis of support for legislation.

Senator KYL. I am happy to engage in a second round if you all would like to.

Senator WHITEHOUSE. [Presiding.] Absolutely, but the floor is now Senator Franken's.

Senator FRANKEN. Thank you, Mr. Chairman, and thank you, gentlemen. I should make clear that I was not subject to a libel case. A news organization in the United States attempted to enjoin a book of mine based on a trademark, and they lost and were ruled against, and were actually kind of laughed out of court. But I identify with authors who face this kind of thing. And I do want to focus on the "chilling effect" and what it actually is.

Mr. Wimmer, you said that in some cases this can restrict travel for an author. What does that mean? Does that mean they can get arrested in the other country or they can have their assets seized? Or what does it mean?

Mr. WIMMER. Well, in most countries—and this is, you know, based on civil litigation. I think you could travel to England even if you had a judgment against you and not worry that you would be thrown into debtor's court. On the other hand, there was a journalist named Andrew Meldrum who was prosecuted in Zimbabwe under Mugabe's information law based on content that was downloaded from the Internet. And I would be absolutely certain that Mr. Meldrum would not go back to Zimbabwe under any circumstances. So it depends a little bit on the context.

But, you know, for most of the cases we are talking about, international libel cases, the real restriction comes from living and working in other places where you could have assets that would then be used to satisfy the judgment or publishing with publishing houses there, which would be a restriction.

Senator FRANKEN. With publishing houses that are located in the country where the judgment was made?

Mr. WIMMER. Right. It seems less likely that if you had been subjected to a foreign judgment, finding that you had—declaring, in fact, that you had defamed someone and published false statements, it would be much less likely as a practical matter that you

would be able to enter into a contract with a publisher in that country because they would be less likely to want to associate themselves with an author that was subjected to a judgment already. So a lot of these are practical but not sort of legal bars.

Senator FRANKEN. OK. I was listening to Senator Kyl's line of questioning. Does anyone conceive of any kind of Federal law being unconstitutional? Would it be likely that it would come before the Court, in anybody's judgment, in either of your judgments?

Mr. BROWN. I would just add that provided that it does not step too far on the due process front and attempt to ensnare within its reach foreign libel plaintiffs who have virtually no connection to the U.S. and, therefore, do not have the minimum contacts to be sued here, and that is why we advocate an approach that is silent on due process and to let the courts interpret the law consistent with what they have done in that area. But I think as long as it does not overreach in that area, there is nothing that I think would be constitutionally objectionable.

Senator FRANKEN. OK. From Mr. Wimmer's testimony, it seems that he does not believe that simply having a Federal law saying that we do not in the United States pay these judgments is sufficient, that he wants the ability to go after legal fees in these other countries. Doesn't that just sort of roil the whole thing and just add another layer of litigation that—you know, we are dealing with foreign sovereign nations. Aren't we sort of making things more complex than they need to be? Isn't there an understanding and—I do not want you to speak for Ms. Ehrenfeld, but isn't there some kind of understanding that if this happens in another country it really does not count for that much?

Mr. WIMMER. Well, you have obviously identified an important concern, and it really goes to how far the legislation goes. For example, I do not know of anyone who suggested that we should have legislation that would attempt to enjoin a pending foreign action while it was ongoing because that would be too intrusive into another country.

Senator FRANKEN. Obviously.

Mr. WIMMER. So that is one sort of polar side that you can look at and say, well, we would not go there.

On the other hand, you have identified one that strikes me as fairly straightforward, which is to say as a matter of national policy these judgments, if they are not consistent with our First Amendment due process, would not be enforceable, which is a helpful first step. But I do think that the judgments continue to have, you know, an immediate effect on the people who are subject to them, and you cannot really combat that completely here in the U.S. Obviously, you would need to reform the law, but——

Senator FRANKEN. I mean, you want a chilling effect on people bringing libel suits in other countries.

Mr. WIMMER. Right.

Senator FRANKEN. Right? And, you know, how much is all that worth is my question.

Mr. WIMMER. Well, one way Congress could resolve this is by looking at the range of issues that it could go. We have sort of identified two poles here: one is just the national policy that they are not enforceable generally, and the other is enjoining them before

they happen. And, you know, those are two extremes. Somewhere along the continuum you have got the possibility of a declaratory judgment action that would take the national policy and say, well, in this specific suit we find that the First Amendment was not followed and that cannot be enforced.

The attorneys' fees is one more step along the continuum. You may decide that that is too intrusive into another country's business. Damages is another step on the continuum. So, in a way, it is a line-drawing exercise, I think.

Senator FRANKEN. It seems that one—and I am over my time. It just seems that one—you create a continuum, it just seems that one was really extreme, and the other was reasonable.

Mr. WIMMER. Right.

Senator FRANKEN. So when you have a continuum——

Mr. WIMMER. I need to have something else?

[Laughter.]

Senator FRANKEN. That is an interesting continuum. OK. Mr. Chairman, I have used my time, and thank you.

Senator WHITEHOUSE. Senator Kyl, I will treat your first round as having been the remainder of Senator Sessions' time, and now you are on your own time.

Senator KYL. Thank you. I am just going to continue Senator Franken's line of questioning here, too, because I think we are all seeking the same thing here.

It seems to me that, first of all, you would like to deter these kinds of suits, and you could have such a robust action here in the United States that you could go too far. But it seems to me that getting a judgment in the United States for attorneys' fees, as long as some minimum contact requirement were satisfied, that that would be a bit of a deterrent because, in effect, you are saying, fine, you do not want me to do business in your country, well, you are not going to do business in this country, that is, unless you pay up first. At least if you have a bank account here, I am going to be able to have access to that potentially in an enforcement action and so on.

So I guess that is the first question. Would it be useful to at least have the deterrent effect of a judgment in the United States which could be enforced if the individual decided to come over to the United States?

Mr. BROWN. Well, Senator, I do think that deterrent effect is crucially important, and when you take a step back and think that someone like Dr. Ehrenfeld has this judgment against her for speech that was entirely protected in the jurisdiction in which she wrote, in the jurisdiction in which she published, I think that you will see that the balance of equities does tilt in favor of having some kind of deterrent mechanism such as attorneys' fees.

And I think just to add to the excellent answer that Mr. Wimmer gave, a deterrent mechanism may also prompt reform overseas, and that is one piece of the puzzle we have not brought up here yet this morning. There is now some effort in the U.K., I think, to address their own nation's libel jurisprudence. I think that the fact that there is some agitation in other parts of the world about the unfairness of British courts maintaining jurisdiction over libel cases on the thinnest of jurisdictional reeds, such as publication

over the Internet, has created in that country a sense that perhaps reform needs to take place there.

Now, we could be waiting for that for some time, which is why incremental steps here that create a deterrent effect, such as the possibility of attorneys' fees, I think is wholly appropriate.

Senator KYL. OK. What would the declaratory judgment be in a successful case? And what would the effect of it be?

Mr. WIMMER. Senator Kyl, I think we would be looking for a declaratory judgment that would address the specifics of the way the judgment was rendered, the facts of it, and would say that the judgment was rendered in a way that is inconsistent with the First Amendment and due process.

Senator KYL. And so the practical effect is the author can go to other publishing houses and say, "Look, that was a bogus deal over there. I have got a valid U.S. declaratory judgment. Publish my writings."

Mr. WIMMER. Exactly, and it would really help to cure a lot of the chilling effects that Bruce and I have talked about today, and it would blunt the impact of the foreign judgment in a way that I think, even putting aside attorneys' fees, that act itself would have a deterrent effect if the foreign plaintiff knew that we would have—the author here would have an opportunity to blunt the impact of that judgment. The attorneys' fees, I agree with you, would be an additional deterrent.

Senator KYL. What are some of the other implied negative consequences for an author who has this kind of action taken against him or her?

Mr. WIMMER. Well, one other consequence that really arises from the way that foreign judgments are often rendered is it is almost a defamation on the author himself or herself to have a judge in England make a decision that statements were false on the basis of a default action in which there was no trial. There was no quest for truth, but there is a finding now that statements are false, that defamation occurred, a demand for an apology, an injunction against publication. So that I think has a reputational harm that is vested in the author just from the judgment.

Senator KYL. Does the injunction also potentially reach even to the point of retailers?

Mr. WIMMER. Oh, sure. Absolutely.

Senator KYL. So it is not just the publishing house. It is basically telling anybody in the country you cannot deal with this——

Mr. WIMMER. Oh, no question. Yes.

Senator KYL. It just seems to me that if somebody—the best place to do business in the world is still the United States of America, and you are basically involved in a tit-for-tat action here. But I think people who file these lawsuits may at some point in their career want to come to the United States and do some kind of business, and that until we get some kind of international treaty or something that deals with this, that may be the best kind of action to contemplate here.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. Thank you.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Brown, do you support or oppose S. 449?

Mr. BROWN. The overall import of the bill we support wholeheartedly. We want to see strong deterrent measures taken. We want to see the possibility of inflicting some pain on the foreign libel plaintiff who seeks to circumvent the First Amendment by filing a lawsuit overseas.

We have addressed some issues involving the personal jurisdiction component of the bill because we want to make sure that we, in vindicating the First Amendment, also uphold what the courts have said about due process and the amenability to suit of foreign citizens. And so we would like to see that bill move forward in a way that both protects the First Amendment and also does not overreach on due process so in the future that some may claim that we overstepped on the due process ground.

Senator SPECTER. Well, is there any more of a problem with S. 449 on the nexus issue than there is with the alien tort statute or the Torture Victim Protection Act?

Mr. BROWN. Well, those statutes are silent on the question of personal jurisdiction, and the current Senate proposal does propose holding to suit here in the United States someone who has caused papers to be served in this country. And our concern is that when we look out at the Federal courts to see what they have said about that indicia being sufficient for due process, we are not comfortable enough that it is enough of a contact with the United States in order to permit personal jurisdiction to move forward. And that is why we are in support of the deterrent mechanisms in the statute, but we would like ultimately, I believe, to see a statute that is generally silent on the question of personal jurisdiction and lets the Federal courts interpret that to the full extent that due process would allow.

Senator SPECTER. How big a problem is it, Mr. Wimmer, to have people trying to enforce libel judgments in the United States which do not conform to our interpretation of the First Amendment? Is the issue occasional?

Mr. WIMMER. It is occasional. There have been only a few cases, and I think that is largely because a lot of foreign libel plaintiffs really never intend to come to the United States to enforce. They like the effect of having a foreign judgment and the current impact it might have on authors.

Senator SPECTER. They like the effect of having a foreign judgment that they do not choose to enforce? Why? Why do they like that?

Mr. WIMMER. Well, if they get a judgment that basically says, you know, we find that this was an incorrect statement, that it was false, that it was malicious, that you should apologize to the plaintiff—and foreign default judgments often go into a lot more detail than U.S. default judgments—that gives them some vindication. They can publish it on websites and say, you know, "The court has found that this book was false in its statements about me."

So I think, you know, from that perspective it gives them some vindication even without enforcing it in the U.S., because they know as soon as they come across the border, they have got to deal with the First Amendment, and it becomes much harder.

Senator SPECTER. Do you support S. 449?

Mr. WIMMER. I do. I support the bill and appreciate your leadership on it. The jurisdictional question, I think Bruce has raised some interesting points about that issue. There have been some media lawyers who have expressed concerns, not about S. 449 but about the topic generally, that if we express the view that it only takes a slight amount of contacts to justify jurisdiction in our country, at the same time that we are trying to tell other countries do not exercise jurisdiction over us based just on Internet publication or based just on a dozen books making their way across your borders, that we get that argument thrown back at us. And so that has been sort of a rhetorical concern, but, you know, we do support S. 449.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator Specter, and thank you for your leadership on this issue. It is one of many areas in which you have shown intellectual leadership, but the hearing here today is very much a testament to your work on this issue.

I have a couple of questions I would like to get into. I am told that generally courts are reluctant to enforce foreign judgments that are inconsistent with public policy in the forum state. Since the public policy of the United States vis-a-vis the First Amendment is quite clear, why is that not a sufficient protection in these circumstances? Is it a protection at all? And how would you evaluate it?

Mr. BROWN. I could take a stab at answering that.

Senator WHITEHOUSE. Do we let the common law of this develop a little bit more rather than proceed statutorily given the problem of——

Mr. BROWN. Right. I think that if I am not mistaken, the standard in many States is that such judgments need not be enforced. It is not generally a "shall not" standard. And so, one, you are dealing with State public policy, not the constitutional overlay that the First Amendment would provide. And, two, you are dealing with a standard that is a "need not" standard and not a "shall not" standard.

Senator WHITEHOUSE. Gotcha.

Mr. BROWN. And what we like about the possibility of Federal legislation is that it would be a "shall not," and it would be consistent and uniform nationwide under the First Amendment.

Senator WHITEHOUSE. All right. Let us talk a little bit more, then, about the due process problem, the minimum contacts and long-arm problem, because that seems to be sort of a bedeviling one. Going back to my early law school days, I seem to remember such a thing as an in rem proceeding, which related to a particular item and, therefore, had less of a minimum contacts type issue. I am new to this issue. You have looked at it for a long time. Is there any way that you could make the publication itself more the subject of the proceeding on a traditional in rem basis rather than make the sponsor of the litigation overseas the target, which raises more of those minimum contacts problems, particularly if there is a reciprocality problem between what we are saying they should not do and what we are doing ourselves?

Mr. WIMMER. That is really interesting, Senator Whitehouse. I am sort of plumbing the depths of my recollections from law school about in rem jurisdiction. I think you could. I do not know if you would run into problems with justiciability and ripeness because if it is in rem on the article, do you have a dispute with the other side that would be sufficient for a court to find it to be ripe, which may be an issue that could be dealt with. I think it is an interesting idea.

Senator WHITEHOUSE. Worth taking a little bit further——

Mr. BROWN. And it is something—I would just add I feel like I am back in law school and I want to pass because I read the wrong assignment.

[Laughter.]

Senator WHITEHOUSE. I used to do that myself so do not feel bad.

Mr. BROWN. But we could follow up on that in written responses after the hearing.

Senator WHITEHOUSE. Could we make that a request for the record and you can follow up in writing on the in rem theory, what its limitations are?

Mr. WIMMER. Certainly. That would be terrific.

[The information appears as a submission for the record.]

Senator WHITEHOUSE. Clearly, if you are—as I try to walk through the different elements of it, it seems clear, to me anyway, that if all you are doing is denying a foreign plaintiff a United States forum to execute on a judgment, your minimum contacts are kind of OK because as soon as they show up to enforce, boom, there are your minimum contacts, you sort of cut them off at the doorway. And it strikes me that the long-arm problem at that point goes away, or at least it is not a concern at least at that point. The question then becomes: If they have not moved to do this, if they have taken advantage of a foreign court for harassment, public relations, whatever other purposes, now how do we engage?

You have identified it as a problem, but I do not recall hearing what your specific recommendation was. Do either of you have a specific recommendation on how to solve that?

Mr. BROWN. What I was going to say, as Mr. Wimmer and I have both at various times this morning said, there may be some parts of the libel tourism conundrum that defy an easy resolution; that if a person with no minimum contacts never has an intent to enforce in the United States, does not come here to do that, even a declaratory judgment action would not reach that person. And so one thing that I tried to think about in addressing this problem in my written testimony is was there some way at least to get the clock ticking on a person over whom you might have personal jurisdiction at some point who never moves to enforce. And my thinking was if they filed a lawsuit in a jurisdiction that, for example, creates a 2-year statute of limitations for libel, they sue, they get a default judgment or some kind of judgment, within 2 years they have not moved to enforce here in the U.S. Well, in their home country their laws say within 2 years you should move to try to repair reputational harm. You did that. You got a default judgment. But 2 years later you still have not tried to enforce it. It suggests that there is something dubious about that lawsuit and that perhaps if such a person over whom you might have personal jurisdic-

tion at some point for a declaratory judgment action, that in such an action you might do something more than just attorneys' fees, because in the name-clear proceeding, you might feel that that is a person where it may be more appropriate along this incremental continuum from declaratory relief and non-enforcement, perhaps to attorneys' fees and damages, where you might entertain doing something more aggressive.

Senator WHITEHOUSE. My time has expired. I will turn to Senator Kyl.

Senator KYL. Mr. Chairman, I just had one other question. Has anybody looked at international treaties to advise us where we might potentially find a remedy there, if we were able to work with some other countries?

Mr. WIMMER. We have, Senator Kyl, and——

Senator KYL. Excuse me. Or bilateral—not necessarily a treaty, but there are various other kinds of bilateral agreements and arrangements between different countries.

Mr. WIMMER. We have, Senator Kyl. One place to focus is the European Union because that gets you a large bloc of countries at once. There is an e-commerce directive that they have that has some helpful provisions as applied to electronic commerce, and it is conceivable that you could find a way to use that approach to get at this issue.

Part of the problem, however, is that under the Treaty of Rome and some other EU documents, the European Union has given this back to the member states as something that is sort of core to their sovereignty and so really has not engaged in a 27-country solution, which is a shame. But I do think that the EU is one place to focus, not only because it is a large bloc of countries but because any judgment rendered in an EU country can be enforced in another one, which increases the stakes for publishers in the EU.

The other possibility—and this is something that members of the media have thought about—is focusing on U.S. bilateral negotiations with countries as a matter of trade and to say, you know, if we are going to have this trade relationship, there are certain premises that we need to agree on. We have been pretty good at focusing on intellectual property in the past few years as an important element of a trade agreement, and this could follow on from that in some ways. So I think that is a potential area.

Senator KYL. It is the latter idea that I had in mind, and you do get into bilateral, but you can—I mean, I am not sure whether we could go to the World Trade Organization, whether that would be a good idea. But at a minimum, intellectual property could form the basis for bilateral agreements among countries, and it is possible that if the Congress were to pass at least the minimum kind of law—and I would like to see something that has a deterrent effect in it as well—and then began beating the drum pretty loudly with these other countries that this is a problem we need to address and their relations with the United States could see some setback in certain areas if they did not seriously address it with us, then it is quite conceivable that we could get agreement on this.

I also think that there—I mean, the big white elephant in the room that nobody is mentioning here is there is one particular—at least I guess I could ask you. Is there one sort of predominant

theme in these cases or a particular kind of case that is being brought, and isn't that the real problem that we are trying to deal with here?

Mr. WIMMER. Well, one theme that emerges in several cases is the funding of terrorism, and that may be a consequence of a particular plaintiff who has been extremely active. There are a number of Russian oligarch cases that typically occur in England. Unfortunately, there are U.S. celebrity cases that go to Ireland. So, in a way, you know, we have met the enemy and it is us.

But the theme, I am not aware of a particular theme where you could sort of say if we could deal with the substance of X, we could cut back on these suits.

Senator KYL. Well, at least the cases I am aware of, personally aware of, do get into the issue of intimidation against those who blow the whistle on terrorist support.

Mr. WIMMER. Right, and I agree completely with that.

Senator KYL. I want to thank you both again, and I have a feeling that we are going to use you as a resource on the Committee here.

Thanks, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator Kyl.

Senator Franken.

Senator FRANKEN. A couple questions. Mr. Brown, you talked about "may" versus "shall" in terms of not enforcing. Has one of these ever been enforced in the United States? In other words, has some judgment in England ever been enforced in the United States?

Mr. BROWN. Not that I can recall.

Senator FRANKEN. So if it has never happened, it does not seem like that aspect of it is a major problem, the "shall" versus "may."

Mr. BROWN. Well, again, though, in our written testimony, as we describe more fully, only having two States at this point—New York and Maryland—having confronted this issue, and knowing that the standard is what it is, there is a lot of uncertainty still——

Senator FRANKEN. Well, I like the idea of a Federal law on this, but I just wanted to know that.

Is there a commercial dimension to this which is much more like someone writes that some drug does not work and they get sued in some other countries? In other words, is this more than just First Amendment—and that is First Amendment, too, but is there a whole different dimension to this? Because I think there was some mention, some hint of that in your answer to Senator Kyl.

Mr. BROWN. Well, I would just say that even though there are some common themes in a lot of these cases, as Mr. Wimmer just described, involving international terrorism, national security issues, through the years I have been involved in some situations with authors where—in one case, for example, a book that is about to be published, and the international businessman who grew up in Pennsylvania went to Asia to start a scrap metal business and grew it very successfully, is now publishing a book about his experiences in different parts of the world working in those different business cultures. He is an American. The book will be published here. He was very concerned about being sued overseas because of some of the different business conflicts that he writes about, situa-

tions that took place in Malaysia, Germany, Hong Kong. And he was so concerned about it that he went out and bought himself $2 million worth of libel insurance on the book because he felt that he could not risk that exposure of being sued in a foreign jurisdiction.

Senator FRANKEN. But, still, he is writing the book. I am talking about someone who writes in a trade magazine or writes in the New York Times or writes somewhere else that this car has a problem or this drug has a problem or that kind of thing, a product with a problem.

Mr. WIMMER. It is interesting you would ask. The U.N. Human Rights Commission took a look at this about a year and half and issued a report, and as much as we love the media, they were really focused on scholars and scientists and other people who might want to do scientific research and would have a case like this brought against them to stifle the results of that research and found that it could be an issue.

You know, I am not aware of too much of that yet here, but——

Senator FRANKEN. OK. Let me talk about the celebrity cases because, you know, we do have a First Amendment right to know what celebrities are going out with other celebrities, and I think we desperately need to protect that, and what celebrities are behaving badly, someone accused them of behaving badly, but no one else saw, and we certainly have the right of things like the National Enquirer and other publications to print that third-hand piece of knowledge that they took no effort to actually corroborate. And sometimes these celebrities will go to Ireland or somewhere and say that these publications should not be doing this. I mean, is there something to be said for protecting people's privacy in some way and being able to go to some place and get a judgment saying this is based on absolutely nothing?

Mr. WIMMER. Well, one result of that—and, you know, there are very different standards for privacy overseas and particularly in Europe than the U.S., without question. The National Enquirer, in fact, as I understand it, is now blocking the IP addresses of anyone in Ireland because they have had such a problem being sued in Ireland over material published about U.S. celebrities in the U.S. that they are trying to use that as a way that they could defend themselves against jurisdiction there to say, look, not only do we not print in Ireland, we block the IP addresses of anyone from Ireland who is trying to access our content.

So it does create—and I know this is not the question you have asked, but it does create a possible model that we could see rolling out for the future where countries sort of get blocked because of the way their courts are being used.

Mr. BROWN. And I would just add to that that no one is suggesting a Federal bill that refuses to enforce a foreign judgment or provides declaratory relief over any foreign judgment simply because it is foreign in nature. The American author or journalist would still have to be able to show that it does not comport with the First Amendment. And we know that celebrities have had success bringing these lawsuits within the United States and winning them here. And we would certainly be certain not to refuse to enforce a judgment simply because it was foreign in nature. We really would look at its compatibility with First Amendment standards.

Senator FRANKEN. Thank you, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator Franken.

Gentlemen, do foreign criminal libel laws bear on this in any way that is different or should get some special mention here before the hearing concludes?

Mr. BROWN. I was just going to say that there is a case pending right now in which I believe the possibility of foreign criminal libel jurisdiction has been threatened against a New York Times travel reporter involving an article he wrote concerning an airline crash with a Brazilian jetliner that he miraculously survived. He has been sued in Brazil. I understand it is still civil, but there has been a threat of something more severe than that. And I do think perhaps in our follow-up testimony to the Committee that is something that we should explore because there are many jurisdictions in the world that do still have criminal libel jurisdiction.

Senator WHITEHOUSE. But for the time being, if you are evaluating the scope of the problem, it is in the civil side, not in the criminal side so far.

Mr. WIMMER. It varies a bit by country. In France, for example, it is much more common to have a criminal libel action brought because that is just the way it is done. In fact, ironically enough, English companies sometimes go to France to obtain French criminal libel judgments against other English publications. So I guess the libel tourism could happen that way as well.

But I think it is important to point out that we do not exercise criminal libel jurisdiction very much in the U.S., although there are a few statutes still on the books. But it is very common elsewhere, especially in civil law jurisdictions. So I do see that as a potential issue for the future.

Senator WHITEHOUSE. OK. Well, then, I would encourage you to follow up in your written responses as well on that.

Obviously, Senator Specter's bill is carefully and thoughtfully drawn, as is all his work. But we also have another bill, Representative Cohen's bill, which has the advantage of having cleared the House of Representatives, and minimizing differences between Senate and House product can be valuable.

If we were to start with the Cohen bill as a point of departure on this subject, what would be your most significant recommendations as to ways in which you think it should be improved, or if you really think it has to be improved in certain ways in order to be effective and ways in which you think it must be improved?

Mr. BROWN. Well, the first thing I would do is add a declaratory relief provision to it, that it currently focuses on the non-enforceability of judgments. And I would add the declaratory relief, and then I would think about what I could do in the area of attorneys' fees for that declaratory relief proceeding as well.

Mr. WIMMER. Yes, I agree with that.

Senator WHITEHOUSE. And the problem of minimum contacts is the same problem whether it is attorneys' fees or—I mean, you either have minimum contact or you do not. Whether you are trying to get jurisdiction over somebody for an order or for a judgment or for damage or for attorneys' fees, it is all the same. Correct?

Mr. BROWN. Right. And that is why I think the legislation could ultimately be silent on the personal jurisdiction issue as it pertains minimum contacts.

Senator WHITEHOUSE. Sort itself out as this all develops.

Mr. BROWN. Right.

Senator WHITEHOUSE. So that would be your recommendation on that subject, to let it sort itself out as the case law develops rather than try to define it specifically in the statute.

Mr. WIMMER. Although I think we would recommend that it provide as a matter of national policy that jurisdiction extend to the limits of the Due Process Clause.

Mr. BROWN. Right. Yes.

Mr. WIMMER. But aside from that, I think you could be silent on it and let the courts figure that out in the context of each case.

Senator WHITEHOUSE. All right. Well, this has been very helpful. I appreciate it. I do not think there is any other further business. The record will remain open for an additional—is a week enough to get it in?

Mr. WIMMER. Oh, sure.

Senator WHITEHOUSE. Very good. The record will remain open for an additional week, and I thank you both for your testimony. This has been a helpful hearing.

[Whereupon, at 11:20 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Before the United States Senate Committee on the Judiciary
"Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?"
February 23, 2010

Responses to Questions Submitted by Senator Sheldon Whitehouse
by Kurt A. Wimmer and Bruce D. Brown

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1. **What are the possibilities and limitations of using the concept of in rem jurisdiction over the publication at issue as part of a legislative response to the "libel tourism" problem?**

In rem jurisdiction has been proposed as a possible means of bringing a foreign libel plaintiff within the jurisdiction of the U.S. courts so that an American citizen sued overseas can bring an action here against a foreign libel plaintiff. In rem jurisdiction allows a court to exercise jurisdiction over the property of a defendant when that property exists within the forum state. The proposed application of in rem jurisdiction in the libel tourism context would envision using the publication at issue in the overseas libel action as "property" on which a domestic court could base in rem jurisdiction over a foreign libel plaintiff as a defendant in a subsequent action in the U.S. However, the legal and constitutional limitations of in rem jurisdiction would likely prevent such an application.

First, the basis for the exercise of in rem jurisdiction is the property of a defendant, not the property of a plaintiff. See 4A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1070 (3d ed. 2003). That follows from the purpose of in rem jurisdiction – to facilitate the adjudication of a dispute over an interest in property that exists within the jurisdiction when personal jurisdiction over the defendant is not available. As a result, in rem jurisdiction is not a natural fit for libel tourism because the property at issue would belong to the U.S. author-plaintiff, not to the foreign defendant.

Second, in rem jurisdiction applies only when the dispute involves an interest in the property which serves as a basis for the jurisdiction. For example, we were unable to find case law in which in rem jurisdiction has been applied to bring a libel defendant within a court's jurisdiction because it is not "ownership" over the allegedly defamatory publication that is at issue in a libel case, but rather redress for damage to the plaintiff's reputation. On the other side of the equation, in rem jurisdiction has applied to domain names under the Anticybersquatting Consumer Protection Act of 1999 ("ACPA"), 15 U.S.C. § 1125(d)(2). The act allows courts to exercise in rem jurisdiction in any judicial district where the "domain name registrar, registry, or other domain name authority that registered or assigned" a domain name to a potential defendant is located if personal jurisdiction over the defendant does not exist in any other U.S. jurisdiction. In that scenario, in rem jurisdiction is appropriate because ownership over the property – the domain name – drives the case. Here, using the publication as a basis for in rem jurisdiction would be inappropriate in an action against a foreign libel plaintiff because ownership of the publication is not at the heart of the claim.

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Third, under the Supreme Court's decision in Shaffer v. Heitner, 433 U.S. 186 (1977), the same constitutional due process requirements that apply to personal jurisdiction would also apply to in rem jurisdiction. In the traditional application of in rem jurisdiction, the "minimum contacts" test is easily met because jurisdiction is exercised over property that exists within the forum state, not over the defendant himself. See, e.g., Mattel Inc. v. Barbie-Club.Com, 310 F.3d 293 (2d Cir. 2002) (Sotomayor, J.) (in rem jurisdiction under the ACPA over a domain name owned by a foreign defendant with no ties to the U.S. would not violate due process). But in Shaffer, the Supreme Court struck down a Delaware statute allowing the exercise of in rem jurisdiction over property located within the state in a case where the defendant's personal, rather than property, interests were implicated. To permit in rem jurisdiction as a means of evading in personam jurisdiction, the Court held, would violate constitutional due process unless sufficient minimum contacts could be shown. Id. at 207. The same would hold true if libel tourism legislation authorized the application of in rem jurisdiction over a publication as a substitute for exercising in personam jurisdiction over a foreign libel plaintiff.

An attempt to exercise in rem jurisdiction over a foreign libel plaintiff based on the publication at issue would likely be unsuccessful and would be limited by constitutional concerns. Consequently, potential legislation should focus on expanding personal jurisdiction to its fullest extent by including a national service-of-process provision and requiring courts to interpret state long-arm statutes co-extensively with the outermost reaches of the Due Process Clause.

2. How should concern about the abuse of foreign criminal libel laws inform the Judiciary Committee's consideration of the "libel tourism" bills pending before it or other future legislative responses?

Criminal libel laws are a matter of particular concern in international media law. Many countries have criminal libel laws and rarely use them. Indeed, several States in the United States still have old criminal libels laws on the books, although they are rarely used (and are subject to the requirements of New York Times v. Sullivan on the rare instances when they are sought to be used by prosecutors).

It is not surprising that so many countries whose legal systems rely on civil-law traditions have criminal libel laws. In a country without a common-law heritage that lacks an effective system of civil litigation for redress of injuries, citizens often expect to turn to the state for recompense of injuries. However, most countries now have civil litigation traditions that have replaced this reliance on the state. Many international organizations have expressed concern over criminal libel laws and have actively sought their repeal. In the former Yugoslavia, for example, the United Nations and OSCE used their authority under the Dayton Accords to repeal Bosnia's criminal libel law and replace it with a civil system for defamation that accords with international standards.

Many European, Asian and South American countries, however, continue to use criminal defamation laws in cases that can pose particular perils for American authors. In the context of "libel tourism," it is interesting to note that even plaintiffs with access to the highly favorable English libel courts for civil litigation sometimes seek criminal prosecutions in France instead.

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In the recent Interbrew litigation, investment banks based in London obtained a French prosecution against English publishers for leaking confidential documents. But the most difficult cases arise in the context of foreign nationals using their "home court advantage" to secure prosecutions against American authors and publishers.

In a recent case, for example, a travel blogger who also writes for the New York Times, Joe Sharkey, has had both civil litigation and a criminal prosecution (for "insulting the honor of Brazil") commenced against him in Brazil because of his firsthand reports of involvement in a high-profile air-travel incident. This case illustrates the central danger of both civil and criminal defamation laws in countries other than the United States, which uniformly do not protect free expression to the extent of United States law. Mr. Sharkey, a travel writer, must have the freedom to visit other countries. A civil suit could be enforced against his assets here. But the addition of a criminal prosecution is particularly pernicious, because it could severely limit Mr. Sharkey's ability to travel in South and Central America, or any country that could honor a warrant for his arrest or for his return to serve a sentence under a conviction. Because Mr. Sharkey's writing was done in the United States, it should have the full protection of our First Amendment. But the combination of foreign civil and criminal process being used against him endangers not only his assets, but his personal freedom and his ability to practice his profession.

The legislation being considered by the Committee could provide an important opportunity for U.S. authors to blunt the impact of criminal prosecutions based on speech. If the legislation is broadly drawn to apply against both civil litigation and criminal prosecutions based on expressive activities of those within the United States, our authors and publishers could at least partially neuter the impact of such prosecutions by securing a judgment of a United States court that the process issued by the foreign court, whether a conviction, a judgment, or a warrant, cannot be enforced in the United States. Given the respect in which the American judiciary is held abroad, this could be an important counterbalance against the threat of global criminal prosecutions resulting from the exercise of the First Amendment freedoms that our country has worked so hard to protect. Again, we commend the Committee for considering this important legislative effort.

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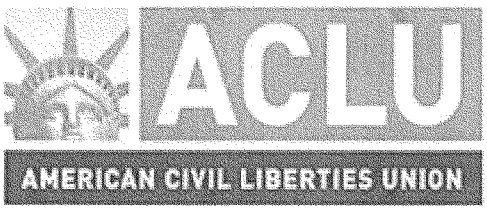
SUBMISSIONS FOR THE RECORD



Written Statement of the
American Civil Liberties Union

Michael W. Macleod-Ball
Chief Legislative and Policy Counsel

before the
Senate Judiciary Committee

February 23, 2010

Hearing: "Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?"

57951.004

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Laura Murphy
Director

Written Statement of the
American Civil Liberties Union

Michael W. Macleod-Ball
Chief Legislative and Policy Counsel

Senate Judiciary Committee
February 24, 2010

Chairman Leahy, Ranking Member Sessions, and Members of the Committee:

The American Civil Liberties Union (ACLU) has more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide. We are one of the nation's oldest and largest organizations advocating in support of individual rights in the courts and before the executive and legislative branches of government. In particular, throughout our history, we have been the nation's pre-eminent advocate in support of individual free speech rights. We write today to express our strong support for legislation to resolve the problem known as 'libel tourism'. Some say no such problem exists.[1] Those who believe it is a problem don't necessarily agree on the best approach to dealing with the issue. The ACLU is less concerned with these differences of opinion than with upholding the standards found in the U.S. Constitution against challenges arising out of foreign laws that fall short of accepted international standards. We encourage this committee to craft legislation to protect the free speech rights of those authors and writers entitled to such protection from the chilling effect of foreign laws that fail to conform to basic international human rights agreements.

A party seeking libel damages may bring a claim in any jurisdiction where the libelous communication was published. Given the pervasive scope of modern-day electronic communications, many prospective plaintiffs could sue in nearly any country in the world. This circumstance affords libel plaintiffs, in particular, broad forum-shopping opportunities – directly proportionate to the scope of distribution of the communications claimed to be libelous. The sharp conflict between defamation legal standards in the United Kingdom and the U.S. – combined with the likelihood of at least incidental parallel publication due to common bonds of language, business, and culture – increases the likelihood of libel tourism involving these two countries. Plaintiffs prefer to bring suit in the U.K. because British law places the burden on the author to prove the truth of a published statement, whereas in the U.S. the plaintiff must prove its falsity before

[1] *See, e.g.*, Paul H. Aloe, *Unraveling Libel Terrorism*, New York Law Journal, June 18, 2008; John J. Walsh, *The Myth of 'Libel Tourism'*, New York Law Journal, Nov. 20, 2007.

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winning a defamation claim. Under our First Amendment, the free speech right gives strong protection to those who discuss public figures or matters of public interest.[2]

The most egregious British libel tourism cases involve publications with only incidental circulation in the U.K., plaintiffs and defendants with only minimal connection there, and plaintiffs with little or no connection to the United States. Such was the case of American author Rachel Ehrenfeld, who sold in England a mere 23 copies of her book about terrorism financing. She was sued in England by a Saudi businessman who claimed the book defamed him. The businessman's connections to the U.K. and damages there were tenuous. In addition, the U.K.'s libel standards are easier to meet, and the claim would have been marginal, if not frivolous, under U.S. law.

A free society is one in which there is freedom of speech and of the press -- where a marketplace of ideas exists in which all points of view compete for recognition. Whether viewpoints or ideas are wrong or right, obnoxious or acceptable, should not be the criterion. Therefore, we regard the existence of a right of action for defamation arising out of a discussion of a matter of public concern to be violative of the First Amendment. Even in private matters, the First Amendment should protect against liability unless the plaintiff can prove with clear and convincing evidence that the false and defamatory speech was made with knowledge of its falsity or with reckless disregard as to its truth or falsity and with intent to damage an identifiable party's reputation.

The operation of foreign laws should not be permitted to chill the exercise of constitutionally protected rights here in the U.S. Proposals offered during the current Congress would help preserve the right of free speech by affording some ability to challenge the enforcement in the U.S. of such foreign libel judgments. S. 449 offered by Senator Specter and its companion, H.R. 1304, offered by Representative Peter King, would help preserve the right of free speech by giving individuals the ability to challenge the validity of foreign defamation judgments when plaintiffs attempt to enforce them in this country. Departing somewhat from original language offered in the 110th Congress, the bills would entitle U.S. speakers to seek a claim against foreign judgment holders if and when they attempted to serve court papers here. They would only render the foreign judgments unenforceable if the foreign lawsuits did "not constitute defamation under United States law."[3]

Representative Stephen Cohen's bill, H.R. 2765, passed the House in June 2009 and takes a more defensive posture. Instead of providing the libel tourism victim a claim against the foreign plaintiff, it instead bars enforcement of such a judgment in the U.S.

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[2] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

[3]The Specter bill in its original form was somewhat broader in its application and created issues relating to the validity of the court's exercise of personal jurisdiction. That approach, which comes closer to the path taken by the New York State Legislature in its attempt to resolve the libel tourism issue for N.Y. residents, was improved by the changes offered by Senator Specter during deliberations in the Senate Judiciary Committee during the 110th Congress tying personal jurisdiction to the foreign plaintiff's attempt to make service on the libel tourism victim within the U.S. Even as strengthened, however, observers do not agree whether the personal jurisdiction criteria will meet the 'minimum contacts' standards first elucidated in the landmark *International Shoe* decision. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945)

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The bill has fewer questions surrounding its validity and would certainly provide protection for the victim whose assets are in the U.S., thereby requiring the original plaintiff to come to courts here to enforce the judgment. On the other hand, the bill will be less effective against American victims with assets overseas and will do little to discourage foreign plaintiffs from bringing the actions in the first place.

We have expressed concern with establishing a framework that effectively precludes enforcement of foreign judgments in the U.S. As a general rule, those within the family of nations ought to respect each other's court judgments. In these circumstances, however, we believe the United States is justified in standing up for its progressive free speech standards that are far closer to international standards than those of Great Britain. In fact, in July 2008 the United Nations Human Rights Committee recommended that the United Kingdom revise its libel laws to bring them into accord with international standards.

> The Committee is concerned that the [U.K.'s] practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the internet and the international distribution of foreign media also create the danger that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.[4]

The Committee recommended, among other things, that plaintiffs in Britain be required to make some preliminary showing of falsity or the existence of some failure to conform to journalistic standards.

With support of such international authorities, we believe that passage of any of the bills offered in the current Congress would not be contrary to our role as a member of the family of nations – respectful of the laws and rights of others. To the contrary, as we stand for the importance of one of our basic freedoms – the right to speak freely – we stand for an ideal to be pursued by all nations as recognized by existing international agreements. In our view, a victim of libel tourism should not suffer the consequences of a foreign libel judgment when the site of the judgment has failed to conform its laws to accepted international standards. The essence of each of these bills moves in that direction – even if we would prefer the standard for such cross-border disputes to reference accepted international norms. These bills help the United States to stand as a beacon for the preservation of individual free speech rights and encourage other nations to adopt similarly strong standards in line with agreed-upon international norms.

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[4] International Covenant on Civil and Political Rights, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations at para. 25 (July 30, 2008).

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Thank you for your efforts to highlight this important human rights issue and to advance legislation designed to address this problem. If you have any questions, please contact Michael W. Macleod-Ball at 202-675-2309 or by email at mmacleod@dcaclu.org.

Sincerely,

Michael W. Macleod-Ball
Chief Legislative and Policy Counsel

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Office of Government
Relations

ALA American Library Association

September 23, 2010

The Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Building
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the more than 65,000 members of the American Library Association (ALA), I want to thank you for convening today's hearing on the threat posed to First Amendment rights by the practice known as "libel tourism."

As you know, "libel tourism" refers to the practice of filing libel suits against U.S. authors and publishers in foreign jurisdictions where the law favors the plaintiff and where the plaintiff is likely to prevail. Such suits seek to punish and intimidate United States authors and publishers whose speech is otherwise protected by the First Amendment. These lawsuits effectively chill free expression and undermine our First Amendment rights in this country.

Based upon its longstanding commitment to the First Amendment and the right to free expression, ALA would like to express its concern about the negative impact of these foreign lawsuits on authors, journalists and publishers, as well as the threat to library users' right to obtain and read the works placed under threat by libel tourism – a chilling effect that extends to all Americans' right to read.

There are numerous examples of these libel lawsuits. One of the most notable cases is the libel lawsuit filed in England by Saudi businessman Khalid Salim bin Mahfouz against U.S. author and terrorism expert, Dr. Rachel Ehrenfeld. Even though Ehrenfeld's book, *Funding Evil: How Terrorism is Financed and How to Stop It* had never been published or promoted in Britain and was published in the United States solely for an American audience, the British court awarded Mahfouz legal fees and substantial damages and ordered that the book not be further distributed in the United Kingdom.

In another case, two American academics, Robert O. Collins and J. Millard Burr, were forced to stand by and watch as their book on terror funding, *Alms for Jihad,* was pulped by the Cambridge University Press (CUP). CUP pulped the books in order to settle another libel lawsuit filed by Khalid Salim bin Mahfouz. This particular lawsuit reached directly into American libraries when CUP asked libraries to remove the books from their shelves and return the books to CUP so that they could be pulped.

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The global reach of the Internet means that authors, publishers and journalists can be threatened by libel tourism from any place in the world. This is not a threat just for traditionally successful authors and larger publishers but also for American journalists across the world as well as "little" authors of blogs, individual online publishers and even libraries that also publish Internet content. (For the purposes of this discussion, ALA is using the term "author" as the creator of any type of traditionally printed/published or online publication. This includes publishers and all types of authors including those who post blogs, self-publish or post online materials.)

ALA sees common ground among stakeholders in this libel tourism debate. We all want to protect the First Amendment rights of our authors and assure that foreign governments and interests cannot compromise our right to free expression and stifle the free exchange of ideas and information assured by the First Amendment. Any successful legislation should contain the following key principles:

- Authors should not have to go outside of this country to defend their rights;
- There must be a prohibition in the United States against the enforcement of any foreign libel judgments that are inconsistent with the First Amendment; and
- Authors should have appropriate legal tools to protect their rights to free expression.

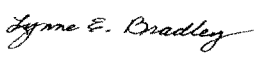
ALA appreciates the two legislative approaches that have been offered by the Free Speech Protection Act of 2009 (S.449) and H.R. 2765. There are strengths in each. Through today's hearing your committee can address options and consider a new, approach that builds on the strengths of each bill. While ALA urges careful consideration of these options so that an international environment of litigation on top of litigation is avoided, we encourage you to add two of the provisions proposed by the American Association of Publishers into H.R. 2765:

- Allow U.S. authors to seek declaratory relief in federal court upon the rendering of a foreign libel judgment concerning speech published and primarily disseminated in the United States; and,
- Assure that federal courts can find a foreign libel judgment to be non-recognizable and non-enforceable if it is inconsistent with the First Amendment or if the exercise of jurisdiction by the foreign court did not comport with U.S. constitutional standards of due process.

As you consider these various options, know that ALA is ready to work with you and others to protect our First Amendment rights by assuring that authors have the right to free expression and that all Americans have the right to read.

Thank you for this opportunity to comment and submit this letter for the public record of this hearing. The work of your committee is welcomed and much appreciated.

Sincerely,



Lynne E. Bradley, Director
ALA Office of Government Relations

Testimony of Bruce D. Brown
Baker & Hostetler LLP

Before the United States Senate
Committee on the Judiciary

"Are Foreign Libel Lawsuits Chilling
Americans' First Amendment Rights?"

February 23, 2010

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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.

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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

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[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).

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> 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.

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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.

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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

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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 that 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

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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.

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[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).

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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.

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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

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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.

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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 interferences. 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

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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 confided 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.

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

- Ekstra Baladet, 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 Ukranian-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 Ukranian-based internet news site that publishes articles in Ukranian.[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"

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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

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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 its 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.

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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]

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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

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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).

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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.

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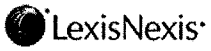
Exhibit B



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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.

Write Here. Libel There. So Beware The Washington Post April 23, 2000, Sunday, Final Edition

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.

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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

Economist.com

WORLD
INTERNATIONAL

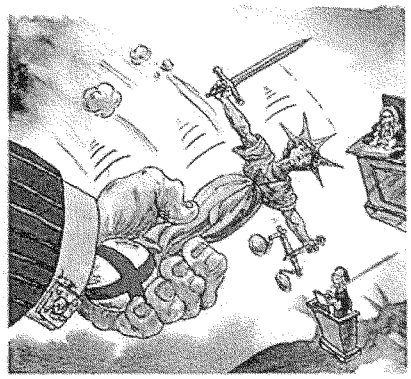
Libel tourism

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

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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.

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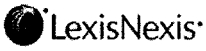

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THE WALL STREET JOURNAL.
The Wall Street Journal

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 Wittaker 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 worshipers 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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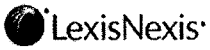

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THE WALL STREET JOURNAL.
The Wall Street Journal

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.

Foreign Courts Take Aim at Our Free Speech The Wall Street Journal July 14, 2008 Monday

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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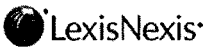

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THE WALL STREET JOURNAL.
The Wall Street Journal

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 moneyman 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.

'Libel Tourism' Threatens Free Speech The Wall Street Journal January 10, 2009 Saturday

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

Bruce D. Brown
Testimony before Senate Judiciary Committee
Hearing on Libel Tourism
February 23, 2010

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	- Judgment not enforceable - Attorneys' fees for U.S. enforcement action - Attorneys' fees for foreign libel action - Damages	- Judgment not enforceable - Attorneys' fees for U.S. enforcement action - Attorneys' fees for foreign libel action
Foreign court does not violate due process	- Judgment not enforceable - Attorneys' fees for U.S. enforcement action - Attorneys' fees for foreign libel action	- 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	- Declaratory relief - Attorneys' fees for U.S. enforcement action - Attorneys' fees for foreign libel action	- Declaratory relief - Attorneys' fees for U.S. enforcement action
Foreign court does not violate due process	- Declaratory relief - Attorneys' fees for U.S. enforcement action	- No declaratory relief

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EXHIBIT C

Bruce D. Brown
Testimony before Senate Judiciary Committee
Hearing on Libel Tourism
February 23, 2010

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

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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).

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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."

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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;

VerDate Nov 24 2008 12:41 Sep 13, 2010 Jkt 057951 PO 00000 Frm 00075 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\57951.TXT SJUD1 PsN: CMORC

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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.

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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

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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).

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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

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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).

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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

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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

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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).

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THE WALL STREET JOURNAL.
The Wall Street Journal

January 10, 2009 Saturday

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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 moneyman 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.

'Libel Tourism' Threatens Free Speech The Wall Street Journal January 10, 2009 Saturday

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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Senate Judiciary Committee

On

"Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?"

Tuesday, February 23, 2010;
Dirksen Senate Office Building, Room 226
10:00 a.m.

Statement of Dr. Rachel Ehrenfeld
Director,
American Center for Democracy

Thank you Mr. Chairman and members of the Committee for holding this hearing on foreign libel judgments and the chilling effects that they exert on American freedom of speech and national security. My statements deal with the phenomenon known as libel tourism –foreign forum shopping – which is used to obtain libel judgments against Americans in countries that lack the protections for freedom of speech afforded by the United States Constitution.

Libel tourism is a pernicious and growing phenomenon whereby wealthy individuals, including corrupt terror financiers exploit plaintiff-friendly foreign libel laws to silence American scholars, authors, producers and publishers. Since the attacks on America on September 11, 2001, foreign libel laws have become a potent weapon used by the forces of tyranny that seek to undermine our freedom. It is no exaggeration to say that libel tourism threatens the free expression rights of all Americans, and intimidates courageous investigators and thinkers into silence in such vital areas as national security, medicine, and travel safety.

Libel tourists are claimants who exploit plaintiff-friendly libel laws in foreign countries in order to exercise a veto over U.S. citizens' constitutionally protected speech. As a result, American authors and publishers that have never written for or marketed in foreign countries may still be sued for statements that warrant full First Amendment protection. By choosing to sue American authors and publishers in countries which lack First Amendment protections for freedom of expression, foreign plaintiffs strip away rights which the Founding Fathers fought to secure, and subject American citizens to the social, cultural and religious mores of other sovereigns.

Those sovereigns do not share our reverence for freedom of expression. In many countries today, journalists can be jailed for criminal libel. Truth is not a defense: publications can be confiscated; newspapers, film, television studios and broadcast

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stations can be shuttered; and writers and producers can be heavily fined and forced to publish apologies, retract and repudiate as false what they know to be true. Thus, most choose to keep silent instead of bringing to light political corruption and human and civil right violations.

I can attest that libel tourism inflicts great financial and emotional costs on authors. I am an independent scholar dedicated to expose the enemies of freedom and Western democracy. I spend great time and effort tracking down information across the globe. My books and articles are based in large part on evidence presented to Congress, parliaments and courts. I publish only material that can be verified. My credibility and livelihood depend on it.

In 2003, I published my book, *Funding Evil, How Terrorism is Financed and How to Stop It.* In that book, I mentioned Khalid bin Mahfouz, Saudi billionaire, formerly chief operating officer of the corrupt BCCI, banker to the Saudi royal family, and at that time, owner of the National Commercial Bank of Saudi Arabia, the biggest bank in the Middle East. In 1992, Mahfouz paid $225 million to settle criminal charges against him in New York arising from his control of BCCI. Mahfouz was also sued for hundreds of millions of dollars for funding al-Qaeda's attack on the U.S. on 9/11, by the victims' families.

In *Funding Evil*, I showed that Mahfouz had transferred some $74 million to at least two front charities for terrorism: the International Islamic Relief Organization and his Muwafaq or "blessed relief" Foundation, which then gave the funds directly to al Qaeda, Hamas, and other radical Muslim organizations.

From London, Mahfouz's lawyers demanded from me public apologies, a retraction, removal of my book from circulation everywhere, legal fees, and a donation to a charity of Mahfouz's choice. This was followed by further harassment and intimidation in the form of multiple faxes, voice messages, letters, e-mails and even personal threats. I refused to comply with Mahfouz's outrageous efforts to silence and humiliate me.

In response, Mahfouz sued me in a British court for libel. I did not live in England. My book was not published or marketed in England. Nonetheless, the English court accepted jurisdiction because it was told by Mahfouz's lawyers that twenty-three copies of *Funding Evil* arrived in England via Internet purchases, and a chapter of my book appeared briefly on the ABC TV website.

I refused to recognize the English court's jurisdiction over me. In 2005 the British court granted Mahfouz a judgment by default. In addition to awarding him hundreds of thousands of dollars, ordering me to pay his legal fees, and demanding that I publish international retractions and apologies, the English judge decided, without any trial, that Mahfouz's denial of terror financing is enough to declare that my book was false. Mahfouz's lawyer also requested me to pulp every copy of the book in existence.

All this farce was then posted on Mahfouz's website dedicated to intimidate everyone from even trying to expose his terror financing activities.

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Until the New York legislature passed the Libel Terrorism Protection Act in May 2008, I spent many sleepless nights worried that Mahfouz would try to enforce the English judgment against me in New York. His deliberate non-enforcement of the judgment left it hanging over my head and my career like a sword of Damocles.

The United States has a tradition of almost automatic enforcement of foreign judgments under the doctrine of comity enshrined in the Uniform Foreign Money-Judgments Recognition Act, adopted by a majority of states. Although writers can assert a First Amendment defense to enforcement actions, few have the economic resources to do so. Hence, libel tourism forces them to engage in self-censorship.

The result of Mahfouz's libel suits and that of others of his ilk is a "chilling effect" on free speech. According to Mark Stephens, a prominent libel lawyer in London, at least 40 to 50 authors and publishers, including many Americans he advised, opted to cancel books and articles for fear of being sued in England.

I was not the only American writer whom Mahfouz had attempted to silence; I was simply the first to fight him. Mahfouz's website openly bragged about obtaining settlements against more than 40 victims, all writers and publishers who were forced to apologize to him by the mere threat of libel litigation. Mahfouz openly boasted on his website about his power to intimidate and silence his critics in the media and academia using the British libel laws and court. Among Mahfouz's victims are many familiar names: Cambridge University Press, The Washington Post, USA Today Magazine, Harper's Magazine, the Center for American Progress & American Progress Action Fund, Penguin Books, the Los Angeles Times, Fortune Magazine and the Wall Street Journal. These media outlets and many others published retractions, corrections, and apologies to avoid legal confrontation with Mahfouz, the plaintiff friendly British laws and courts, and Mahfouz's backers in the Saudi government.

My case demonstrates the chilling effect is no mere abstraction. I cannot travel to the U.K., lest I be detained to enforce Mahfouz's extant judgment, and I run the same risk in Europe, due to the European Community's reciprocal enforcement of member states' judgments. Similar laws apply in most Commonwealth states, too. Mahfouz's litigiousness in London led American publishers with assets abroad to cancel several books under contract or consideration. Those who once willingly courted my work now refuse to publish me. It also cut down drastically on the consulting work and speaking engagements I used to have. The same has happened to some of my colleagues writing on national security issues.

It would be a grave mistake to underestimate the threat that foreign libel lawsuits pose to American national security concerns, and other areas of interest. Mahfouz alone succeeded to silence more than 40 writers and publishers. How many more were intimidated by other libel tourists? We know that Russian oligarchs used similar tactics to silence American reporters who tried to shed light on the Russians' shady business practices. After a Forbs reporter lost his life, most American publications refrain from

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further exposes. Others settled. How many lives and fortunes could have been saved had the American media felt free to expose terror financing and corruption?

Libel tourism attempts to stop reporting on radical Muslim terrorism and terror financing is illustrated by the case of Dr. Paul Williams. An award winning author who has published over 20 books, Dr. Williams wrote and published the fact that five students at Ontario, Canada's McMaster University had been members of al Qaeda. Those al Qaeda members have been designated as terrorists by the United States, and each has a $5 million bounty on his head, courtesy of the FBI. Dr. Williams exposed that they absconded from the school with nuclear materials. Dr. Williams was sued by the university in Canadian courts. His reputation is ruined, and a once prestigious writing career has ground to a screeching halt.

Libel tourism is only one of the more pernicious forms of foreign libel suit that threatens American free speech rights.

Foreign libel suits have interfered with travel safety warnings. Joseph Sharkey is a freelance travel writer for the New York Times is currently being sued in Brazil for writing on his blog that flawed operations at Brazilian air control led to a fatal plane crash over the Amazon, from which he was one of the few to emerge alive. Official inquiries of the incident have vindicated his account of events. Nonetheless, Brazilian prosecutors and legislators are seeking to criminalize the case against him. In addition to the injuries he suffered in the crash, he now fears for his safety.

Foreign libel suits have interfered with the American political process. In 2005, England's Justice Eady – the same judge who took jurisdiction over Mahfouz's case against me – took jurisdiction over current California governor Arnold Schwarzenegger in a libel case by a woman named Anna Richardson. Richardson claimed that Schwarzenegger and several aides had libeled her in a Los Angeles Times story when they contended that she had lied about an incident in which Schwarzenegger had allegedly sexually harassed her. In London, Eady ruled that Schwarzenegger was 'not peripheral' to the libel case in his court. At that time, Schwarzenegger was running for California's governorship and the frivolous suit threatened to cost him the election.

Foreign libel suits have interfered with law enforcement efforts to stop drug trafficking and trace money-laundering routes. As early as 1984, Bahamian Prime Minister Lynden Pindling sued Brian Ross of NBC and NBC itself in Canadian courts for reporting on his deep involvement with infamous drug runner and money launderer Robert Vesco The suit charged the parties with libel and slander, demanding $2 million damages. The case was secretly settled in 1989.

Foreign libel suits threaten domestic freedom of the press. The Singaporean government successfully sued Dow Jones Publishing on account of two editorials and a letter published in The Wall Street Journal Asia. The articles reported on a damages hearing in a defamation case brought (and won) by former Prime Minister Lee Kuan Yew against opposition politician Chee Soon Juan and what an international legal organization said

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about Singapore's judicial system. This marked the third time that Singapore held Dow Jones in contempt based on the company's op-eds.

Some of these cases may seem surreal to Americans who have grown so accustomed to free expression rights. We take them for granted and have difficulty envisioning societies in which those rights are treated as privileges, or in which those rights are provided lesser protections. In order to preserve the rights that we currently enjoy, we must pass legislation prohibiting the enforcement of foreign libel judgments that would not meet our more protective standards.

This is not a question of interfering with the legal regimes of other sovereigns, but of maintaining American protections for U.S. citizens, allowing them to write, publish, blog, and speak in *this* country without fear of foreign reprisals. This is not a question of abdicating any personal responsibility for potentially libelous statements made in the U.S., but rather of ensuring that they are tried in a proper forum which affords rigorous protections for opinion statements, and which protects truth. This is a question of maintaining and enhancing American sovereignty, national security, and liberty for all.

This is a matter of avoiding what happened to Cambridge University Press (CUP) in 2007. CUP was merely threatened with a suit by Mahfouz for the publication of *Alms for Jihad*, a book that exposed how Saudi charitable fronts were funneling funds to terrorist organizations worldwide. A cowed Cambridge settled the case immediately. As part of its settlement, it paid an exorbitant sum, published international retractions and pulped all unsold copies of the book and demanded that all libraries, including Americans, destroy their copies. In stronger terms – CUP – the oldest and most prestigious English-language publishing house - submitted to Mahfouz's demands for the destruction of a carefully documented work, in a throwback to the book-burning tactics of the Middle Ages and Germany's Nazi regime.

This is an issue of avoiding the unfair imposition of improper treatment such as was done against Peter Wilmhurst. He is a British cardiologist who in a scientific meeting in the U.S. criticized in an American company's research into the safety of their product. The American company sued Dr. Wilmhurst in England.

With The Free Speech Protection Act, S. 449, you have before you legislation that is widely supported in the authors' and publishers' communities. It does not involve the appropriation of any funds. It does not involve any interference in the domestic libel laws of other countries. It is aimed at protecting our most basic rights to research, expose injustice and corruption, and express our thoughts and emotions. It is meant to defend our rights to defend ourselves against infringement by foreign sovereigns, and against attack by foreign enemies.

I urge you to pass the Free Speech Protection Act with all due haste, and to reaffirm the guarantees of free expression.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 23, 2010

Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?"
February 23, 2010

Today's hearing focuses on how lawsuits brought against American reporters and publishers in foreign courts are affecting our First Amendment rights.

When the Supreme Court issued its landmark ruling in N.Y. Times v. Sullivan over 40 years ago, Justice Brennan noted that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

The role that American authors, reporters and publishers play in our democracy is essential. Although they are protected under our First Amendment in American courts, many other countries recognize no similar protections. When plaintiffs travel to countries where there is no regard for freedom of the press to sue American authors or publishers that has come to be known as "libel tourism." Often, the publication at issue was not directed to that foreign country, and in many cases, the plaintiff has no connection to the foreign forum. The foreign court has been chosen simply because of its plaintiff-friendly libel laws. This is international forum shopping of the worst kind.

The United Nations has criticized British courts and law for creating libel laws that chill freedom of expression and permit libel tourism to flourish, but the threat to Americans' free speech cannot be confined to one or two countries. England, Canada, Brazil, Australia, Indonesia and even Singapore are examples of countries whose weak libel protections have attracted libel lawsuits against American journalists. Due to the worldwide dissemination of materials through the internet, as well as the international publication of U.S. newspapers, such lawsuits threaten to dramatically alter the quality of public debate both here and abroad. As the son of a Vermont printer, this is an issue that I take very seriously.

Whether it is an American institution like the New York Times or a popular blog like The Huffington Post, modern technology allows reports to be read around the world regardless of the author's intent to target foreign markets. If American authors and publishers run the risk of foreign lawsuits with every article or book that they write, there is a race to the bottom and to the

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most chilling and restrictive standards. This potential chilling effect will in turn deprive Americans of the kind of candid commentary and uninhibited information that our laws are designed to foster and protect.

The most well known example of libel tourism is the case of American journalist Rachel Ehrenfeld, who wrote a book about the financiers of the 9/11 attacks. She did not market her book in England yet was sued for libel there by a Saudi businessman she linked to terrorism. The content of her publication would have been protected under U.S. libel law, but a British court applying its laws issued a multimillion dollar default judgment against her. Today, Ms. Ehrenfeld is limited as to the content of her investigative writing, since even U.S. companies are leery of publishing her works for fear that plaintiffs will target her and bring another libel action.

After surviving a mid-air collision in Brazil, American journalist Joseph Sharkey wrote an article in the New York Times detailing the crash and exposing problems that he uncovered with Brazil's air traffic control system. Because of this article, he was sued in Brazil by someone who was widowed in the crash. The widow claimed that Mr. Sharkey injured her by insulting the honor of Brazil. That case is still pending, but Mr. Sharkey is spending money and time defending himself in Brazilian court.

Even Roman Polanski recently sued Vanity Fair for libel in the U.K. Mr. Polanski is a fugitive from justice who fled America after being convicted of sexually abusing a young girl. He has fought extradition while living in Europe. The Vanity Fair article recounted a story of his alleged aggressive sexual advances made just after his wife was murdered, and portrayed him as being insensitive to her death. The magazine was written in the U.S., edited in the U.S., and primarily sold in the U.S., but the British court claimed jurisdiction, and ruled in favor of Mr. Polanski.

Foreign libel judgments clearly impact American authors' livelihood, credibility and employment potential. They also have the potential to limit the types of books and articles that talented and reputable authors will publish in the future. These journalists' writings involved issues of national security and safety. Their willingness to investigate and publish books examining these important issues may ultimately save lives and inform public debate.

In addition, publications exposing financial improprieties, consumer protection issues, medical malpractice, and sexual abuse have all fallen victim to libel tourism lawsuits around the world. For example, in 2000, Dow Jones & Company published an article in Barron's magazine alleging money laundering and tax evasion by Joseph Gutnick, a well-known philanthropist. The article was edited in New York, was primarily sold in hard copy in the U.S., and was uploaded to the internet in New Jersey. Yet, an Australian court found that the five copies of Barron's that were sold on the newsstands in Victoria were sufficient to establish jurisdiction over Dow Jones.

I am encouraged that some countries have taken steps to strengthen their libel protections and jurisdictional requirements in the wake of these lawsuits. The British House of Lords is reportedly preparing a bill that would overhaul its centuries-old libel laws to require a showing of actual injury in order to bring suit for libel. That is certainly a step in the right direction. In Canada, the Ontario Court of Appeal ruled that the Washington Post could not be sued in Ontario for an article whose contacts with the forum were based solely on publication on the internet.

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That decision was hailed by authors and publishers around the world, and I am heartened that these country's laws may be moving in the right direction. However, similar decisions have not followed in other countries, and this problem is much broader in scope than just the U.K. and Canada. As one country tightens its libel protections, another may just emerge as the next-best-available forum of choice for libel plaintiffs.

Two libel tourism bills are pending before this Committee. They both address what role American courts should play in protecting the First Amendment rights enshrined in the U.S. Constitution. As much as we might like to, we cannot legislate changes in foreign law to simply eliminate libel tourism. But I believe we can all agree that our courts should not become a tool to uphold foreign libel judgments that would undermine our First Amendment or due process rights. Making that explicit with Federal legislation makes sense. Whether the U.S. Congress should pass legislation creating an unprecedented retaliatory cause of action in American courts, however, is a tougher question.

I thank Senator Whitehouse, the Chairman of the Subcommittee on Administrative Oversight and the Courts, for co-chairing this hearing with me. I also thank the distinguished witnesses for coming. I look forward to hearing their testimony.

# # # # #

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The Sedition Act of 1798 and the East-West Political Divide in Vermont

By: Robert D. Rachlin*

The Sedition Act of 1798 was the first, although not the last, U.S. legislation criminalizing speech critical of the government. Born in the wake of widespread hysteria over the prospect of war with France, the Act had a mercifully short life, expiring with the presidential term of John Adams in 1801. Aimed chiefly at Republican opponents of the Federalist government, the Sedition Act had a mixed reception in Vermont, bisected both politically and geographically by the Green Mountains.

I. BACKGROUND

1790s politics were a rough affair, one party demonizing and challenging the patriotism of the other, casting about for scandals. The implacable battles between the Federalists and the Republicans were conducted largely, but not exclusively, along regional lines. The mercantile North was resolutely Federalist; the agrarian south leaned sharply toward Jeffersonian republicanism. The five New England states (Maine was not admitted until 1820) were Federalist fortresses, buttressing Massachusetts-born President John Adams. In the Fifth

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Congress (1797-1799) every single New England senator and representative was a Federalist, with a single exception: Matthew Lyon, one of two Vermont representatives, was the region's lone Republican in Congress.

The lopsided Federalist Senate majority extended south to the Mason-Dixon Line. The senators from every state to the north of that divide were Federalists. To the south, every senator, except Federalist Humphrey Marshall of Kentucky, was Republican, also called "Democratic-Republican." In the House, Republicans and Federalists were more broadly represented both in the north and the south. In New York, for example, four of ten representatives were Republican. The robust mercantile and financial interests of the north aligned with the Federalists, while the agrarian south felt threatened by these interests, particularly as Treasury Secretary Alexander Hamilton pressed for the creation of a consolidated national financial structure seen by many as favoring the moneyed commercial interests of the north. Sectional animosities were further aroused over slavery.

In Vermont, the political and philosophical antagonisms between settlers east and west of the mountains preëxisted statehood. Bennington, the first chartered town, was west of the mountains. But newcomers had earlier drifted up in the east, chiefly from Connecticut,[1] and were imbued with the Calvinism and political conservatism prevailing in their former colonies.[2] The independent state of Vermont, established in 1777, was initially and for a few months thereafter called "New Connecticut."[3] In the Connecticut River valley "orthodox Congregationalism was firmly intrenched [sic]."[4] While eastern Vermonters imported Federalism, Calvinist religion, and respect for authority in their train, a large number of those who settled west of the Greens were of a different cast. Ethan Allen, Ira Allen, and Matthew Lyon, who purchased and occupied lands granted by New Hampshire Governor Benning

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Wentworth in disregard of prior New York claims, were among these westerners. Unlike their brethren on the other side of the mountains, these western settlers were dyed in an anti-authoritarian, free-thinking hue. Religious dissenters from southern New England and participants in Shays Rebellion in Massachusetts fled to the wild regions centered around Bennington. As one contemporary observer noted, "In the place Religion is much out of style."[5] Ailene Austin has neatly, if with a broad brush, characterized the philosophical fault line of the Green Mountains as a boundary between the ideas of Jean-Jacques Rousseau and Edmund Burke.[6]

After the Continental Congress repeatedly rejected Vermont's efforts to join the Union, the self-proclaimed independent state began annexing towns in New Hampshire and New York with the general consent of their inhabitants. Enlargement of Vermont became a bone of contention, prompted by concern that the state legislature would be dominated by one side of the mountains or the other. Annexations from New Hampshire in 1781-82 generated pressure in the west for balance with annexations from New York.

Vermonters' possession of the new lands was soon under attack. New York vigorously contested the "Hampshire Grants," asserting title to all the land east to the Connecticut River under a 1664 royal grant of Charles II to the Duke of York. Persistent, often violent, attempts by New York officials to evict the occupants of the Hampshire Grants from their lands and homes and the equally determined armed resistance of the Hampshire grantees, especially in the west, created a sustained state of perilous and insecure affairs for the settlers. From this precarious environment Ethan Allen's Green Mountain Boys emerged. The Grant lands west of the Green Mountains became an incubator of republican radicalism. Quoting the *American Mercury* of 31 December 1792 , William Alexander Robinson writes, "'Itinerant Jacobins' were said to be

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holding forth in the barrooms of Rhode Island and Vermont and endeavoring to stir up opposition."[7] ("Jacobins" were radicals in revolutionary France, deriving the sobriquet from the Parisian convent where they first met.) Although the settlers east of the Greens were as subject to the New York claims as those in the west, "the backbone of resistance to the 'Yorkers' arose [west of the mountains] while the eastern counties were relatively supine."[8] Matthew Lyon's attitude toward Vermonters east of the Green Mountains can be inferred from his characteristic reference to the "aristocrats over the mountain."[9]

The rebelliousness of the westerners was exacerbated by an uneasy relationship with lawyers, most of whom identified with the authoritarian, Federalist politicians. The ease with which lawyers settled into the ruling cadres of Vermont was a bone of contention with the westerners, as voiced by Lyon. In his *Farmer's Library*[10] he expounded "Twelve Reasons Against a free People's employing Practitioners in the Law, as Legislators." The insecurity of land speculators, such as Lyon himself, was reflected in the assertion that "these professional gentlemen are inclined to stand up for the claims of landlord, landjockies, and overgrown landjobbers, in preference to the poorer sort of people." The powerful Federalist tandem of Isaac Tichenor--governor of Vermont in the late 1790s--and Nathaniel Chipman--U.S. Senator during the same period and a former federal district judge--were both trained lawyers, as was Charles Marsh, the U.S. District Attorney who later prosecuted Lyon under the Sedition Act. The distribution of political loyalties between eastern and western Vermont was, of course, not unvarying. Both Chipman and Tichenor resided west of the mountains.

The French Revolution, beginning in 1789, further polarized the population. Thomas Jefferson saw the upheaval across the ocean as a validation of the principles of the American Revolution and of the Declaration of Independence. Among the Federalists, the French tumult

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was widely viewed as a dark precursor of anarchy, class leveling, and atheism. The Federalists and Republicans responded to the French upheaval with mutual demonization. To Jefferson and his followers, the Federalists were partisans of England, upholders of class distinction, and crypto-monarchists. The Republicans, to Adams and the Federalists, were unruly atheists and Jacobins bent on overturning the established order and substituting mob rule for the orderly governance furnished by natural aristocrats. The words "democrat" and "democracy" were terms of reproach in the mouths and pens of Federalists. As the French Revolution became more bloody and the guillotine evolved into the chief instrument of France's domestic politics, the Federalists were gifted with useful ammunition against the Republicans. When the French, incited by American commercial ties with England affirmed in the Jay Treaty of 1794, began to attack American merchant ships and American diplomatic missions to France were contemptuously snubbed, popular belligerence toward the former ally erupted, giving Federalists a warrant to tar the Jeffersonian Republicans as conspirators with the common enemy.

Political flame-throwing stirred up by the events in France were reflected on a smaller scale within the confines of Vermont. From an early date, the geographic division between eastern and western Vermont became a fact of political salience.[11] Quite naturally, the towns to the west of the Green Mountains, populated by inhabitants of an independent, free-thinking spirit tended Republican; religious and social traditionalists in the east gravitated naturally to the Federalists.[12] The former independent state of Vermont experienced its first years as the fourteenth state of the Union, having been admitted in 1791 after protracted haggling with Congress. Especially after the end of President Washington's second term of office in 1797 and the election of John Adams, the Federalist east began to face off more acrimoniously with the Republican west. This political division persisted far into the future, as the conservative east and

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liberal west managed over the succeeding decades to hold together by compromises such as the so-called "mountain rule," by which recruitment of governors alternated between residents of the east and west.[13] From 1870 until the election of Thomas P. Salmon in 1972, governors were elected by turn from the west and the east. The impulse toward unity in the teeth of political enmity induced the General Assembly to meet in alternate years east and west of the mountains.

The conflict with France during the Adams years ignited the first dramatic debate about the extent and limits of federal executive power and a corresponding impact on civil liberties. With much of the population in a near panic over the prospect of war with France, the Federalist government, confronting the opposition of the Republican Party, responded with the Alien and Sedition Acts of 1798.[14] Passed by Congress in four separate enactments between June 18 and July 14, 1798, the Alien Acts greatly expanded the power of the president to detain and deport such aliens "as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any unreasonable or secret machinations against the government thereof." The requirements for naturalization were significantly increased. Where formerly an alien had to reside within the United States for five years before naturalization,[15] the first of the four acts increased the residency period to fourteen years. The Sedition Act, enacted last, criminalized speech and writings, a direct challenge to the First Amendment.

John Adams, in an 1813 letter to Thomas Jefferson, asserted that he had never once invoked the "Alien Law."[16] He could not make this exculpatory claim with respect to the companion Sedition Act,[17] which brought immediate and oppressive constraints to bear on citizens generally and on newspaper publishers and the opposition Republican Party in particular. The political advantage gained by equating opposition with treason was not lost on

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the party in power. Federalist Senator Theodore Sedgwick from Massachusetts wrote of the snub of American emissaries by France: "It will afford a glorious opportunity to destroy faction. Improve it."[18] Identification of the Republican opposition with the French furnished a pretext for the Federalists to treat the opposition as the "internal foe."[19] The Act decreed imprisonment from five months to two years and a fine of up to $5,000, equivalent to over $62,000 in 2008 money, for any persons who "shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States" or "to impede the operation of any law of the United States." Whoever "shall write, print, utter[20] or publish, or shall cause or procure to be written, printed, uttered or published" any "false, scandalous and malicious writing" against the government" with intent to bring the President or Congress "into contempt or disrepute" was subject to two years' imprisonment and a fine of up to two thousand dollars. Writing in 1901-2, Woodrow Wilson, who later presided over the Espionage Act of 1917,[21] reflected that "the Sedition Act cut perilously near the root of freedom of speech and of the press. There was no telling where such exercises of power would stop. Their only limitations and safeguards lay in the temper and good sense of the President and the Attorney General."[22] A generation later, historian Richard Hofstadter criticized the Sedition Act, commenting that "the language . . . was vague enough to make a man criminally liable for almost any criticism of the government . . .."[23]

It is plain from the charges brought under the Sedition Act that the target of enforcement was the opposition Republican Party as much as actual or supposed French-inspired machinations. Any criticism of the government could be viewed as seditious within the broad reach of the Act's language, dependent only "on the temper and good sense" of the enforcement authorities. Such "temper and good sense" was not always in abundant supply.

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By its terms, the Sedition Act was to expire on March 3, 1801, the last day of President Adams's current term. This provision, introduced by Representative George Dent of Maryland, was approved by the House without debate.[24] Final House passage of the Sedition act on July 10, 1798, following extended and passionate debate was by a close vote, 44 to 41.[25] While it is unclear why the act was to end with President Adams's first term, it is possible that the temporal limitation resulted from a compromise by the Federalists to ensure the slim majority needed to pass the bill, which was approved by the President four days later.[26] Matthew Lyon, Vermont's lone Republican congressman, who was later to become a prominent victim of that enactment, voted against it. The vote of Vermont's other Representative, Federalist Lewis R. Morris, is not recorded, although his sentiments in favor of the act are not hard to divine.[27] In the Senate, Vermont's two senators, Federalists Nathaniel Chipman and Elijah Paine, voted for the bill.

As might have been anticipated, enactment of the Sedition Act provoked energetic and bitter debate among state legislatures, newspapers, and the population at large.[28] Two state legislatures, Kentucky and Virginia, passed resolutions condemning the Act.[29] Vermont newspapers divided along partisan lines. The outspoken *Vermont Gazette* (Bennington), published by Anthony Haswell was in a small minority of Republican newspapers in the state. Haswell eventually became one of two[30] Vermonters prosecuted under the Sedition Act. Public outrage, by no means unanimous, erupted around the country.[31] "Liberty poles"[32] were erected in many states as a challenge to the Act and to the federal government, including one at Wallingford, Vermont,[33] Congressman Lyon's first town of residence in the former Hampshire Grants.

The clash between civil liberties and a perceived national security imperative, whenever it occurs in the United States, typically excites rhetorical clustering around extreme positions.

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The Sedition Act and its reaction were no exception. "Fear of 'Jacobinism,' associated with the French Revolution, furnished the chief support for the Alien and Sedition Acts."[34] In Vermont as well as elsewhere, accusations of Jacobinism were hurled against opponents of the Acts.[35] On rare occasions, the epithet was used against the Federalists themselves.[36] The Sedition Act proved a useful tool in Federalist attempts to squelch the Republican, i.e., Jeffersonian, opposition.

The resolutions passed by Virginia and Kentucky opposing the Sedition Act prompted rebuttals from other states. The state legislatures of Maryland, Pennsylvania, Delaware, Connecticut, New York, and Vermont all passed resolutions opposing the Virginia and Kentucky initiatives, which had been chiefly authored by James Madison and Thomas Jefferson respectively. Although at least one state (Connecticut) explicitly approved of the Alien and Sedition Acts,[37] most states condemning the Virginia and Kentucky Resolutions grounded their opposition in a rejection of the broader issue of the nullification of federal enactments on constitutional grounds by state legislatures.[38] Vermont submitted a detailed minority report in opposition to the Alien and Sedition Acts, attacking the Acts themselves and defending in limited terms the nullification prerogative of the states.[39]

The nullification prerogative of the states was not the only framing issue aroused by the Alien and Sedition Acts and the state responses to them. Enforcement of the Sedition Act raised another underlying question: was the common law of England, which recognized the crime of seditious libel, automatically incorporated into the law of the United States? This issue was at the center of the 1799 prosecution in Massachusetts of Abijah Adams, a bookkeeper for the anti-federalist *Boston Independent Chronicle*.[40]

Abijah Adams was prosecuted, not under the Sedition Act, but under Massachusetts law,

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incorporating the English common law of seditious libel. In certain respects, the Sedition Act was more lenient than common law libel. Section 3 of the Act provided that the truth of the publication would constitute a defense,[41] which comports with modern American libel law.[42] Under the now-superseded English common law, "it is immaterial . . . whether the matter of it be true or false, since the provocation, and not the falsity, is the thing to be punished criminally."[43] Similarly, punishment of the publisher of defamatory statements was not, at common law, seen as an untoward restriction of press freedom: "[T]he liberty of the press, properly understood, is by no means infringed or violated [by punishment for libel]. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."[44]

The contrasting defensive value of truth in the Sedition Act and under common law libel afforded the Act's defenders an argument that the Sedition Act, far from being an instrument of oppression, was, in fact, a palliation of the more rigorous common law. Of course, this did not settle the question whether the common law of England was or was not imported with the original settlers into the law of Massachusetts or of the United States. In the event, Abijah Adams was convicted, fined $500 (about $6,200 in 2008 currency) and sentenced to serve thirty days in the county jail.

II. RESPONSE OF THE VERMONT LEGISLATURE

In 1798-1799, Vermont, particularly the eastern half of the state, was firmly in Federalist hands, as were the northern states generally. Federalist Governor Isaac Tichenor served until 1807, politically surviving the "Jefferson Revolution" of 1800. Federalists dominated, but did not monopolize, the Vermont legislature in the years 1798 to 1801. This is evident from the responses of the majority and minority of the Vermont Legislature to the Virginia and Kentucky

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Resolutions. The two contrasting responses and the support each received within the Legislature reflected the sharp partisan division of opinion within Vermont, a division likely exacerbated by the prosecution, conviction, and imprisonment of Vermont Congressman Matthew Lyon the preceding fall. The Lyon case is discussed below (III.).

The Vermont majority resolution, as it pertains to the Sedition Act, can be summarized as making four chief points: (1) state nullification is rejected; (2) the "compact" theory of the Union is rejected; (3) freedom of speech and of the press is subject to limitations of sedition and defamation; (4) Vermont has itself sanctioned such limitations in its own legislation.

The Kentucky and Virginia Resolutions and those of the states that replied in opposition raised an issue even more inflammatory than the incursions of the Alien and Sedition Acts on personal liberty: the question of nullification. Did the states as parties to the compact creating the Union have the power to invalidate laws enacted by the national Congress? This question turned on interpretation of the Tenth Amendment to the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The competency of the individual states to nullify Congressional acts that it deemed unconstitutional became intertwined with the pervasive controversy over "states' rights" that culminated in the Civil War and persists to this day. The attempt by South Carolina in 1832 to declare a national tariff law unconstitutional and its refusal to enforce it within its boundaries led President Andrew Jackson to threaten the use of military force against the recalcitrant state. A compromise settled that dispute; but in 1850, the Vermont Legislature excited a national uproar and general disapproval by its enactment of the Habeas Corpus Law,[45] which, in defiance of the federal fugitive slave laws, imposed on state's attorneys the duty to protect fugitive slaves.

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Vermont, the first state to outlaw slavery in its Constitution,[46] had a history of anti-slavery legislation predating 1850.[47] The Vermont law was justly seen as an attempt to nullify the Compromise of 1850, signed by President Millard Fillmore, which greatly strengthened existing fugitive slave laws.[48]

Although Vermont, in practice if not in theory, would in 1850 weigh enact legislation that could be seen as supporting nullification in response to a strong moral imperative, its reaction in 1799 to the Kentucky and Virginia Resolutions was more cautious. The majority's response to the Virginia Resolution was brief and to the point: "*Resolved*: That the General Assembly of the state of Vermont do highly disapprove of the resolutions of the General Assembly of the state of Virginia, as being unconstitutional in their nature, and dangerous in their tendency. It belongs not to *State Legislature[s]* to decide on the constitutionality of laws made by the general government; this power being exclusively vested in the *Judiciary Courts of the Union*."[49] This resolution was approved by a vote of 104-52 on October 30, 1799.

The more detailed majority response to the Kentucky Resolution both rejected the principle of nullification and asserted the merits of the Alien and Sedition Acts. Quoting from the Kentucky Resolution ("That the states constituted the general government, and that each state as party to the compact, has an equal right to judge for itself as well of infractions of the constitution, as of the mode and nature of redress"), the Vermont majority did not equivocate: "This cannot be true."[50] The majority acknowledged that the "old confederation" was indeed formed by the state legislatures, "but the present constitution of the United States was derived from a higher authority. The people of the United States formed the federal constitution, and not the states, or their Legislatures." The state legislatures could therefore propose constitutional amendments, but had no power "to dictate or control the general government." The majority

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then advanced a slippery slope argument: if state legislatures could invalidate these particular acts, they could at their discretion approve or reject all acts of Congress. "Would this not defeat the grand design of our Union?" In short, the Vermont majority rejected the "compact" view of the Union.

The majority proceeded to a defense of the Sedition Act on its merits, beginning with a logically dubious argument: Vermont could not consider the Sedition Act unconstitutional because Vermont itself had enacted sedition laws of long standing, providing severer penalties than the Federal Sedition Act. This may have constituted a practical impediment to a declaration by Vermont that the Sedition Act was unconstitutional, but it hardly equated to a theoretical justification of the act. Both the federal and Vermont acts were arguably unconstitutional, especially as the majority acknowledged that in its own bill of rights freedom of speech and of the press had been declared "unalienable." In its approval of the Sedition Act, the majority gave voice to its view of freedom's limitations as reflected in the state's own sedition law:
" . . . the railer against the civil magistrate, and the blasphemer of his maker are exposed to grievous punishment. And no one has been heard to complain that these laws infringe our state constitution. Our state laws also protect the citizen in his good name; and if the slanderer publish his libel, he is not in a criminal prosecution, indulged, as by the act of Congress, in giving the truth of the facts as exculpatory evidence."[51]

Vermont, like Massachusetts, adhered to the common-law standard of defamation,[52] which, as seen in the Abijah Adams prosecution, did not admit truth as a defense. The majority thus indulged another argument of questionable force: if the Sedition law is bad, our own is much worse; therefore, we have no quarrel with the former.

We can pass over the balance of the majority resolution, which dealt with the Alien

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Laws. However, the majority's parting shot warrants a comment, as it rested on a manifest, perhaps deliberate, misconstruction of a word having multiple meanings:

"In your last resolution [i.e., the last section of the Kentucky Resolution], you say, 'That confidence is everywhere the parent of despotism, free government is founded in jealousy, and not in confidence.' This is a sentiment palpably erroneous, and hostile to the social nature of man: the experience of ages evinced the reverse is true, and that jealousy is the meanest passion of narrow minds, and tends to despotism . . .."

While "jealousy" had even then the modern meaning of "The state of mind arising from the suspicion, apprehension, or knowledge of rivalry" given by the OED, that work also furnishes the sense that was clearly intended by the Kentucky Legislature: "Solicitude or anxiety for the preservation or well-being of something; vigilance in guarding a possession from loss or damage."[53] Jefferson, the patron and chief draftsman of the Kentucky Resolution, himself used the word in the sense plainly intended by the Kentuckians, when in his First Inaugural Address he referred to "a jealous care of the right of election by the people."[54]

Significantly, no mention is made in the majority resolution of the external environment which was the ground asserted for the Alien and Sedition Acts: the developing threat of war with France. The responses of other states to the Kentucky and Virginia Resolutions rested mainly on the nullification issue. The Vermont majority resolution was not content to reject nullification in direct terms, but went beyond other states in defending limitations on freedom of speech and the press. The majority resolution in response to the Kentucky Resolution passed by almost the same margin as the response to the Virginians: 101-50.

The minority produced and recorded its own response.[55] If, given the recent imprisonment of Lyon under the Sedition Act, citizens in the anti-federalist bastions of western

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Vermont were expecting a robust condemnation of the Act's curtailments of the press and free speech, they were disappointed. The minority explicitly refrained from any assessment of the constitutionality of the Act, but recorded its concurrence with John Marshall that the Act "was calculated to create *unnecessarily*, discontents and jealousies, at a time when our very existence as a nation may depend on our union" (italics in the minority report original). Thus, the minority memorialized its dissent from the Act on its merits without providing more than a broad, non-specific reason for its opinion. The minority then went on to devote substantial ink to its objections to the Alien Acts, which we pass over here.

The minority did not shrink from addressing the issue of nullification, even if it trod a fine line, first stating:

"For as it appears clearly by the twelfth [tenth] article of the amendments to the constitution, as has been before observed, that the states individually compose one of the parties to the federal compact or constitution, it does of course follow, that each state must have an interest in that constitution being pure and inviolate."

It later carefully added a prudent disclaimer:

"Let it not be supposed, that in advocating the power of each state to decide on the constitutionality of some laws of the union, we mean to extend that right to any laws which do not infringe on the powers reserved to the states by the twelfth [tenth] article of the amendments to the constitution. We cannot therefore, be charged with an intent to justify an opposition, in any manner or form whatever, to the operation of any act of the union. That we conceive to be rebellion, punishable by the courts of the United States."

Adhering to the "compact" view of the union repudiated by the majority, the minority carried the logic to its rational conclusion: States have the power and privilege of passing on acts

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of the general government that infringe on the terms of the compact, one of which was the amendment reserving undelegated powers to the states. The minority did not address the slippery slope argument of the majority; it contented itself with an assurance that it saw only those acts of Congress which infringed upon the powers of the "compact" members as vulnerable to nullification by state legislatures. It offered no guidance on how such susceptible enactments were to be identified. Rhetorically, the majority occupied the stronger redoubt on this issue.

The minority did prove itself better lexicographers than the majority when it came to the word "jealousy":

"Whether jealousy, in a political sense, be a virtue or a vice, depends, we conceive, on the object by which it is produced, and the extent to which it is carried. As a proof of this, we will . . . quote an admonition of our illustrious Washington, in his farewell address to his fellow-citizens. 'Against the insiduous [sic] wiles of foreign influence (says he) I conjure you to believe me fellow-citizens, the jealousy of a free people ought constantly to be awake.'"

The Alien Acts aside, the chief arguments of the minority were (1) the Sedition act is vexatious for reasons barely set forth; (2) the union is founded on a compact of states; (3) states have the power of nullification when the compact is violated, an eventuality indistinctly described.

The diffidence of the minority about the merits of the Sedition Act is surprising from one point of view, given the incarceration under it of one of Vermont's two congressmen. From another point of view, its restraint is understandable. It must have felt a concern not to seem indifferent to the agitated state of affairs between the United States and France. By avoiding this issue, the minority members preëmptively parried any imputation of an unpatriotic spirit. Such caution was foreign to the disposition of Matthew Lyon.

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III. ENFORCEMENT IN VERMONT

Historians disagree about the number of prosecutions that were instituted under the Sedition Act. Frank Maloy Anderson estimates that about twenty-four or twenty-five people were arrested nationwide under the Sedition Act, adding that "only 10, or possibly 11, cases came to trial" and that ten cases ended in convictions.[56] John Ferling gives the number of indictments as seventeen.[57] James Morton Smith reports fourteen.[58] What is indisputable is that Vermont accounted for a disproportionate number of the prosecutions. Although Vermont in 1800 had about 3% of the national population, it accounted for 18% to 30% of the Sedition Act prosecutions, depending on whose total of Sedition Act prosecutions one accepts. Three Vermonters were indicted under the Sedition Act, if one includes a "Doctor Shaw," who, according to a dispatch from Windsor, Vermont, was acquitted.[59] It is also indisputable that a Vermonter was the target of the very first prosecution under the Act. This initial foray against dissenters is the more remarkable in that its target was a sitting Congressman. It is less surprising that this Congressman represented the inhabitants of western Vermont.

A. PROSECUTION OF MATTHEW LYON

Born in 1749 in an Ireland tormented by the oppressive, confiscatory policies of England, Matthew Lyon emigrated to the United States at an age between thirteen and fifteen as a "redemptionist," one who barters his service in return for ship passage and board.[60] Upon arrival in the United States, he was indentured to a tradesman who paid the ship captain Lyon's passage. Later, he was traded to another master in return for a pair of stags, prompting Lyon throughout his life to make oath "by the bulls that redamed [redeemed] me."

His early American domicile was in Litchfield County, Connecticut, birthplace of Ethan Allen. His precise movements are subject to conflicting reports. An old history of Woodbury,

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Connecticut has him first indentured in that town and later sold to Hugh Hanna of Litchfield for a pair of stags worth about £12.[61] The ambitious Lyon either bought his freedom or fled from his master. In 1773, he took advantage of the cheap land for sale in the Hampshire Grants, purchasing property in Wallingford, Vermont.[62] Moving there in 1774, Lyon quickly embroiled himself in the ongoing conflict with the "Yorkers" over rightful title to the land. Falling in with the Green Mountain Boys he joined Ethan Allen (and Benedict Arnold) in the successful storming of Fort Ticonderoga on May 10, 1775. In 1777 or 1778 he moved to Arlington, Vermont where he was employed as a laborer by Thomas Chittenden,[63] the first governor of the self-proclaimed State of Vermont. After the death in April 1784 of Lyon's first wife, a cousin[64] of Ethan Allen, he soon married Chittenden's daughter Beulah. The new family connection with the powerful Chittenden,[65] coupled with the common cause he made with the militant Allens likely paved Lyon's path to the public offices that he later held in the fledgling state of Vermont, including among others town representative of Arlington, Deputy Secretary of the Governor and Council, Clerk of the Assembly, and assistant to Treasurer Ira Allen.[66]

Lyon's military exploits included soldiering during the Revolutionary War. As a lieutenant in the Northern Army under the command of General Horatio Lloyd Gates, Lyon in 1776 was put in command of a detachment assigned to a remote, exposed position in Jericho, Vermont. Seeing themselves defenseless against an anticipated Indian attack, Lyon's troops, with the tacit encouragement of other officers, mutinied and fled their post. Lyon repaired to Ticonderoga to report the action of his troops to General Arthur St. Clair, who was preparing the evacuation of the fort in the face of General Burgoyne's advance from the north. Lyon, along with his men, was accused of cowardice, tried by court-martial, and cashiered from the service, despite his protest that he had been powerless to prevent the flight of his troops.[67] Lyon moved

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from Arlington to Fair Haven, Vermont, in 1783, where he built several mills and a forge, and established himself as the "father" of the town. Ten years later, he turned to printing and produced a newspaper, *The Farmer's Library*, which became only the fourth newspaper functioning in the state at that time.

Although Lyon was eventually restored to military duty and attained the rank of colonel, the Jericho events and his consequent disgrace dogged him throughout his later career. It was rumored that upon his ejection from the army he had been presented with a wooden sword. Taunts about the alleged wooden sword followed him. His experience of the "White Boy" rebellion[68] in Ireland against the forcible dispossession of small farmers must have shaped his character, especially as his father was said to have been hanged by the British for his part in it. Lyon became the iconic western Vermonter, furnished with an eloquence and audacity that transformed him into an often reckless opponent of everything he perceived as tyranny. His character and temperament fit in well with the Allens, who had put their resolutely independent-minded stamp on Vermont west of the mountains. Not surprisingly, Lyon's political sympathies rested with the Jefferson Republicans, and he fiercely opposed the Federalists, placing him in continual conflict with the dominant Federalist governing class in Vermont.

Lyon went from one minority setting to another. After serving several terms in the Vermont Legislature, he was elected to the Federalist-dominated U.S. House of Representatives from western Vermont in 1797. He made few friends in Congress when, with his usual contempt for pomp and circumstance, he refused to participate in the customary reverential parade tendered to President Adams following his address to that body. On January 30, 1798, after repeated jibes about the "wooden sword" by Connecticut Federalist representative Roger Griswold, Lyon responded at last by spitting in Griswold's face. The Federalists seized on this

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opportunity to rid themselves of a vociferous opponent, by moving Lyon's expulsion from the House. Extensive debate consumed most of the following two weeks.[69] In the end, the motion gained a majority, but fell short of the two-thirds required. Three weeks after the spitting incident, Griswold advanced on a preoccupied Lyon and proceeded to pummel him with a cane. Lyon finally gained his footing and engaged Griswold with the help of a pair of fire tongs snatched from the chamber fireplace. The Speaker of the House, Federalist Jonathan Dayton, looked on in amusement as Lyon and Griswold thrashed each other until some members finally dragged Griswold by the legs off Lyon. Naturally, this occasioned further prolonged debate.[70] A resolution to expel both members failed overwhelmingly.

Lyon sought re-election to the House in 1798. When the Rutland *Herald* refused to publish communications favoring his re-election, Lyon took up his own cause by founding a semi-monthly magazine to publish his own views where other publishers refused. *The Scourge of Aristocracy and Repository of Important Political Truths* was furiously anti-federalist.

Deprecated for railing against what he saw as the monarchical pomps with which Adams surrounded himself, widely despised for his outspoken republican sentiments, and disparaged by nativists for his humble Irish ancestry, Lyon presented an irresistible target of Federalist vengeance once a suitable weapon was at hand. On October 5, 1798,[71] Lyon was indicted under the Sedition Act, the first test of this law. The three-count indictment recited a letter he had written to *Spooner's Vermont Journal*[72] excoriating the "ridiculous pomp, foolish adulation, [and] selfish avarice" which he clearly aimed at President Adams. A second count charged Lyon with procuring the publication of a letter supposedly from a "diplomatic character in France,"[73] referring to the "bullying speech of your President" and wondering why the House and Senate hadn't responded to it with "an order to send him to a mad house." The third count simply

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accused Lyon of "assisting, counseling, aiding, and abetting the publication" of the letter cited in the second count.

Trial in the federal circuit court commenced on October 7, 1798 in Vergennes, with Supreme Court Justice William Paterson presiding, assisted by Samuel Hitchcock, who had succeeded Nathaniel Chipman as Judge of the United States District Court for the District of Vermont--both staunch Federalists. With a Federalist district attorney and marshal, the outcome was predictable. In the politically charged environment, Lyon served as his own attorney. It must have been next to impossible to find a lawyer willing to defend him, as the lawyer himself could well make utterances in the course of Lyon's defense that would themselves be deemed seditious under the sweeping language of the Act.

Lyon was not without defenses. He urged, first of all, that the Sedition Act was unconstitutional, a not-unreasonable position in light of the breadth of utterance that the Act declared criminal. Lyon also argued that the letter from the "diplomatic character" was written before the effective date of the Sedition Act and that he had opposed its publication. Finally, Lyon relied on the clause of the Sedition Act making the truth of the pertinent statements a defense.

At the time of jury arguments, Chief Justice Israel Smith[74] of the Vermont Supreme Court, a former Congressman and political rival of Lyon[75] appeared in court as defense counsel for Lyon, but did not participate in the arguments, claiming that he was unprepared. Why he appeared is unclear, unless it was simply to show support for the accused. Smith's appearance on October 9, 1798 was two days before the Legislature convened, also in Vergennes. In that session, which became known as the "Vergennes Slaughterhouse,"[76] Smith was described as "a man of uncorrupted integrity and virtue," but one who had undergone a party conversion. The

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dominant Federalists refused to re-elect Smith to the Supreme Court "on account of his attachment to the republican party." Many other civil officers suffered the same fate and were replaced by "those who were of the most decided federal principles, and with the avowed design of encouraging the supporters of Mr. Adams, and of checking the progress of democracy."[77] In light of the gathering anti-Republican storm, Smith's reluctance to take up the cudgel for Lyon is understandable, if not especially admirable. Following the "Jeffersonian Revolution" of 1800, Smith's journey to Damascus paid off: He served as a Republican in the U.S. House of Representatives and Senate.[78]

Justice Paterson took full advantage of his jury instructions to all but command the jury to return a guilty verdict, which it dutifully did after one hour's deliberation.[79] Lyon was sentenced to four months imprisonment, fined one thousand dollars (about $12,500 in 2008 purchasing power), and assessed the costs of the prosecution. He was promptly hustled off to the primitive jail in Vergennes, where he was treated with gratuitous severity by the Federalist jailer Jabez Fitch. While in jail, he campaigned successfully for re-election to Congress, the only instance in U.S. history of a successful congressional candidacy conducted from behind bars. With the help of friends, his fine was paid, and he promptly returned on a journey to Congress, accompanied along his route by widespread popular adulation.

After completing his term in the House, Lyon moved to Kentucky where he was also elected to Congress. Although Lyon lived his life in many places--Ireland, Connecticut, Vermont, Kentucky--it was as a Vermonter that Lyon lived most of it and had his greatest impact. His exploits surely contributed to the blunt, fiercely independent, no-nonsense image of the "typical" Vermonter in the popular mind. But it is important to keep in mind that Lyon was a product, not just of Vermont, but of western Vermont, where such qualities shone to a greater

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extent than among the more tradition-bound easterners. The political divide in Vermont, symbolized by the geographic divide of the Green Mountains, was evident in the presidential election of 1800. Every Vermont county west of the Greens voted for Jefferson; every county east of the Greens voted for Adams. The electoral vote nationally was a tie, obliging Congress to decide the election. Lyon's vote is claimed to have finally broken the deadlock on the thirty-sixth Congressional ballot for President in 1800, resulting in the election of Thomas Jefferson.[80]

B. PROSECUTION OF ANTHONY HASWELL

English-born Anthony Haswell (1756-1816) was a multi-talented printer and publisher and a redoubtable anti-Federalist. Settling in Bennington, he established the *Vermont Gazette* in 1783 with a partner and the following year built the first paper mill in the future state of Vermont. Haswell was an indefatigable pamphleteer and composer of verse, some of which he set to music. Apparently an ardent Freemason, he composed a Masonic hymn.[81] From his pen flowed orations for various occasions, such as the death of George Washington,[82] the anniversary of the Battle of Bennington, [83] and the interment of a military officer.[84] His interests extended to printing manuals for the young, including the quaintly-titled *Haswell's Easy and instructive lessons, for the use of American scholars, just entering the paths of science compiled from the writings of various authors, and interspersed with original essays, on a great variety of subjects.*[85] When publisher after publisher refused to print Ethan Allen's deistic *Reason: The Only Oracle of Man*, Haswell accepted the commission, which could hardly have enhanced his reputation in the eyes of the Federalists of eastern Vermont or the ruling Federalist power centers. When the majority of the copies, unsold and languishing in Haswell's attic, were destroyed in a fire, the catastrophe was "regarded by the pious as a belated manifestation of Divine displeasure."[86] Haswell relentlessly hounded President Adams in the pages of the

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Vermont Gazette, portraying him as a monarchist at heart and a squanderer of the nation's treasure. The issue of September 8, 1798 contained an extract from a piece in a New York paper arguing, on the basis of Adams's writings in praise of the British constitution, that the president was in favor of nobility. In the issue of September 1, 1800, four months after he was jailed, Haswell published an article mentioning the president's twenty-five thousand dollar annual salary, noting that "last year he spent nine months snug in Braintree" and that it was "probable that Mr. Adams will spend the remainder of the fall at the same place. The 25,000 dollars is paid by the sweat of many an industrious brow."

When Matthew Lyon was indicted for his political utterances, Haswell sprang to his defense, although his personal relationship with the abrasive Lyon seems to have been tense.[87] Despairing of raising the one thousand dollar fine, without payment of which he would continue to languish in jail, Lyon devised a plan to raise the money by lottery. As prizes, Lyon put up much of his property. Haswell promoted the lottery in the pages of his *Vermont Gazette*. In the issue of January 31, 1799, Haswell printed a message "To the Enemies of Political Persecution in the Western District of Vermont," which was to provide the pretext of his later prosecution for sedition. Whatever federalist irritation was occasioned by this article was surely aggravated by the tumultuous reception that Lyon received from the citizenry, prompting some earnest doggerel from Haswell's pen:

"Come take the glass and drink his health,
Who is a friend of Lyon,
First martyr under federal law
The junto dared to try on."[88]

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Haswell was more careful than Lyon in his fulminations against the Adams administration, but it was widely believed that Haswell too would eventually fall into the trap forged by the Sedition Act.[89] In the October 12, 1798 issue of his newspaper, Haswell reported the arrest of Lyon and added that "we hear that bills [of indictment] were likewise found . . . against the printer of this paper."

His premonition was correct. Publication of his anxiety was overtaken by the reality. Haswell was arrested on October 8, 1799,[90] with his trial scheduled for the United States Circuit Court sitting in Windsor. Haswell's lone biographer, John Spargo, comments that "by that fact the cards were stacked against him. His conviction was almost assured." Spargo adds: "It was practically certain that a jury drawn from that [i.e., eastern] side of the mountains, the Federalist stronghold, would be largely composed of the supporters of that party, and party feeling ran too high to permit fairmindedness."[91] As in Lyon's case, Justice William Paterson presided. But this time, Israel Smith, having been scorned by the ruling Vermont Federalists in the "Vergennes Slaughterhouse," appeared from the outset as defense counsel.[92]

The indictment was founded on an article that appeared in Haswell's *Vermont Gazette* on January 17, 1799, as Lyon--recently re-elected to Congress despite his incarceration--continued as a prisoner in the Vergennes jail "holden by the oppressive hand of usurped power . . . deprived almost of the light of heaven [misquoted in the indictment as "right of reason"],[93] and suffering all the indignities which can be heaped upon him by a hard-hearted savage . . .." Noting that Lyon could not emerge from prison, even after completion of his term, without eleven hundred dollars in fine and costs, which Haswell termed a "ransom," the article went on to describe the lottery to raise the needed funds. Haswell concluded: "May we not hope that this amount may answer the desired purpose, and that our representative shall not languish a day in prison for

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want of money after the measure of Federal vengeance [misquoted in the indictment as "injustice"] is filled up?"

The indictment concluded with an extract from an article that appeared in the August 15, 1799 *Gazette*. In this case, too, the language of the indictment, as reported by Wharton, varied in certain details from the article itself, but the substance was the same. The actual language of the article extract charged in the indictment was as follows: "At the same time, our administration publicly notified, that Tories, men who had fought against our independence, who had shared in the desolation of our towns, the abuse of our wives, sisters and daughters, were men worthy of the confidence of the government."

On April 28, 1800, Haswell appeared with his two lawyers, Israel Smith and a "Mr. Fay,"[94] who promptly moved for a continuance to permit them to secure the attendance of witnesses who would support the truth of Haswell's statements. Justice Patterson denied the motion as to one of the witnesses, ruling that his anticipated testimony as described by counsel would not be admissible in any event, but granted several days' adjournment to bring the others into court. Wharton's report of the trial proceedings is either greatly abbreviated or the evidence produced by the defense was thin at best. In fact, the latter may well be the case, because the presentation of evidence, the charge to the jury, the jury's deliberation, and delivery of the verdict all appear to have taken place on a single day, May 5, 1799.

As in Matthew Lyon's case, Justice Paterson's charge to the jury left little option but for the jury to find Haswell guilty. Judicial incitement to that end was probably unnecessary. The empanelled jurors were from east of the mountains, and could be expected to have little sympathy for a "radical" from the other side of the hilly divide. Justice Paterson had to acknowledge that the Sedition Act, unlike common-law defamation, made truth a defense.

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Haswell had, in fact, called witnesses who testified to the hardships Lyon was enduring in the jail presided over by the arch-Federalist marshal, Jabez Fitch. No evidence appears to have been offered to prove the truth of Haswell's assertion about the alleged benefices conferred on Tories.

But Justice Paterson, consistent with other sedition cases, instructed the jury that truth would exonerate Haswell only if the defendant met each and every contention of the indictment. He pointed out that "as to the charge against the administration of selecting Tories 'who shared in the desolation of our homes,' &c., no attempt at justification had been made." Justice Paterson laid one other possible doubt to rest: "Nor was it necessary that the defendant should have written the defamatory matter. If it was issued in his paper, it is enough."[95]

Despite an eloquent plea to the jury in his own defense,[96] Haswell was found guilty "after a short deliberation," and he was fined two hundred dollars and sentenced to two months' imprisonment, which he served in the Bennington jail. His release upon completion of his term was greeted with much the same public celebration as attended Lyon's over a year earlier. "An immense concourse of people from the neighbouring country assembled to welcome him back to liberty . . . He marched forth from his quarters at the jail to the tune of Yankee Doodle, played by a band, while the discharge of cannon signified the general satisfaction at his release."[97]

IV. CONCLUSION

In times of actual or perceived threat to the nation, civil liberties may be curtailed in the overriding pursuit of security. Freedom of speech and of the press, in particular, hang in the balance in such times.[98] The suspension of habeas corpus by President Lincoln, enactment of the Espionage[99] and Sedition[100] Acts during World War I, and the forced relocation of ethnic Japanese during World War II were significant curtailments of civil liberties imposed during actual wars.

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The calibration of civil liberties with the imperatives of national survival has an ancient pedigree. The principle *public safety must be the highest law*[101] has been widely accepted as justification for trimming civil liberties in the context of a serious threat to national survival.[102] More controversial is the reduction of civil liberties in the face of circumstances other than actual or imminent war. The Cold War, the consequent rise of "McCarthyism," and the recent legislative and executive reactions to the perceived threat of terrorist attacks are examples within living memory. The USA PATRIOT Act,[103] widely viewed as a curtailment of civil liberties, has been subject to vigorous debate as to its necessity. The Sedition Act of 1798 did not emerge during an actual war and arguably has more in common with the McCarthy phenomenon and the USA PATRIOT Act than with the wartime measures taken by Lincoln, Wilson, and Franklin Roosevelt. It is only fair to note that in 1798 warlike acts had been committed by France against the infant United States: scores of peaceful American merchant ships had been assaulted and captured by the French. When President Adams, in defiance of his saber-rattling Federalist cohorts, concluded a peace with France, the pretext for the Sedition Act vanished.

But Federalists did not readily loosen their hold on this law, which had been so useful a tool against their Republican opponents, including two western Vermonters. The Act expired by its terms in 1801, but an attempt was made by Federalists in Congress to renew it. Matthew Lyon, the Act's first victim, spoke eloquently against it,[104] and Congress finally laid that dismal law to rest.[105] Congress later remitted the fines levied against Lyon[106] and Haswell[107] in belated recognition of the injustice that had been visited upon them amidst the war frenzy of the late 1790s.

Although the 1917 and 1918 enactments recruited much of the description of criminalized speech from the Sedition Act of 1798, prosecutions were directed against acts that

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amounted to more than mere obloquy against the government. *Schenck v. United States*[108] upheld the conviction of a man who had urged men to resist the draft. In *Abrams v. United States*,[109] defendants had circulated pamphlets urging cessation of industrial production needed for the war effort. The socialist leader Eugene V. Debs was convicted under the Espionage Act of urging draft resistance. The conviction was upheld in *Debs v. United States.*[110] Whatever quarrel one may have with these cases (*Abrams* was, in fact, later reversed by the Supreme Court),[111] there is no basis for charging that the Espionage Act was used as a cudgel against opponents merely political, as had woefully been the case under the Sedition Act. The lessons of 1798-1800 had been absorbed.

Public attitudes and the Sedition Act prosecutions in Vermont dramatized the political divide between the eastern and western halves of the state. Western Vermont was home to the strongest anti-Federalist journals: Haswell's *Vermont Gazette* and Lyon's *Farmer's Library* and *Scourge of Aristocracy*. The newspapers of the east, dominated by Alden Spooner's *Vermont Journal*, tended for the most part to hew to the Federalist line.

After the controversy over the Alien and Sedition Acts subsided, western Vermont continued to carry the banner for the more radical brands of progressivism, most notably during the middle 1800s, when pressure for the abolition of slavery dominated the political and religious conversation. Western Vermonters, such as Orson Murray and Rowland T. Robinson sided vigorously with William Lloyd Garrison in his push for immediate emancipation, renunciation of government or political solutions, rejection of gradualist "colonization" schemes, and reliance on moral suasion.[112]

While later enhancements in transportation, communication, and mass media, along with the changing demographics occasioned by immigration to the state have obliterated the sharp

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ideological distinctions between eastern and western Vermont, the early history of the state cannot be appreciated without recognizing that early Vermont was, in many respects, a house divided. That the state held together partly by adoption of the "mountain rule" in the selection of governors and, even today, has alternated between Democrats and Republicans in every change of administration since that of F. Ray Keyser, ending in 1963, may be an unconscious memorial to the sharp divisions that set one half of the state against the other.

NOTES

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[1] Timothy Dwight, *Travels in New-England and New-York*, 4 vols. (London: William Baynes and Son, 1823), 453.
[2] David McWilliams Ludlum, "Social Ferment in Vermont, 1791-1850." [Ph.D. thesis, 1939] (New York: AMS Press, 1966). 5-6.
[3] The minutes of a convention in Westminster on January 15, 1777 makes reference to the New Hampshire Grants, "an independent jurisdiction forever hereafter to be called, known, and distinguished by the name of New-Connecticut, alias Vermont." William Slade, *Vermont State Papers* (Middlebury: J. W. Copeland, printer, 1823), 69-70.
[4] Ludlum, *Social Ferment*, 13.
[5] Anna H. Weeks to Holland Weeks, 20 October 1796, quoted in Aleine Austin, *Matthew Lyon, "New Man" Of the Democratic Revolution, 1749-1822* (University Park: Pennsylvania State University Press, 1981), 48.
[6] Ibid., 79-80.
[7] William Alexander Robinson, *Jeffersonian Democracy in New England* (New Haven: Yale University Press, 1916), 9.
[8] Ludlum, *Social Ferment*, 14.
[9] Letter from Lyon to Stevens T. Mason (14 October 1798) written from the jail in Vergennes, Vermont, quoted in Austin, *Matthew Lyon*, 109.
[10] 19 August 1794, 1, 4.
[11] It is significant that the record of the convention referred to in note 7 recites that it was attended by "the representatives on the west and east side of the range of Green Mountains." The delegates are listed as either from the west or the east. Slade, *Vermont State Papers*, 66.
[12] William Doyle, *The Vermont Political Tradition : And Those Who Helped Make It*, Revised ed. (Montpelier, Vt.: W. Doyle, 2003), 65.
[13] On the "mountain rule" generally, see Lyman Jay Gould, Hand, Samuel B., "A View from the Mountain: Perspectives of Vermont's Political Geography," in *In a State of Nature: Readings in Vermont History*, ed. H. N. Muller III, Hand, Samuel B. (Montpelier, Vt.: Vermont Historical Society, 1985), 186-190.
[14] 1 Stat. at Large, 566-572, 577-578, 596-597.
[15] 1 Stat. at Large, 414
[16] John Adams to Thomas Jefferson, 14 June, 1813 John Adams et al., *The Adams-Jefferson Letters: The Complete Correspondence between Thomas Jefferson and Abigail and John Adams* (Chapel Hill: Published for the Institute of Early American History and Culture at Williamsburg, Virginia by the University of North Carolina Press, 1988), 329-330. Adams was responding to a letter from Jefferson to one "Dr. Priestly" (clearly meaning the renowned theologian/scientist Joseph Priestly, a known correspondent of Jefferson) in which Jefferson "disclaim[ed] the legitimacy of that Libel on legislation, which, under the form of a Law, was for Sometime placed among them" (quoted in Adams's letter to Jefferson). Adams, defending the legislation to Jefferson, declared that "we were then

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at War with France; French spies swarmed in our Cities and in the Country." Noting that Jefferson as Vice President had also signed the law and that "I know not why you are not as responsible for it as I am," added "This Law was never executed by me in any Instance."

[17] 1 Stat. at Large, 596-597.

[18] Letter from Theodore Sedgwick to unknown recipient, Philadelphia, 7 March 1798 (Mass. Hist. Soc.), quoted in James Morton Smith, *Freedom's Fetters; the Alien and Sedition Laws and American Civil Liberties*, *Cornell Studies in Civil Liberty* (Ithaca: Cornell University Press, 1956), 21n. "Improve" in this context means "To turn (a thing) to profit or good account, to employ to advantage; to make profitable use of, take advantage of, avail oneself of, utilize; to make use of, use, employ." *Oxford English Dictionary*, s.v." improve," entry 2, definition 2.

[19] Smith, *Freedom's Fetters*, 20-21.

[20] It is unclear from the language of the Act whether "utter" was used in a sense restricted to writings, which is fairly inferable from the context, or in the broader sense embracing spoken remarks. It appears that most, if not all, of the prosecutions under the Sedition Act were based, at least mainly, on writings.

[21] 40 Stat. 219, amended by Act of May 16, 1918, ch. 75,40 Stat. 553-54 (the Sedition Act), reenacted by Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359

[22] Woodrow Wilson, *A History of the American People in Five Volumes*, 5 vols., vol. 3 (New York: Cosimo Classics, 2008 [1901-1902]), 153-154.

[23] Richard Hofstadter, *The Idea of a Party System* (Berkeley: Univ. of California Press, 1975), 107.

[24] United States, *"Annals,"* formerly *Debates and proceedings of the Congress of the United States with an appendix, containing important state papers and public documents and the laws of a public nature; with a copious index.* (1789): 2137. The bill was originally introduced in the Senate on June 26, 1798 by Federalist Senator James Lloyd of Maryland (ibid., 589) and passed by the Senate on July 4 (ibid., 599).

[25] Ibid., 2171. The debate commences at 2139.

[26] Larry Gragg speculates that the date of expiration was selected "to underscore [the Act's] political purpose." Larry Gragg, "Order Vs. Liberty," *American History* 33, no. 3 (1998).

[27] A letter from Brattleboro (then Brattleborough), Vermont to the Albany Centinel, 3 August 1798, 2 praised Morris for supporting the federal government against "foreign tyranny and domestic faction." The writer added: "When our country reflect on the integrity and federalism of a Morris, may they pardon the folly, the indecorum and phrenzy of a Lyon."

[28] Frank Maloy Anderson, "Contemporary Opinion of the Virginia and Kentucky Resolutions I," *The American Historical Review* 5, no. 1 (1899), Frank Maloy Anderson, "Contemporary Opinion of the Virginia and Kentucky Resolutions II," *The American Historical Review* 5, no. 2 (1899), Douglas Bradburn, "A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts," *The William and Mary Quarterly* 65, no. 3 (2008), Thomas F. Carroll, "Freedom of Speech and the Press in the Federalist Period: The Sedition Act," *Michigan Law Review* 18 (1919-1920), Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *The William and Mary Quarterly* 5, no. 2 (1948), John Chester Miller, *Crisis in Freedom: The Alien and Sedition Acts*, [1st ed. (Boston,: Little, Brown, 1951), Smith, *Freedom's Fetters*.

[29] Anderson, "Contemporary Opinion" I and II; Koch and Ammon, "The Virginia and Kentucky Resolutions."

[30] Possibly three: see note 59 and accompanying text

[31] Bradburn, "A Clamor."

[32] "[A] tall flagstaff surmounted by a liberty cap, the flag of a republic, or other object regarded as a symbol of liberty." Philip Babcock Gove, *Webster's Third New International Dictionary of the English Language Unabridged* (Springfield, Mass.: G. & C. Merriam. 1976), 1303 s.v. "liberty pole."

[33] A characteristic newspaper philippic against the erectors of liberty poles is contained in the *Federal Galaxy*, Brattleboro, August 25, 1798, 2: "Almost every town exhibits a *liberty pole*, as they falsely term it, which these sons of Belial have erected to their idol faction." For a reference to the Wallingford liberty pole, see Hugh Gaine, *The Journals of Hugh Gaine, Printer* (New York: Arno, 1970), 188.

[34] Miller, *Crisis*, 143.

[35] *Federal Galaxy* (Brattleboro), 25 August 1798, 3, referring to "our *sapient* Jacobin French apologists"; *Spooner's Vermont Journal* (Windsor), 28 August, 1798, 1: "Blush, Jacobins --- for these are your friends and fraternizers --- Hide yourselves, ye Sans Culottes; call upon the rocks and the mountains to cover you"; *The Rutland Herald*, October 29, 1798, 2: "A Jacobin placed an headless effigy before Mr. [Elbridge] Gerry's house the other day – in hopes he would suppose it the doings of a federalist and be irritated *against his government*." These are just a few of over 150 references to Jacobins and Jacobinism in Vermont newspapers during John Adams's administration.

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[36] *The Vermont Gazette* (Bennington), 11 August 1798, 2: "it is the intention of the federalists to introduce into this country, the system of Jacobinism."
[37] Anderson, "Contemporary Opinion II," 247-248.
[38] Anderson, "Contemporary Opinion II," 245-249.
[39] Anderson, "Contemporary Opinion II," 245-252. The Vermont minority protest is reproduced at 249-252.
[40] For an account of the indictment and trial, see Smith, *Freedom's Fetters*, 247-257. The editor of the newspaper, Thomas Adams, was not brought to trial on account of illness. The prosecution settled for the paper's bookkeeper.
[41] 1 Stat. at Large, 597.
[42] "The truth of the offensive statement or communication is an absolute or complete defense to a claim of defamation, whether the claim is one sounding in libel or slander, regardless of bad faith or malicious purpose or the malice or ill will of the publisher." 50 *American Jurisprudence 2d*, "Libel and Slander," §249. Footnotes omitted.
[43] William Blackstone, *Commentaries on the Laws of England*, 4 vols., vol. 4 (Chicago: University of Chicago Press, 1979 [1765-1769]), 150. Footnotes omitted.
[44] Blackstone, *Commentaries*, vol. 4, 151.
[45] "No. 16 – An Act Relating to the Writ of Habeas Corpus to Persons Claimed as Fugitive Slaves, and the Right to Trial by Jury," in *The Acts and Resolves Passed by the Legislature of the State of Vermont at the October Session, 1850* (Montpelier, Vt.: E. P. Walton and Sons, 1850), 9-10, cited in Horace K. Jr. Houston, "Another Nullification Crisis: Vermont's 1850 Habeas Corpus Law," *The New England Quarterly* 77, no. 2 (2004): 262.
[46] Article I, Chapter 1 (1777).
[47] Houston, "Nullification Crisis," 265-266. and footnotes therein.
[48] On the issues raised by this Vermont initiative, see, generally, Houston, "Nullification Crisis." In 1858, the Vermont General Assembly enacted (No. 37) "An Act to Secure Freedom to all Persons within this State." In addition to penalties of fine and imprisonment for holding a person in slavery within the state, the Act provided (sec. 5), "Neither descent, near or remote, from an African, whether such African is or may have been a slave or not, nor color of skin or complexion, shall disqualify any person from being, or prevent any person from becoming, a citizen of this State, nor deprive such person of the right and privileges thereof."
[49] State Papers of Vermont, *Journal and Proceedings of the General Assembly of the State of Vermont 1797-1799*, ed. Marlene B. Wallace, vol. III (Montpelier, Vt.: Secretary of State, 1978), 607. Italics in original.
[50] Ibid. The complete text of the majority resolution on the Kentucky Resolution is in Vermont, *Journal of General Assembly*, 607-610.
[51] Vermont criminalized blasphemy and defamation until the laws (Vermont Statutes 1947, Title 13, §§801-802) were repealed in 1979.
[52] A law passed by the Assembly of the Vermont Republic on February 11, 1779, established "the common law as it is generally practiced and understood in the New-England states." Slade, *Vermont State Papers*, 288.
[53] *Oxford English Dictionary*, s.v. "Jealousy."
[54] Jefferson also used the word in its invidious sense, referring to "further discontents and jealousies among us." *A Summary View of the Rights of British America*.
[55] The complete text of the minority resolution on the Kentucky and Virginia Resolutions is in Vermont, *Journal of General Assembly*, 675-680 (November 5, 1799).
[56] Frank Maloy Anderson, "The Enforcement of the Alien and Sedition Laws," in *Annual Report of the American Historical Association for the Year 1912* (Washington: American Historical Association, 1914), 120.
[57] John E. Ferling, *Adams vs. Jefferson : The Tumultuous Election of 1800, Pivotal Moments in American History* (New York: Oxford University Press, 2004).
[58] Smith, *Freedom's Fetters*, 185.
[59] *Connecticut Gazette*, New London, 21 May, 1800, 3.
[60] Background information about Lyon is drawn chiefly from Austin, *Matthew Lyon.*; J. Fairfax McLaughlin, *Matthew Lyon, the Hampden of Congress a Biography* (New York: Wynkoop Hallenbeck Crawford Company, 1900), Pliny H. White and Vermont Historical Society., *The Life and Services of Matthew Lyon. An Address Pronounced October 29, 1858, before the Vermont Historical Society, in the Presence of the General Assembly of Vermont* (Burlington,: Times job office print, 1858). The Austin biography is the single modern book-length treatment and is equipped with a satisfying scholarly apparatus. McLaughlin was Lyon's great-grandson. Although his treatment of Lyon was understandably somewhat tendentious, McLaughlin drew on cited archival sources as well as family communications. Reverend White, also a lawyer and journalist, presented an engaging account of Lyon, although not without some errors. White gives July 4, 1798 as the date of the Sedition Act. The correct date is July 14, 1798. White has Lyon born "about 1746." Lyon was born July 14, 1749. United States. Congress. and

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United States. Congress. Senate. Historical Office., *Biographical Directory of the United States Congress, 1774-Present* [Text (HTML), graphics.] (United States Congress, 1998); available from http://purl.access.gpo.gov/GPO/LPS21383 (accessed July 31, 2009).

[61] William Cothren, *History of Ancient Woodbury, Connecticut : From the First Indian Deed in 1659* (Waterbury, Conn.: Bronson Brothers, 1854), 320.

[62] Austin (Austin, *Matthew Lyon*, 158, n. 126.cites "*Ye Horsforde Book*, p. 43, but does not provide any full bibliographic information that I was able to find in her book. She is likely referring to H. H. Hosford, *Ye Horseforde Booke: The Horsford - Hosford Family in the United States of America* (Cleveland: Tower Press, 1936). I have not examined this source.

[63] McLaughlin, *Lyon*, 175.

[64] Some authors have described Lyon's first wife, Mary Horsford, as Ethan Allen's niece. Austin describes the actual relationship: Mary's mother was married to the brother of Ethan Allen's father. Austin, *Matthew Lyon*, 11.

[65] The 1777 Vermont Constitution "provided mechanisms by which the Allen-Chittenden faction intended to control the wheels of state." H. N. Muller III and Samuel B. Hand, eds., *In a State of Nature : Readings in Vermont History* (Montpelier, Vt.: Vermont Historical Society, 1985), 39.

[66] Austin, *Matthew Lyon*, 22.

[67] The most complete account of these events was given by Lyon himself in an extended statement given to a Congressional committee in his own defense, on the occasion of the fracas with Congressman Roger Griswold. United States, "*Annals*," 5th Congress, 1025-1029. Given the self-serving purpose of Lyon's declaration, the accuracy of his narrative may be open to question in some particulars.

[68] For a contemporary account of that rebellion , see James Gordon, *The History of the Irish Rebellion* (Philadelphia: John Clarke & Co., 1813), 96-102.

[69] United States, "*Annals*," 5th Congress, 955-1029.

[70] Ibid.: 1034-1058.

[71] Reported as October 3, 1798 in White and Vermont Historical Society, *Matthew Lyon*. The October 5, 1798 date is based on Francis Wharton, *State Trials of the United States During the Administrations of Washington and Adams* (Philadelphia: Carey and Hart, 1849), 333.

[72] 31 July, 1798, 1-2.

[73] Wharton, *State Trials*, 333.

[74] H. P. Smith, *History of Addison County, Vermont* (Syracuse, N.Y.: D. Mason & Co., 1886), 659-660. He should not be confused with Noah Smith, who is reported to have been an "Assistant Judge" on the Supreme Court in 1800. Vermont. Supreme court. [from old catalog] and Royall Tyler, *Reports of Cases Argued and Determined in the Supreme Court of Judicature of the State of Vermont. With Cases of Practice and Rules of the Court* (New-York: Printed and published by I. Riley., 1809), 3.; Zadock Thompson, *History of Vermont, Natural, Civil and Statistical, in Three Parts, with a New Map of the State, and 200 Engravings* (Burlington, Vt: Stacy & Jameson, 1853), 123.

[75] Lyon had run unsuccessfully against Smith for Congress in the elections of 1790, 1792, and 1794, finally defeating him in 1796.

[76] Vermont historical society. [from old catalog] et al., *Addresses Delivered before the Vermont Historical Society* (Montpelier,: Walton's steam printing establishment, 1866), 37. (in an address by Pliny H. White, "Jonas Galusha: The Fifth Governor of Vermont").

[77] Thompson, *History*, 89.

[78] United States. Congress. and United States. Congress. Senate. Historical Office, *Biographical Directory of the United States Congress*.

[79] Wharton, *State Trials*, 336.

[80] The honor is debatable, based on how one views the order of voting on the crucial ballot. An extended defense of Lyon's claim to it is made in William P. Kennedy, "Matthew Lyon Cast the Deciding Vote Which Elected Thomas Jefferson President in 1801," ed. 2d Session 77th Congress (Government Printing Office, 1942). However, a more realistic assessment bestows the honor on Lyon only because Vermont was the last state to vote. Before the final ballot was taken, the result was a foregone conclusion.

[81] Anthony Haswell, *Hymn on Masonry Presented to Temple Lodge, by a Brother, to Be Sung at the Installation of Their Officers* (Bennington, Vt.: Anthony Haswell, 1793).

[82] Anthony Haswell, Tichenor, Isaac, *Illustrious and Beloved General Washington, Has Departed from Scenes of Mortal Life . . .* (Bennington, Vt.: Anthony Haswell, 1799).

[83] Anthony Haswell, *An Oration, Delivered at Bennington, Vermont, August 16th, 1799 in Commemoration of the Battle of Bennington* (Bennington, Vt.: Anthony Haswell, 1799).

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[84] Anthony Haswell, *An Oration Delivered at Shaftsbury, on Sunday, January 10, 1802, at the Interment of Capt. Aaron Cole.* (Bennington, Vt.: Anthony Haswell, 1802).
[85] Bennington, Vt: Darius [Clark], 1819.
[86] Charles A. Jellison, *Ethan Allen: Frontier Rebel*, [1st ed.] (Syracuse, N.Y.: Syracuse University Press, 1969), 310.
[87] John Spargo, *Anthony Haswell, Printer-Patriot-Ballader; a Biographical Study* (Rutland, Vt.,: The Tuttle Company, 1925), 56.
[88] Reproduced in Smith, *Freedom's Fetters*, 245 and quoted in Austin, *Matthew Lyon*, 126.
[89] Spargo, *Haswell*, 56-57.
[90] Ibid., 58.
[91] Ibid., 67.
[92] Description of the trial is based on the report in Wharton, *State Trials*, 684-687.
[93] The language of the indictment is reproduced from Wharton, *State Trials*, 684-685. It is, of course, possible that Wharton has misquoted the indictment and that the indictment correctly quoted the article.
[94] Possibly David Fay, a Republican lawyer, then State's Attorney of Bennington County. See brief biography in Prentiss C. Dodge, *Encyclopedia Vermont Biography : A Series of Authentic Biographical Sketches of the Representative Men of Vermont and Sons of Vermont in Other States, 1912* (Burlington, Vt.: Ullery Publishing Co., 1912), 83.
[95] Ibid., 686.
[96] Ibid., 685-686, note.
[97] Ibid., 687, note.
[98] For a historical survey of the wartime circumscription of free speech in the United States, see Geoffrey R. Stone, *Perilous Times : Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, (New York: W.W. Norton & Co., 2004).
[99] See note 22.
[100] See note 22.
[101] "*Salus populi suprema lex esto*," Cicero, *De legibus*, 3.3.8.
[102] Clinton Rossiter, *Constitutional Dictatorship : Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948); Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006).
[103] P.L. 107-56, 115 Stat. 271-402, 107th Congress.
[104] United States, "*Annals*." 6th Congress, 973-975.
[105] Ibid.: 1049-1050.
[106] H.R. 80, 26th Congress (1840).
[107] H.R. 72, 28th Congress (1844).
[108] 249 U.S. 47 (1919).
[109] 250 U.S. 616 (1919).
[110] 249 U.S. 211 (1919).
[111] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
[112] Ludlum, "Social Ferment", 134-198; Jane Williamson, "Rowland T. Robinson, Rokeby, and the Underground Railroad in Vermont " *Vermont History* 69 (Supplement) (2001): 19-31.

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Statement for the Senate Judiciary Committee
S. 449 and H.R. 2765
Professor Doug Rendleman
February 19, 2010

May it please the Committee. I am Doug Rendleman, Huntley Professor of Law at Washington and Lee Law School. I have taught and written about civil procedure, conflict of laws, and debtor-creditor issues for nearly four decades. In the 1990s while I was writing annual supplements for my book for Virginia lawyers, Enforcement of Judgments and Liens in Virginia, I became interested in foreign-nation defamation judgments, and I have developed the issue in those supplements ever since. In 2009, I wrote an article, "Collecting a Libel Tourist's Defamation Judgment?" which the Washington and Lee Law Review will publish later this year. That article, which follows, comprises the bulk of my statement. I add a few comments below.

The present state law on foreign-nation judgments is lacking in both uniformity and depth. I commend to the Committee Professor Linda Silberman's statement and testimony last year before the House Judiciary Subcommittee of Commercial and Administrative Law. Her support of a general national solution points Congress in a salutary direction. Congress has the expertise and the ability under the Constitution to improve this small but crucial corner of the law.

In developing a national solution, Congress might consider both the existing state statutes and the American Law Institute's proposed federal statute that Professor Silberman worked on and recommended. Several nettlesome issues must be grasped, two examples are reciprocity and exclusive vs. concurrent federal jurisdiction. In addition, I encourage Congress to develop a standard for comity-public policy that resembles full faith and credit for a sister-state judgment.

In that connection, I commend a cautious approach to the instant libel-targeted Bills. The proposed legislation, S. 449 and H.R. 2765, would, if enacted, continue an unfortunate trend in the wrong direction: requiring that a foreign-nation defamation judgment must be based on substantive law that is identical to United States' law as a prerequisite for collection here.

Rachel Ehrenfeld's and Deborah Lipstadt's heart-rending stories cry out for relief of some kind. But a more cautious and nuanced solution will be wiser in the long run than the Bills before this Committee. Many, perhaps most, libel-tourists' judgments are void for lack of jurisdiction and could be rejected without more. In addition, Congress ought to decline to create an actionable tort against someone who files a lawsuit in a foreign nation on a cause of action that is sustainable there. A cautious approach that recognizes foreign sensibilities, but like Goldilocks and the porridge is nuanced enough to reject those judgments that are too hot for United States taste will better serve the United States' foreign relations interests as well as our business and commercial interests.

Thanks you for the opportunity to present this statement on this important issue.

Doug Rendleman
Lexington, Virginia

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"Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?"
Testimony of Kurt Wimmer
Partner, Covington & Burling LLP
February 23, 2010

Chairman Leahy, Ranking Member Sessions, and Members of the Committee, thank you for inviting me here this morning, and thank you for addressing this issue today.

For the past 15 years, I have been advising publishers, authors and technology companies on how to continue to publish the robust news and information that Americans deserve, and that our First Amendment protects, in an era when publishers can be sued in foreign jurisdictions that do not protect free expression simply because their work can be accessed through the Internet. The issues you are addressing today can help to preserve the vitality of the First Amendment in an internationally networked world.

In countries quite literally from A to Z — from Australia to Zimbabwe — courts, litigants and prosecutors have pursued distant authors based on Internet publications intended for the authors' local readers. From my vantage point, it seems clear that the potential for being sued or prosecuted on the basis of an online publication does, in fact, chill the exercise of essential First Amendment freedoms. This chill can result in self-censorship, in decisions not to publish, and in decisions to review and assess American content based on legal standards that are less protective of free expression than our laws. This chilling effect can undermine the search for truth that our First Amendment demands, in areas that are as essential to our national security as terrorism. As Senator Specter has said, "freedom of expression of ideas, opinions, and research, and freedom of exchange of information are all essential to the functioning of a democracy, and the fight against terrorism." That freedom is endangered by libel tourism.

Some ask whether publication of sensitive matters really would be chilled, given that U.S. courts have refused to enforce judgments rendered by foreign courts applying laws that do not comply with our constitutional standards. In *Bachchan v. India Abroad Publications Inc.*, for example, a New York state trial court noted that England lacks an equivalent to the First

57951.102

Amendment and concluded "[t]he protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution."[1] Given this view, shouldn't U.S. authors publish to the world just as they publish to America, and simply rely on U.S. courts to refuse to enforce any foreign judgments that result?

The answer, sadly, is that the very act of rendering a foreign judgment has immediate and damaging effects on the publisher or author who is sued, before a judgment is ever enforced – and, in many cases, even if it is never enforced. The impact of the sword of Damocles is not that it falls, but that it hangs.

The United Nations Human Rights Committee has recognized these same chilling effects. In a 2008 Report, the Human Rights Committee expressed its concern that the United Kingdom's "practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as 'libel tourism.'"[2] The Human Rights Committee further noted the "advent of the internet and the international

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[1] 585 N.Y.S.2d 661, 665 (Sup. Ct. N.Y. County Apr. 13, 1992). *See also, e.g.*, *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 406 F. Supp. 2d 274, 285 (S.D.N.Y. 2005) (refusing to enforce a French libel judgment that was "incompatible" with the First Amendment because doing so would have been "repugnant to the public policy of [New York]"); *Ellis v. Time, Inc.*, No. Civ. A. 94-1755, 1997 WL 863267, at *13 (D.D.C. Nov. 18, 1997) (prohibiting application of British libel law, because it would have chilled protected speech and violated the First Amendment); *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 2, 4 (D.D.C. 1995) (declining to enforce British libel judgment because doing so was would have been repugnant to the public policies of Maryland and the United Staes) ; *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515 (LLS), 1994 WL 419847, at *1 (S.D.N.Y. May 4, 1994) (refusing to apply British law "since establishment of a claim under the British law of defamation would be antithetical to the First Amendment protections accorded the defendants").

[2] U.N. Human Rights Comm., Consideration of Reports Submitted by States, P 25, Commc'n No. CCPR/C/GBR/CO/6 (July 7-25, 2008), at 7.

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distribution of foreign media also create the danger that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest."[3]

Just as in all First Amendment analysis, proving a chill is a challenge. We cannot know for certain when punches have been pulled, when stories have been killed, and when manuscripts have been left unpublished. There are, however, a few concrete examples.

In 2006, the Cambridge University Press, surely one of the most prestigious and well-funded publishers in the world, received a libel claim for a book by American professor Robert Collins and former State Department official J. Millard Burr entitled *Alms for Jihad: Charity and Terrorism in the Islamic World*. The libel plaintiff was a Saudi billionaire, Sheik Khalid bin Mahfouz, who claimed the book defamed him by linking him to the funding of terrorism. Rather than mount a spirited defense, Cambridge University Press folded and settled with Sheik bin Mahfouz — it simply couldn't afford the litigation. In 2007, it not only ceased publishing the book, but shredded all unsold copies. It asked all libraries that had purchased the book to destroy it. The American Library Association advised libraries not to pulp the book. "Unless there is an order from a U.S. court, the British settlement is unenforceable in the United States, and libraries are under no legal obligation to return or destroy the book," its Office of Intellectual Freedom stated in a release. "Given the intense interest in the book, and the desire of readers to learn about the controversy firsthand, we recommend that U.S. libraries keep the book available for their users." If even the Cambridge University Press cannot stand up to well-financed libel tourists, how can other publishers truly be expected to do so?

The National Endowment for Democracy's Center for International Media Assistance published just last month an excellent report entitled *Libel Tourism: Silencing the Press Through Transnational Legal Threats*. In the report, investigative journalist Drew

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[3] *Id.*

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Sullivan traces the chilling effect of transborder libel litigation around the world, and the examples of investigative journalists buckling under the pressure of litigation are telling.

There is no doubt that even foreign defamation judgments that are not enforced can cause real damage to U.S. authors who are sued abroad. The *Ehrenfeld v. bin Mahfouz* case is illustrative. The same billionaire who conquered the Cambridge University Press and sued almost 40 other publishers, Sheik bin Mahfouz, obtained a default judgment against Dr. Rachel Ehrenfeld in the United Kingdom, including damages, legal fees, a "declaration of falsity," an order directing Dr. Ehrenfeld and her publisher to publish an apology, and an injunction against the further publication of the challenged statements.[4] This foreign judgment may impede Dr. Ehrenfeld from obtaining future publishing contracts, as publishers typically carry insurance policies requiring them to review the liability risks of works they consider for publication, and they may shy away from an author subject to such a foreign judgment. Dr. Ehrenfeld told a New York court that publishers who accepted her work in the past declined to do so after the English judgment.[5]

Foreign libel judgments, especially those accompanied by a "declaration of falsity," also impose reputational harms on authors and publishers. No author or publisher wants to be tarred with the brush of a defamation judgment. This is especially true if that judgment states that the author or publisher published statements deemed by a court to be untrue. Unless a United States author is provided with a mechanism to challenge the foreign judgment on his or her own initiative, the foreign libel plaintiff can deprive the author or publisher with an opportunity to vindicate his or her reputation.

These chilling effects are not merely side effects of a foreign defamation judgment. Instead, they may be the prime motivation for filing suit in a foreign country with

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[4] *Ehrenfeld v. bin Mahfouz*, 881 N.E.2d 830, 833 (N.Y. 2007).

[5] *Id.* at 836.

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lesser protections for freedom of expression. Again, the *Ehrenfeld* case is illustrative. When he sued Dr. Ehrenfeld, Sheik bin Mahfouz was a financier and billionaire with business interests around the world. The money judgment he obtained in his English lawsuit against Dr. Ehrenfeld, although a huge burden for Dr. Ehrenfeld, would be less than rounding error to a man of Sheik bin Mahfouz's staggering wealth. Instead, the greatest benefits of this judgment to a plaintiff such as Sheik bin Mahfouz are the English court's "declaration of falsity" and injunction.

Indeed, a foreign libel plaintiff may never seek enforcement of the judgment obtained in the foreign court, especially if the plaintiff knows that a United States court will refuse to enforce it. Instead, the libel plaintiff simply wants to use it to chill criticism. For example, Sheik bin Mahfouz took no action to enforce the default judgment he obtained against Dr. Ehrenfeld (but refused to disclaim is his right to enforce it in the future[6]) and maintains a website where he has posted information about the suit he brought against her and suits he has brought against other authors and publishers. The website also contains a warning designed to chill future criticism of him: "Khalid bin Mahfouz and his family reserve their rights against the authors, editors, publishers, distributors and printers of these publications [and] they expressly reserve their rights against any person or entity which repeats any of the erroneous allegations contained in these or any other publications."[7]

This chilling effect not only jeopardizes individual members of the media, but also impedes the crucial free flow of information and ideas to the American public on matters of public concern. Foreign litigation against United States publications and authors constitutes a clear threat to the ability of the American press to vigorously investigate and publish news and information about the most crucial issues before the American public. If a member of the media may be sued in any country in which a handful of individuals have accessed or purchased a

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[6] *Id.* at 833.

[7] http://www.binmahfouz.info/faqs_4.html.

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work, the media loses the important ability to predict which country's laws will apply to the work. In such a situation, an author or publisher may have no choice but to tailor the work to the standards of the nations that afford the weakest protections for free expression. It will not matter than the speech being curtailed would be protected in the United States.

This chill damages not only the free flow of protected speech to Americans. If the process continues and publishers continue to take efforts to limit the ability of their speech to be accessed outside of the United States, the rest of the world will no longer have access to the robust American investigative journalism that often is the only light being shed on despotic regimes and corrupt governments.

Under current law, most American authors and publishers must wait for the foreign plaintiff to take action enforcing the judgment in the United States. This limitation permits the foreign plaintiff to use that foreign judgment to chill future criticism while also ensuring that a United States court will not have jurisdiction over him to declare the judgment unenforceable. Some American authors in now have the right to bring actions in state courts, thanks to statutes adopted by a few states in the past two years.[8] But this is a national – indeed international – problem that calls out for a national solution.

Will legislation within the United States solve this problem entirely? To be sure, it would only be a step. International law reform also will be essential, and the process of obtaining that reform will be a significant project (which I describe in an article that I have submitted for the record). This Committee can move this law-reform process ahead by continuing to focus on this issue, and to consider meaningful legislation that will permit U.S. authors, journalists and publishers to take positive action to ameliorate some of the most

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[8] *See* N.Y. C.P.L.R. § 302(d); Ill. Comp. Stat. 5/2-209(b-5); Fla. Stat. § 55.6055; Cal. Civ. Pro. Code § 1717 (c). A similar bill also is pending in the Arizona legislature. *See* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1268.

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damaging aspects of having to deal with foreign litigants. It is an essential first step, and I am gratified that the Committee is considering it.

Thank you again for your time today, and I would be pleased to respond to any questions you have.

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